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The AMERICAN JOURNAL OF INTERNATIONAL LAW (ISSN 0002-9300) is published quarterly, in January, April, July and October, and is supplied to all members of the American Society of International Law. Annual subscription rate to nonmembers is \$75.00, plus \$5.00 postage outside U.S.A. Available back numbers of AJIL will be supplied at \$25.00 each.

EDITORIAL OFFICE:
NEW YORK UNIVERSITY SCHOOL OF LAW
40 WASHINGTON SQUARE SOUTH
NEW YORK, N.Y. 10012

BUSINESS OFFICE:
2223 MASSACHUSETTS AVENUE, N.W.
WASHINGTON, D.C. 20008-2864

Second-class postage paid at Washington, D.C. and at additional mailing office. POSTMASTER: If undeliverable, send notice on Form 3579 to the American Journal of International Law, 2223 Massachusetts Ave., N.W., Washington, D.C. 20008-2864.

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Printed by Lancaster Press, Lancaster, Pa. 17603

1105

AMERICAN JOURNAL OF INTERNATIONAL LAW

341.05
AM 35

VOL. 84

January 1990

NO. 1

116

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* (1900-1990).

HAS INTERNATIONAL LAW FAILED THE ELEPHANT?

By Michael J. Glennon*

Are we no longer capable of respecting nature, or of defending a living beauty that has no earning power, no utility, no object except to let itself be seen from time to time?

Romain Gary

If, as Lao-tse said, nature is not anthropomorphic, some fellow creatures nonetheless seem to share the better angels of our character; among these animals, none is grander than the African elephant.¹ Elephants live in close-knit "families" of about ten members² that seem to do just about everything synchronously—feeding, walking, resting, drinking or mud wallowing.³ Each unit has a matriarchal structure: it is headed by the oldest female and consists of younger females and their calves, as male calves tend to leave the family and strike out on their own when they reach sexual maturity between the ages of 10 and 15.⁴ Fighting is rare.⁵

Elephants are the largest land animals on earth. They grow for their entire life,⁶ weighing up to 6 tons⁷ and eating up to 300 pounds of food a day, consisting primarily of grasses and bark.⁸ Left alone, they can live past 60.⁹ They seem able to communicate with low-frequency calls that carry for 6 miles,¹⁰ which may explain the coordinated movement and behavior of separated groups. On the same day that the culling of elephants began in Hwange National Park in Zimbabwe, elephants 90 miles away fled to the opposite corner of the reserve.¹¹

* Of the Board of Editors. I am grateful to John McCaull for research assistance; to the University of California, Davis, Law School for summer research support; to Alan Brownstein, Lynne Isbell, Phillip Trimble and Dale Will for providing useful documents; and to Harrison Dunning, David Favre, Richard Leakey, Stephen McCaffrey, Frank McGilvrey, Richard Revesz, Christopher Stone, Frank Wissmuth and colleagues on the Board of Editors for comments on an earlier draft. Views and mistakes are my own. Much of the recent material was obtained by computer and citations to it therefore do not include all the particulars of customary legal style.

¹ This article deals with the African elephant, *Loxodonta africana*. The Asian elephant, *Elephas maximus*, is somewhat smaller and more often tuskless. *A Program to Save the African Elephant*, WORLD WILDLIFE FUND LETTER, No. 2, 1989, at 1-2 [hereinafter *To Save the Elephant*].

² C. MOSS, *ELEPHANT MEMORIES: THIRTEEN YEARS IN THE LIFE OF AN ELEPHANT FAMILY* 34 (1988). Moss, pointing out that no one has established that all members of these groups are related, prefers the term "kin groups." See also I. & O. DOUGLAS-HAMILTON, *AMONG THE ELEPHANTS* (1975).

³ C. MOSS, *supra* note 2, at 35.

⁴ *Id.* at 114.

⁵ *Id.* at 188.

⁶ *Id.* at 239.

⁷ *Id.* at 314, 316. See also Payne, *Elephant Talk*, NAT'L GEOGRAPHIC, August 1989, at 264.

⁸ *Id.* at 34.

⁹ *Id.* at 103.

¹⁰ *Id.* at 123, 185.

¹¹ *Id.* at 314.

Elephants are quite tactile. They often touch each other with their trunks, and tend to stand and even walk bunched together, leaning on or rubbing each other.¹² After being apart for a while, they greet each other by intertwining trunks, clashing tusks and flapping ears, exhibiting great excitement even if the separation has lasted for only a few days.¹³ They aid other members of the group that are threatened or disabled.¹⁴

Elephants have a haunting sense of death. When a member of the family dies, they touch the carcass gently with their trunks and feet, and cover it with loose earth and branches.¹⁵ They do not react to the remains of other species but are fascinated by those of their own:

When they come upon an elephant carcass they stop and become quiet and yet tense . . . First they reach their trunks toward the body to smell it, and then they approach slowly and cautiously and begin to touch the bones, sometimes lifting them and turning them with their feet and tusks. They run their trunk tips along the tusks and lower jaw and feel in all the crevices and hollows in the skull [probably] trying to recognize the individual.¹⁶

Observers noticed one 7-year-old male lingering at such a site long after the others had gone, "repeatedly feeling and stroking the jaw and turning it with his foot and trunk." It was the remains of his mother.¹⁷ Females whose calves have died have seemed lethargic and depressed for many days afterwards.¹⁸ When the matriarch dies, the entire family can disintegrate,¹⁹ its former members seemingly becoming asocial and aggressive.²⁰

Elephants have no natural enemies;²¹ threats come entirely from man.²² Licensed hunting continues to account for several hundred deaths per year.²³ The Governments of South Africa and Zimbabwe conduct culling programs aimed at maintaining their elephant populations at a level the available habitat can support.²⁴ As with many other species, loss of habitat to human encroachment is a major problem. Elephants and cattle compete for some of the same food, and as Africa has become increasingly agricultural, the natural range of the elephant has diminished.²⁵ Certain native groups

¹² C. MOSS, *supra* note 2, at 35.

¹³ *Id.* at 35, 127, 128.

¹⁴ *Id.* at 72, 260.

¹⁵ *Id.* at 73-74, 270.

¹⁶ *Id.* at 270.

¹⁷ *Id.* at 271.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 289.

²¹ A lion cannot kill an adult elephant, but it can kill a calf. *Id.* at 48. There is some evidence, however, that an adult elephant was killed by a snake bite, possibly by a puff adder, black mamba or cobra. *Id.* at 268.

²² Fewer than a thousand elephants are shot each year by sport hunters, who usually possess permits. *To Save the Elephant*, *supra* note 1, at 5.

²³ *Saving the Elephant: Nature's Great Masterpiece*, *ECONOMIST*, July 1, 1989, at 15. On June 30, 1989, Tanzania banned elephant hunting by its citizens. Director of Wildlife Costa Mlay said: "This is just one step towards our call for a global ban on the ivory trade." Reuters (June 30, 1989).

²⁴ *To Save the Elephant*, *supra* note 1, at 7.

²⁵ C. MOSS, *supra* note 2, at 53-54.

have engaged in random killing of elephants: the Masai, for example, spear elephants as proof of their bravery²⁶ and even as a form of political protest.²⁷ As the Masai began to grow crops, their harassment of elephants increased.²⁸

Tourism, too, has had its effect. Tourist lodges in the parks have garbage pits that attract various animals, including elephants. Plastic bags and gloves, medicine bottles, broken glass, metal, wrappings and containers have all turned up in elephant dung.²⁹ A psychiatrist has concluded that these environmental pressures may drive the elephant to increased feeding on fermenting food: "environmental stress can be an important variable in the self-administration of alcohol [from fermented fruits and grains] in these natural habitats. Elephants drink, perhaps, to forget . . . the anxiety produced by shrinking rangeland and the competition for food. And I think that we can see a little bit of ourselves in this kind of behavior."³⁰

By far the greatest threat to the elephant's survival is poaching. The elephant is killed for its ivory tusks, which are carved and used for dice, jewelry, trinkets, ornaments, billiard balls, piano keys and knife handles.³¹ A principal use is for *hanko*, personalized signature seals considered status symbols in Japan.³² International conservation groups estimate that the illegal killing of elephants for their ivory has reduced Africa's elephant population from 1.5 million to fewer than 500,000 in the last decade.³³ By some estimates, the poachers kill two to three hundred a day;³⁴ at this rate, the African elephant could be extinct by the end of the century.³⁵ The *New York Times* compared the elephant population in 1989 for countries where there were more than 50,000 in 1979:

²⁶ *Id.* at 27, 244, 272.

²⁷ *Id.* at 53.

²⁸ *Id.* at 78.

²⁹ *Id.* at 274.

³⁰ R. YAEGER & N. MILLER, *WILDLIFE, WILD DEATH: LAND USE AND SURVIVAL IN EASTERN AFRICA* 115 (1986) (discussing study on alcoholism by Dr. Ronald Siegal). "Elephants are very vulnerable to stress. These stopped breeding under the pressure of hunting and poaching until 1984, when we began to get a grip on conservation in this area." Reuters (July 13, 1989) (comments of Garth Owen-Smith, referring to Namibia's Hoanib River Basin).

³¹ *The Shrinking Roots of Heaven*, U.S. NEWS & WORLD REP., May 22, 1989, at 11.

³² Allman, *Endangered Species: Can They Be Saved?*, U.S. NEWS & WORLD REP., Oct. 2, 1989, at 52, 53.

³³ N.Y. Times, June 11, 1989, §1, at 6. Estimates vary. In 1987, for example, the African Elephant and Rhino Specialist Group of the Union for the International Conservation of Nature reported that the total was 764,000. H. REP. NO. 827, 100th Cong., 2d Sess. 7 (1988) (Endangered Species Act Amendments of 1988) [hereinafter 1988 HOUSE REPORT]. One recent estimate put the number at 625,000. N.Y. Times, June 2, 1989, at A9. Using sophisticated computer modeling techniques, the United Nations Environment Programme (UNEP) estimated the 1989 population at between 1.3 million and 800,000. UNEP, UNEP/GEMS ENVIRONMENT LIBRARY NO. 3, THE AFRICAN ELEPHANT 30 (1989) [hereinafter UNEP REPORT].

³⁴ N.Y. Times, June 11, 1989, §1, at 6. About 40% of the deaths are caused by killing mothers with calves under 10 years old. *ECONOMIST*, *supra* note 23, at 15, 16.

³⁵ Population projections carried out at Imperial College, London, using fast and slow rates of decline, suggest that the date of disappearance will be somewhere between 2010 and the 2030s. *ECONOMIST*, *supra* note 23, at 15.

COUNTRY	1979	1989
Central African Republic	63,000	19,000
Kenya	65,000	19,000
Mozambique	54,800	18,600
Sudan	134,000	40,000
Tanzania	316,300	80,000
Zaire	377,700	85,000
Zambia	150,000	41,000 ³⁶

Numbers, however, do not tell the whole story. They do not convey the brutality of the killing, sometimes by paramilitaristic poachers who spray bullets from semiautomatic weapons over entire herds.³⁷ They do not disclose the horror burned in the memories of survivors that have witnessed the hacking of parents and siblings they have lived with for decades and afterwards wander aimlessly in despair.³⁸ Numbers—and dispassionate references to “ivory” and “offtake”—do not reveal what really is at issue:

The word *ivory* disassociates it in our minds from the idea of an elephant. One tends to lump it with jade, teak, ebony, amber, even gold and silver, but there is a major difference: The other materials did not come from an animal; an ivory tusk is a modified incisor tooth. When one holds a beautiful ivory bracelet or delicate carving in one's hand, it takes a certain leap of understanding to realize that piece of ivory came from an elephant who once walked around using its tusk for feeding, digging, poking, playing and fighting, and furthermore that the elephant had to be dead in order for that piece of ivory to be sitting in one's hand.³⁹

“Every 10 minutes, another elephant is slain and its tusks wrenched or cut from its face by poachers intent on delivering more ivory to the marketplace.”⁴⁰

³⁶ N.Y. Times, June 2, 1989, at A9. (The *Times* listed its sources as Iain Douglas-Hamilton for the 1979 figures, and the Ivory Trade Review Group for the 1989 figures. *Id.*)

³⁷ “Bands of as many as 75 guerrillas, armed with Russian-made Kalashnikov assault rifles and rocket-propelled grenades, scour the bush in quest of elephants, and when they find them they are destroyed without mercy.” Daily Telegraph (London), May 15, 1989, at 15. At Tsavo National Park in Kenya, poachers killed ten elephants before attacking police—who emerged victorious, killing six poachers in the fire fight. Ransdell, *Heavy Artillery for Horns of Plenty*, U.S. NEWS & WORLD REP., Feb. 20, 1989, at 62. In Uganda, elephant poachers have employed rocket-propelled grenades. *Id.* at 61. See *infra* note 181 and accompanying text. In the Central African Republic, Chadian and Sudanese poachers allegedly killed elephants with spears, after slowing them down during the chase by slashing the hamstring muscles of their back legs. Achiron, *Africa: The Last Safari?*, NEWSWEEK, Aug. 18, 1986, at 40–42.

³⁸ According to the London Daily Telegraph, *supra* note 37:

Those left alive are mostly orphans, growing up without their natural inheritance of family guidance and discipline. Instead of occasional rogue elephants, we have scattered communities of delinquents, wondering what they are supposed to do to behave properly as members of their kind. They are lost and cruelly confused—betrayed by an uncaring enemy grown mad with war and the lust for riches. When their tusks develop, they too will die.

Id. at 25.

³⁹ C. Moss, *supra* note 3, at 291. This book is the authoritative work concerning the life and plight of the elephant.

⁴⁰ Brennan, *Ivory Wars; Fighting to Save the Elephants*, Wash. Post, Sept. 24, 1989, at Y7.

This article analyzes the adequacy of the international legal protection of the elephant. In part I, I discuss why the elephant should be protected. Part II summarizes the applicable law, principally the Convention on International Trade in Endangered Species of Wild Fauna and Flora, known as CITES.⁴¹ In part III, I analyze the shortcomings of CITES in protecting the elephant by examining the dynamics of the ivory trade and why that trade has flourished under CITES. In part IV, I consider how those shortcomings might be remedied through two approaches to elephant protection, management and embargo, concluding that embargo is likely to be more effective. Part IV then relates the implementation of the embargo approach to a broader framework, focusing on emerging customary norms concerning the protection of endangered species. It concludes by summarizing steps needed to protect the elephant.

I. WHY PROTECT THE ELEPHANT?

In 1961 Milton Friedman argued that Yellowstone National Park should be sold to private enterprise.⁴² If enough people wanted to preserve it as a park, he contended, they would vote with their dollars and gate receipts would dictate its continued use as a park—rather than, say, as a source of lumber. If the public wants this kind of activity enough to pay for it, “private enterprises will have every incentive to provide such parks.”⁴³ Essentially this same argument has been made with respect to other natural resources such as wildlife.⁴⁴

Why not leave the future of the elephant to the market?⁴⁵ If its greater utility lies in its appeal to tourists, the argument would go, the elephant will and should be preserved by gate receipts at parks; if its greater value lies in its ivory, the ivory will be harvested. Let the market decide.

The trouble with this argument, as applied to either Yellowstone or the elephant, is that it assumes a perfect market, one that will accurately measure *all* demand for alternative uses (ivory versus protection). But the market does not accurately measure demand for protection.⁴⁶ Many people who have never been to Yellowstone nonetheless want it preserved as a park and

⁴¹ Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 6, 1973, 27 UST 1087, TIAS No. 8249, 993 UNTS 243 [hereinafter CITES].

⁴² M. FRIEDMAN, *CAPITALISM AND FREEDOM* 31 (1961).

⁴³ *Id.*

⁴⁴ See, e.g., A. ALCHIAN & W. ALLEN, *EXCHANGE AND PRODUCTION: COMPETITION, COORDINATION AND CONTROL* 346 (3d ed. 1983). For analysis of a similar argument, see Wijkman, *Managing the Global Commons*, 36 INT'L ORG. 511, 522–23 (1982).

⁴⁵ “The solution to protecting the African elephant and other endangered species is to let individuals with an economic stake in their growth and preservation own them. Idealistic efforts to suppress inevitable demand for tusk of the African elephant will only quicken its extinction.” Woodlief, *Banning Ivory Imports Is Counterproductive*, Wash. Post, June 9, 1989, at A26.

⁴⁶ “[O]bservable evidence of the willingness of people to ‘buy’ environmental amenities does not fully show the extent of the public’s demand for environmental quality” C. HITE, H. MACAULAY, J. STEP & B. YANDLE, *THE ECONOMICS OF ENVIRONMENTAL QUALITY* 40 (1972).

are willing to pay tax dollars for its preservation *merely because they like knowing Yellowstone is there*. These preferences for preservation are not measured by gate receipts; the market that reflects conservationist demand is not an economic market—it is a political one. In voting for or against one's congressional representative, one considers whether the representative has voted for or against preservation of Yellowstone. Similarly, tourist revenues in Africa do not accurately reflect the total demand for preservation of the elephant. Many people who have never been to Africa would wish their governments to support elephant conservation *simply because they like knowing that the elephant is still there*.

Stated in traditional economic terms, the ivory market represents a classic case of market failure. The ivory market produces effects external to the exchange that occurs between a buyer of ivory and a poacher/seller. This "externality" is the cost imposed upon those who prefer that the elephant remain alive—a cost comparable to that imposed upon townspeople by a factory that belches pollutants. The market in both situations fails, for the generator of the externality does not have to pay for harming others. One might object that no market failure occurs because the victims could simply bargain with the poachers (or polluters) and offer them a higher price for stopping than they could get for continuing. But—aside from practical difficulties (such as figuring out whom to pay to stop shooting elephants and how to monitor contractual compliance)⁴⁷—such an approach overlooks the problem of the free rider: not all who benefit from the negotiated restriction will contribute.⁴⁸ Private solutions thus fail.⁴⁹ What is required, it becomes evident, is a public solution—regulation.⁵⁰

⁴⁷ These practical difficulties or "transactional costs" can be greater than the benefits to be gained by the exchange. In such circumstances, absent government intervention, the initial allocation of resources will be final. See Calabresi, *Transaction Costs, Resource Allocation and Liability Rules—A Comment*, 11 J. L. & ECON. 67, 67–69 (1968).

⁴⁸ For a discussion of this issue, see generally E. DOLAN, *TANSTAAFL*: THERE AIN'T NO SUCH THING AS A FREE LUNCH* 45 (1969).

⁴⁹ A variant is the answer of Professor David W. Pearce: market evidence is available for these preferences only "in the highly approximate form of voluntary donations, which suffer from the usual problem that such charities are in the nature of public goods. Indeed, the main reason such donations take place is that consumers have moral as well as purely selfish motives at heart." *THE VALUATION OF SOCIAL COST* 24 (D. Pearce ed. 1978).

Pearce also points out that the free market approach to resource allocation fails to take into account the preferences of future generations, even though they may be radically affected by current decisions, "particularly when these involve long-term or irreversible changes in the environment, for instance by depleting stocks of natural resources." Although "the views of the unborn cannot be directly taken into account," he continues, "it can hardly be disputed that those who have made a special study of long-run economic, social and environmental prospects are in a better position to represent their interests (for instance, to argue which resources are in particular need of conservation) than is the man in the street." *Id.* It has been forcefully argued that each generation owes a fiduciary obligation to future generations to pass on an environmentally sound planet, "in no worse condition than it receives it." See Weiss, *The Planetary Trust: Conservation and Intergenerational Equity*, 11 *ECOLOGY L.Q.* 495, 499 (1984).

⁵⁰ For a useful discussion of many of these issues, see R. COOTER & T. ULEN, *LAW AND ECONOMICS* 46, 107, 116–17, 170 (1988).

Regulation directed at protecting the elephant, however, would still assume the point at issue: *why* regulate to save the elephant? Two classes of arguments have been made for protecting wildlife in general (and various other natural resources): that it is *intrinsically* valuable, and that it is valuable *instrumentally* because of its usefulness to human beings.

Many naturalists have espoused the view that nature is intrinsically valuable because it is beautiful. According to Aldo Leopold, "A thing is right when it tends to preserve the integrity, stability, and beauty of the biotic environment. It is wrong when it tends otherwise."⁵¹ But how does one know that something is beautiful? The notion seems implicit in Leopold's thought that one somehow *discovers* beauty or value that exists *out there*, independently of human response and without any relation to human judgment, valuation, use, interests or needs.⁵² The United Nations General Assembly seems to have adopted this view when it proclaimed in 1982 that "[e]very form of life is unique, warranting respect regardless of its worth to man."⁵³

This approach to intrinsic value⁵⁴ has been termed "aesthetic objectivism"—a theory that seems upon reflection to be "a refuge for knowledge claims that cannot really be substantiated."⁵⁵ "The experience of natural beauty is a relative affair. It is conditioned by such things as kind and adequacy of sensory receptors, imagination, emotional temperament, contemplative capacity, age, education, knowledge of the functions of natural objects, and the aesthetic standards and tastes of society."⁵⁶

For the same reason, other arguments for intrinsic value seem similarly unpersuasive.⁵⁷ The elephant's beauty lies in the eyes of its beholder, and its beholders come from many different cultures. Hear the outrage, for example, of Gary's Waitari, an African nationalist:

Meat! It was the oldest, the most true and sincere, and the most universal aspiration of humanity. . . . To the . . . black man [the elephant] always meant merely meat The idea of the "beauty" of the elephant, of the "nobility" of the elephant, was the idea of a man who had enough to eat, a man of restaurants and of two meals a day and of museums of abstract art—an idea typical of a decadent society⁵⁸

⁵¹ A. LEOPOLD, *A SAND COUNTY ALMANAC* 225 (1949).

⁵² See Hargrove, *An Overview of Conservation and Human Values: Are Conservation Goals Merely Cultural Attitudes?*, in *CONSERVATION FOR THE TWENTY-FIRST CENTURY* 227 (D. Western & M. Pearl eds. 1989).

⁵³ World Charter for Nature, GA Res. 37/7 (Oct. 28, 1982), *reprinted in* 22 ILM 455 (1983).

⁵⁴ For a more fully developed example of this perspective, see Rolston, *Biology Without Conservation: An Environmental Misfit and Contradiction in Terms*, in *CONSERVATION FOR THE TWENTY-FIRST CENTURY*, *supra* note 52, at 232.

⁵⁵ G. DICKIE, *AESTHETICS* 170 (1971).

⁵⁶ Willard, *On Preserving Nature's Aesthetic Features*, 2 ENVTL. ETHICS 293, 296 (1980).

⁵⁷ See, e.g., Norton, *The Cultural Approach to Conservation Biology*, in *CONSERVATION FOR THE TWENTY-FIRST CENTURY*, *supra* note 52, at 241.

⁵⁸ R. GARY, *THE ROOTS OF HEAVEN* 274 (J. Griffin trans. 1958). For the epigraph to this article, see *id.* at 60.

Gary himself rejected aesthetic objectivism: "Each of us," he wrote, "carries in his soul and mind a different notion of what is essential to our survival, a different longing, and a personal interpretation, in the largest sense, of what life preservation is about."⁵⁹ If there is some objective means of assessing the intrinsic value of a given species, or even of one species relative to that of another,⁶⁰ it has not been disclosed to all of us.⁶¹

To reject aesthetic objectivism, of course, is not to concede that it would be permissible to wipe out the elephant population for its ivory. Whether its value can be established objectively or not, some people *do* derive aesthetic satisfaction from the elephant. For them, "the ontological status of aesthetic value is simply irrelevant,"⁶² and it is entirely legitimate for them to attempt to make the law reflect their preferences. Their argument is not that the elephant has intrinsic value, but that other widely held values, such as those reflected in humanitarian and compassionate considerations, would be better upheld by elephant preservation, or that, in effect, the elephant is instrumental in providing aesthetic satisfaction.⁶³

⁵⁹ *Id.* at xvi.

⁶⁰ For a provocative exchange, see T. REGAN, *THE CASE FOR ANIMAL RIGHTS* (1983); Professor Robert Nozick's review of the book, *About Mammals and People*, N.Y. Times, Nov. 27, 1983, §7, at 1, col. 1; and Professor Regan's rejoinder, *Animal Rights*, N.Y. Times, Dec. 25, 1983, §7, at 2, col. 1. As characterized by Nozick, Regan argues that mentally normal mammals of a year or more are comparable to mentally enfeebled human beings; they

have beliefs and drives; perception, memory, and a sense of the future, including their own future; an emotional life together with feelings of pleasure and pain; preference- and welfare-interests; the ability to initiate actions in pursuit of their desires and goals; a psychophysical identity over time; and an individual welfare in the sense that their preferential life fares well or ill for them.

Nozick, *supra*, at 11. Nozick considers this description "highly overblown" and takes issue with the suggestion that a species-membership characteristic is morally irrelevant; yet he acknowledges that he cannot explain completely why membership in the human species does and should have moral weight. "Shouldn't only an organism's own individual characteristics matter?" he asks. "Normal human beings have various capacities that we think form the basis of the respectful treatment these people are owed. How can someone's merely being a member of the same species be a reason to treat him in certain ways when he so patently lacks those very capacities?" Nozick, *supra*, at 1. Nozick predicts that Regan will respond that Nozick's view "will smack of 'speciesism.'" Regan does: "I fail to see how or why species membership is itself a morally decisive consideration for deciding anything, least of all which individuals have moral rights or how much value they possess." Regan, N.Y. Times, *supra*, at 2. "Animal rights activists," Regan concludes, "are moral activists, a part of, not apart from, such larger efforts as the human rights and environmental movements." *Id.*

The relevance of animal rights theories to environmental ethics is not universally accepted. See, e.g., Callicott, *Animal Liberation*, 2 ENVTL. ETHICS 311 (1980); Warren, *The Rights of the Non-Human World*, in ENVIRONMENTAL PHILOSOPHY: A COLLECTION OF READINGS (R. Elliot & A. Gare eds. 1983).

⁶¹ "This is fundamentally a religious argument. There is no scientific way to 'prove' that nonhuman organisms (or, for that matter, human organisms) have a right to exist" P. & A. EHRLICH, *EXTINCTION* 49 (1981).

⁶² See Willard, *supra* note 56, at 297.

⁶³ There is, I acknowledge, a bit more going on here than "mere" compassion. We might not be so compassionate if extinction of the tsetse fly or black widow were at issue. Why focus on the elephant? Rightly or wrongly, our compassion seems to be generated by *empathy*—by our

Other instrumental arguments are advanced for saving the elephant.⁶⁴ If the objective were merely to maximize ivory production, the elephant would best be left alone, and the tusks removed after a natural death.⁶⁵ Tusks grow larger and denser with age; more ivory would be yielded by preserving many older elephants than by killing the fewer and fewer remaining young ones.⁶⁶

Ivory production, of course, is not the elephant's only economic value. Tourism is, or could be, a key industry in many African countries with a substantial elephant population,⁶⁷ and elephants are one of the principal attractions. Moreover, their presence helps preserve ecosystems and the species they embrace. When a keystone species⁶⁸ (e.g., the elephant) in an ecological system is removed, the system can collapse as other species swell or shrink in number,⁶⁹ depending on their relationship to the missing element.⁷⁰ Saving the

ability to identify with a given species because its characteristics are similar to our own. I do not mean to imply that species more like ourselves are *entitled* to greater protection than species less like ourselves. Nor, for that matter, am I prepared to defend the proposition that any one species is more worthy of protection than some other, although many of us have an intuitive sense that this may be true. These are difficult issues. See *supra* note 60 and accompanying text. But, according to a study by the General Accounting Office, man now extinguishes more than one species each day—and the rate could soon rise to one species per hour. Boston Globe, Jan. 30, 1989, at 28. Worldwide, the GAO report said, the planet is near a stage of extinction "unequaled since the age of the dinosaurs." *Id.* Up to 20% of all species alive in 1980 could now be extinct. U.S. DEPARTMENT OF STATE AND COUNCIL ON ENVIRONMENTAL QUALITY, GLOBAL 2000 REPORT TO THE PRESIDENT 331 (1980). Not all endangered species can be examined in one article. The problem is worsening, and it is simply necessary to start somewhere.

⁶⁴ For an overview of such arguments with respect to endangered species in general, see S. FITZGERALD, INTERNATIONAL WILDLIFE TRADE: WHOSE BUSINESS IS IT? 5–12 (1989). See generally R. & C. PRESCOTT-ALLEN, WHAT'S WILDLIFE WORTH? (1982).

⁶⁵ *To Save the Elephant*, *supra* note 1, at 6. The general problem confronted here is analyzed brilliantly in Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968). Elephants' poached price "does not indicate the economic value of these animals because here the 'factory' is sold along with the 'product'. 'A management of fools' is how some economists term it." W. VAN DIEREN & M. HUMMELINCK, NATURE'S PRICE: THE ECONOMICS OF MOTHER EARTH 137 (1979). "The core of the problem," *The Economist* opined, "is that, where rare animals or plants are concerned, the interests of an individual may differ from those of society at large." *The Price of a Tusker*, ECONOMIST, Oct. 14, 1989, at 19.

⁶⁶ Linden, *Last Stand for Africa's Elephants*, TIME, Feb. 20, 1989, at 77 (quoting David Western).

⁶⁷ In Kenya, for example, it is the country's largest foreign exchange earner. N.Y. Times, Feb. 11, 1989, at 4. In 1989, some 700,000 tourists were expected to spend \$350 million in foreign currency. L.A. Times, May 8, 1989, at 6.

⁶⁸ See generally Paine, *A Note on Trophic Complexity and Community Stability*, 103 AM. NATURALIST 91 (1969).

⁶⁹ Diamond, *Overview of Recent Extinctions*, in CONSERVATION FOR THE TWENTY-FIRST CENTURY, *supra* note 52, at 37, 40; S. FITZGERALD, *supra* note 64, at 5.

⁷⁰ The living community, or biocenosis, comprising the interdependent organisms in a given environment comes over time to achieve a state of balance or biological equilibrium. "If man influences any one of the complexly and delicately interrelated components of this living, modulating equilibrium, a significant displacement which can lead to the destruction of an entire environment may result." 2 V. ZISWILER, EXTINCT AND VANISHING ANIMALS 72

species can mean saving the ecosystem.⁷¹ Further, by diminishing the size of the elephant's gene pool, the species is made more vulnerable to epidemic and other environmental alterations, which pose a lesser threat to a genetically varied population consisting of diverse elements better able to resist change and disease.⁷² Poaching also reverses processes of natural selection; animals with the largest tusks are taken first, leaving the weaker ones to constitute the breeding pool.⁷³ As time goes on, more and more elephants need to be killed to produce the same amount of ivory, resulting in an ever-accelerating rate of disappearance and an ever-younger population.⁷⁴

II. THE CURRENT STATE OF THE LAW

International law has developed a system, of sorts, directed at the preservation of species such as the African elephant. Although customary international law now requires states to protect endangered species,⁷⁵ the norm has received virtually no attention, perhaps because of its acknowledged indeterminacy in application. Rather, discussion has focused on conventional norms—specifically, those set out in CITES.⁷⁶

The Convention on International Trade in Endangered Species of Wild Fauna and Flora was signed in Washington, D.C., on March 6, 1973, and entered into force on July 1, 1975. By October 1989, 103 states were parties.⁷⁷ CITES establishes a straightforward, three-tiered structure. Levels

(1967). See also P. & A. EHRLICH, *supra* note 61, at 96. "To keep every cog and wheel," Aldo Leopold said, "is the first precaution of intelligent tinkering." A. LEOPOLD, *supra* note 51, at 191.

⁷¹ See Myers, *The Extinction Spasm Impending: Synergisms at Work*, 1 CONSERV. BIOL. 14 (1987).

⁷² According to Joyce Poole, a biologist who studies elephant behavior in Kenya, "The combined loss of wisdom and leadership as well as genetic strength is incalculable." Bohlen, *Nightmare in Africa: Wanton Elephant Poaching Takes Huge Toll*, FOCUS, March/April 1989, at 1, 6. See generally COUNCIL ON ENVIRONMENTAL QUALITY, ELEVENTH ANNUAL REPORT, ENVIRONMENTAL QUALITY—1980, at 32 (1980); R. NASH, WILDERNESS AND THE AMERICAN MIND 257–58 (3d ed. 1982). For an excellent discussion of the importance of preserving genetic diversity, see Note, *Genetic Ark: A Proposal to Preserve Genetic Diversity for Future Generations*, 40 STAN. L. REV. 279 (1987).

⁷³ In an aerial survey of Tsavo in 1985, about two thousand elephants were seen, but only one male as old as 35. The loss of older elephants is particularly threatening to the population, since bulls over 35 are responsible for perpetuating the species. A male that dies before reaching the age of 30 will not likely have reproduced. *To Save the Elephant*, *supra* note 1, at 6.

⁷⁴ Marketed tusks used to weigh 15–20 pounds, but the average weight has gradually declined to about 7 pounds. *Id.* at 5. "The poachers now must kill three times as many elephants to get the same quantity of ivory." *Outlawing Ivory*, TIME, June 19, 1989, at 62 (comment of Curtis Bohlen, senior vice president, World Wildlife Fund). According to David Western, the average tusk weight of commercial ivory has fallen from 10.1 kg. in 1979 to 6.2 kg. in 1982. UNEP REPORT, *supra* note 33, at 11, 12. A 1986 survey of tusks from the Central African Republic showed none from animals over the age of 35. *Id.* at 12.

⁷⁵ See *infra* notes 240–80 and accompanying text.

⁷⁶ See note 41 *supra*.

⁷⁷ S. FITZGERALD, *supra* note 64, at 13.

of protection are a function of the degree of threat to the survival of a species, which corresponds to the appendix in which the species is listed.⁷⁸

Appendix I provides the highest level of protection; it includes "all species threatened with extinction which are or may be affected by trade."⁷⁹ It applies to specimens of those species, whether dead or alive. Export is allowed solely pursuant to permit, which is only issued, *inter alia*, when: "a Scientific Authority of the State of export has advised that such export will not be detrimental to the survival of that species."⁸⁰ The import of such specimens is allowed only pursuant to a similar permit.⁸¹ In addition, the Convention contains provisions governing the re-export of Appendix I specimens: a "re-export certificate" is required, which may be granted only when the re-exporting state is satisfied that the specimen was imported into that state in accordance with the Convention.⁸² The most restrictive provisions, those governing the trade in species listed in Appendix I, thus apply to producer states, middleman states and consumer states. In net effect, these provisions are intended to close down international trade in the species listed in Appendix I.⁸³

Appendix II provides an intermediate level of protection; it includes "all species which although not necessarily now threatened with extinction may become so unless trade in specimens of such species is subject to strict regulation."⁸⁴ Thus, trade in species found in Appendix II is permitted, but regulated. The principal distinction between its regime of protection and that accorded Appendix I specimens is that, while the limitations applicable to export and re-export are similar, the limitations governing import are far less rigorous. No import permit is required with respect to Appendix II specimens, and imports for commercial purposes are allowed. Appendix II covers tens of thousands of species.⁸⁵

Appendix III provides the least protection; it includes "all species which any Party identifies as being subject to regulation within its jurisdiction for the purposes of preventing or restricting exploitation."⁸⁶ Limitations applicable to Appendix III specimens are much narrower than those pertinent to Appendix I or II specimens and derive primarily from the laws of the exporting state; unlike species listed in the first two appendices, Appendix III species are unilaterally designated by the exporting state.

⁷⁸ For a more detailed analysis of the Convention, see S. Lyster, *INTERNATIONAL WILDLIFE LAW* 239-77 (1985).

⁷⁹ CITES, *supra* note 41, Art. II(1).

⁸⁰ *Id.*, Art. III(2)(a).

⁸¹ *Id.*, Art. III(3)(a).

⁸² *Id.*, Art. III(4)(a). But see Art. I(b)(ii) (discussed at note 90 *infra* and accompanying text). See also *infra* text at note 111.

⁸³ An exception is allowed only in "exceptional circumstances." CITES, *supra* note 41, Art. II(1).

⁸⁴ *Id.*, Art. II(2)(a).

⁸⁵ S. Lyster, *supra* note 78, at 245. However, nearly all are plants; 303 are mammals, 618 are birds, and 340 are reptiles. In 1986 Appendix I contained 179 mammals, 133 birds and 52 reptiles. Woodruff, *The Problems of Conserving Genes and Species*, in *CONSERVATION FOR THE TWENTY-FIRST CENTURY*, *supra* note 52, at 83.

⁸⁶ CITES, *supra* note 41, Art. II(3).

CITES permits any party to enter a specific reservation with regard to any species included in any one of the appendixes.⁸⁷ Thus, Japan, although a party, has entered reservations with respect to four different species of whales.⁸⁸

CITES provides that the parties will meet every 2 years. At the 1985 meeting, the parties adopted a system directed at controlling the international trade in raw ivory, which operated as follows:

[E]ach African country first sets a quota establishing the number of elephants that can be killed within its borders during the following year. All tusks and large pieces of unworked ivory taken within each country must be marked with that country's identification number. The export of those tusks or pieces must be accompanied by an export permit, and a copy of the permit must be sent to the CITES Secretariat. The Secretariat then tallies the number of tusks that are exported from each African country to ensure that its quota is not surpassed. Before an importing country accepts a shipment of ivory, it must first receive notification from the Secretariat that the permit is in order and that the quota has not been reached.⁸⁹

Because CITES defines "specimen" as "any readily recognizable part or derivative thereof,"⁹⁰ CITES has been construed as governing only raw ivory, not worked ivory.⁹¹

One central function of the biennial meeting is to review the species listed in each appendix and to determine whether to add, delete or transfer species from one appendix to another.⁹² Such amendments to Appendixes I and II require the approval of a two-thirds majority of those parties present and voting.⁹³ The amendment enters into force 90 days after the meeting.⁹⁴ At the biennial CITES meeting held in October 1989 in Lausanne, the elephant was moved to Appendix I from Appendix II, where it had been listed since 1977.⁹⁵

Several other CITES provisions are worth noting. First, CITES prohibits a party from trading in specimens with a nonparty unless the latter produces documentation comparable to that required of a party.⁹⁶ Second, CITES

⁸⁷ *Id.*, Art. XXIII(2)(b).

⁸⁸ S. FITZGERALD, *supra* note 64, at 377-78.

⁸⁹ 1988 HOUSE REPORT, *supra* note 33, at 9-10.

⁹⁰ CITES, *supra* note 41, Art. I(b)(ii). This definition applies with respect to species listed in Appendixes I or II; a different definition applies with respect to species listed in Appendix III. See *infra* text at notes 321-25.

⁹¹ The terms "readily recognizable" and "derivative" are not defined by CITES. Consequently, trade in certain parts and derivatives is regulated by some parties but not by others. S. Lyster, *supra* note 78, at 242.

⁹² CITES, *supra* note 41, Art. IX(3)(b).

⁹³ *Id.*, Art. XV(1)(b).

⁹⁴ *Id.*, Art. XV(1)(c).

⁹⁵ Perlez, *Ivory Trade Is Banned To Save the Elephant*, N.Y. Times, Oct. 16, 1989, at C13. See also 54 Fed. Reg. 24,759 (1989). No formal change was made to expand the application of CITES to worked as well as raw ivory, but the parties may have assumed that the distinction made in the prior regulatory regime lapsed with that system.

⁹⁶ CITES, *supra* note 41, Art. X.

requires each party to "take appropriate measures to enforce" the Convention,⁹⁷ both by imposing penalties⁹⁸ and by confiscating illegal specimens.⁹⁹ Third, a secretariat, headed by a secretary-general, is established to oversee the operation of the Convention.¹⁰⁰ Other provisions recommend that each party designate ports of entry and exit,¹⁰¹ require that each party keep detailed records of trade in specimens of listed species,¹⁰² and make clear that the Convention does not preclude the right of the parties to adopt stricter domestic measures.¹⁰³

In the United States, although some states have attempted to enact "stricter domestic measures,"¹⁰⁴ the principal such measure is the federal Endangered Species Act of 1973 (ESA).¹⁰⁵ In addition to implementing the Convention in the United States, the ESA prohibits the importation into the United States of endangered species that are listed in the ESA.¹⁰⁶ Although "threatened" species are also listed in the ESA,¹⁰⁷ it does not prohibit their importation; the Secretary of the Interior is directed "to issue such regulations as he deems necessary and advisable" to provide for the protection of threatened species.¹⁰⁸ Beginning in 1978, the elephant was listed as a "threatened" species.¹⁰⁹ Regulations issued by the Secretary pursuant to the ESA permitted the importation of worked ivory from states parties to CITES.¹¹⁰ The regulations further required that imported ivory be accompanied by an export permit from the country of origin, even if it had been shipped to an intermediate country and worked there into a finished product.¹¹¹ Further, the United States Fish and Wildlife Service was authorized

⁹⁷ *Id.*, Art. VIII(1).

⁹⁸ *Id.*, Art. VIII(1)(a).

⁹⁹ *Id.*, Art. VIII(1)(b).

¹⁰⁰ *Id.*, Art. XII.

¹⁰¹ *Id.*, Art. VIII(3).

¹⁰² *Id.*, Art. VIII(6).

¹⁰³ *Id.*, Art. XIV(1)(a).

¹⁰⁴ See, e.g., CAL. PENAL CODE §§6530 and 653r (West 1988) (prohibiting, inter alia, the importation and sale of elephants within the state of California). Earlier, federal courts divided over whether the statute was permissible in light of §6(f) of the Endangered Species Act [hereinafter ESA], 16 U.S.C. §1535(f), which precludes the states from prohibiting what is permitted by the ESA. This provision was held by one federal district court to have preempted the California law, *Fouke Co. v. Brown*, 463 F.Supp. 1142 (E.D. Cal. 1979), and by another to have let the California law stand, *H. J. Justin & Sons v. Brown*, 519 F.Supp. 1383 (E.D. Cal. 1981), *rev'd in part on other grounds*, 702 F.2d 758 (9th Cir.), *cert. denied*, 464 U.S. 823 (1983). For a discussion of the two cases arguing the correctness of the second, see M. BEAN, *THE EVOLUTION OF NATIONAL WILDLIFE LAW* 377-78 (1983). The Ninth Circuit settled the dispute in *Man Hing Imports v. Brown*, 652 F.2d 63 (9th Cir. 1981), and *Man Hing Ivory & Imports, Inc. v. Deukmejian*, 702 F.2d 760 (9th Cir. 1983), holding that ESA §6(f) preempted operation of the California statute.

¹⁰⁵ 16 U.S.C. §§1531-1541 (1982). The ESA, however, is not the only statute pertinent to the illegal ivory trade. The Lacey Act Amendments of 1981, 16 U.S.C. §§3371-3378 (1982), criminalize under federal law any violation of a state, national or foreign wildlife law. Apparently, difficulty in identifying specific foreign wildlife laws has hampered prosecution. Note, *International Trade in Wildlife: How Effective Is the Endangered Species Trade?*, 15 CAL. W.L. REV. 111 (1985).

¹⁰⁶ ESA, 16 U.S.C. §1538.

¹⁰⁷ *Id.* §1533(c).

¹⁰⁸ *Id.* §1533(d).

¹⁰⁹ 43 Fed. Reg. 20,504 (1978).

¹¹⁰ See 50 C.F.R. §17.40(e) (1988); 47 Fed. Reg. 31,384 (1982); 53 Fed. Reg. 52,242 (1988).

¹¹¹ 50 C.F.R. §17.40(e)(3) (1988).

to impose additional regulatory restrictions on African ivory when necessary.¹¹² Spokesmen for the U.S. Department of the Interior indicated in 1988 that existing ESA authority permitted the Secretary to ban the importation of ivory (meaning, presumably, that the Secretary could simply move the elephant from the threatened list to the endangered list¹¹³), but the Secretary declined to exercise that authority because "[i]t probably needs some kind of national consensus."¹¹⁴

Partly in response to this seeming invitation to act, Congress in 1988 enacted the African Elephant Conservation Act (AECA).¹¹⁵ Although legislation had been pending that would have imposed a complete ban on the importation of ivory,¹¹⁶ the AECA as enacted did not do that. The AECA required the Secretary of the Interior to conduct a country-by-country review of all African ivory-producing states and to determine, within 1 year after the date of enactment, whether each state had an effective elephant protection program.¹¹⁷ In the event of a negative determination with respect to a given state, the Secretary was required to place a moratorium on the importation of ivory from that state.¹¹⁸ The Act permitted the continued importation of ivory taken from elephants that die naturally or are killed to implement necessary wildlife management.¹¹⁹ The AECA also addressed the problem of "middleman" states. It required the Secretary to place a moratorium on the importation of ivory from any intermediate country meeting any one of seven criteria set forth in the AECA.¹²⁰ Other provisions of the AECA authorized the Secretary of the Interior to fund elephant conservation projects,¹²¹ prescribed criminal penalties for violating

¹¹² *Id.* Pursuant to this authority, the Service prohibited the importation of ivory into the United States from Burundi, a country with no resident elephant population and a huge reserve of poached ivory. The Service also prohibited the importation into the United States of ivory from any intermediary country that imports ivory from Burundi. 1988 HOUSE REPORT, *supra* note 33, at 8. The Service, in February 1988, also banned ivory imports from Somalia. FOCUS, May/June 1989, at 1. *See infra* text at notes 161-63.

¹¹³ The unilateral ban announced on June 9 by President Bush (*see text infra* at note 137) was taken under the authority of §2202(a) and (b) of the African Elephant Conservation Act, requiring the Department of the Interior to establish moratoriums on ivory trade with all nations that cannot meet its criteria for continuation of trade with the United States. 54 Fed. Reg. 24,759 (1989). *See supra* note 95.

¹¹⁴ *African Elephant Conservation: Hearing Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the House Comm. on Merchant Marine and Fisheries*, 100th Cong., 2d Sess. 30 (1988) (testimony of Ronald Lambertson, Regional Director for the Northeast, U.S. Fish and Wildlife Service) [hereinafter *1988 House Hearings*].

¹¹⁵ Pub. L. No. 100-478, §2001, 102 Stat. 2306, 2315 (1988) [AECA] (16 U.S.C.A. §§4201-4245 (West Supp. 1989)).

¹¹⁶ *See, e.g.*, H.R. 2999, 100th Cong., 1st Sess. (1987) (sponsored by Rep. Anthony Beilenson).

¹¹⁷ AECA, *supra* note 115, §2201.

¹¹⁸ *Id.* §2202(a)(1).

¹¹⁹ 54 Fed. Reg. 19,416 (1989).

¹²⁰ AECA, *supra* note 115, §2202(b). Those criteria included whether the state is a party to CITES, whether it adheres to the CITES Ivory Control System (*see supra* text at note 89) and the volume of its ivory imports.

¹²¹ AECA, *supra* note 115, §2102. No dollar amount was set; the funds will derive from private donations, civil and criminal penalties collected for violation of the AECA, revenues from the sale of confiscated ivory and other appropriated funds. *Id.* §2102(b).

its provisions,¹²² and directed that the Secretary study the effectiveness of the AECA and the CITES Ivory Control System and report the findings to Congress by 1991.¹²³ If the illegal importation of ivory into the United States had not "substantially stopped" by then, the Secretary was to recommend changes in the Act or "other action, including a total ban on the importation of ivory, if appropriate."¹²⁴

Events quickly overtook the AECA, which took effect on October 7, 1988. In the 10-month period after the House hearings on the AECA, ivory prices soared 25 percent and were expected to rise an additional 25 percent in the next 6 months.¹²⁵ But as poaching accelerated,¹²⁶ public awareness grew.¹²⁷ In late 1988, Kenya's President Daniel arap Moi ordered that poachers (many of them Somalis) be shot on sight.¹²⁸ Richard Leakey, the newly appointed Director of the Kenya Wildlife Service, said that he favored a flat-out ban: "If we can get some of the big consumer countries behind this, it will be very positive."¹²⁹ "The poaching is as bad as it has ever been," Leakey said. "We are losing the elephant."¹³⁰ Shortly afterwards, the U.S. Department of the Interior announced that it supported a ban on the ivory trade, and the Kenyan Government reversed its previous position and announced that it, too, favored a worldwide ban.¹³¹ On May 23, 1989, Britain joined the call for a ban.¹³² As governmental support mounted for moving the elephant from CITES Appendix II to Appendix I,¹³³ key non-

¹²² The maximum criminal penalty for an individual is a \$100,000 fine and 1 year in prison. *Id.* §2204(a). The Secretary is also authorized to pay rewards to individuals who furnish information that leads to civil or criminal penalties under AECA. *Id.* §2205.

¹²³ *Id.* §2304.

¹²⁴ *Id.*

¹²⁵ Reuters (Apr. 24, 1989).

¹²⁶ Daily Telegraph (London), May 15, 1989, at 15.

¹²⁷ In a widely publicized action, following an advertisement on the elephant placed in the Apr. 19 *New York Times* by Friends of Animals, Sotheby's of New York City withdrew from sale two elephant tusks valued at \$48,000. "We will never again sell elephant tusks," said Michael Ainslie, President of Sotheby's. "We would hope it sets an example." *Tusk, Tusk*, TIME, May 1, 1989, at 56. In London, Liberty's banned the sale of ivory ornaments and jewelry, after complaints from customers concerned about the dwindling African elephant population. The store said it "no longer wants to be involved in this trade or in the corruption involved." Daily Telegraph (London), May 17, 1989, at 9.

¹²⁸ N.Y. Times, May 23, 1989, at C1.

¹²⁹ Press, *Africans Back Ban on Ivory Sales*, Christian Sci. Monitor, Apr. 26, 1989, at 6. Leakey's outspokenness caused one Kenyan government minister to describe him as a "cheeky white" who felt black Africans could not manage their own affairs. L.A. Times, May 8, 1989, at 6.

¹³⁰ Hiltzik, *Public Backs Paleontologist Leakey; Rivalries Over Poaching Grip Kenya*, N.Y. Times, Apr. 23, 1989, §1, at 4. Shortly before, apparent poachers had attacked two minibuses on safari with tourists.

¹³¹ N.Y. Times, May 12, 1989, at A1. The week before, Tanzania called for a complete ban. *Id.*

¹³² Reuters (May 23, 1989). Over the previous 2 weeks, British television networks had carried a series of reports about the poaching of African elephants and two national newspapers had initiated campaigns to halt their slaughter. *Id.*

¹³³ By this time, support also came from Zaire, Gabon and Gambia. N.Y. Times, June 2, 1989, at A9.

governmental wildlife organizations feared that, in anticipation of a total ban at the CITES meeting in October, poaching would increase dramatically. These organizations urged immediate unilateral bans to preempt "what could become an elephant holocaust."¹³⁴ An "orgy" of killing, they warned, could occur before a CITES ban would take effect.¹³⁵

The dominoes then began to fall. France announced that it was banning the import of ivory as of June 5, 1989.¹³⁶ On the same day, President George Bush announced a ban by the United States.¹³⁷ Interior Secretary Manuel Lujan, Jr., said on June 6 that the United States (which in 1988 had imported about 12 percent of the world's raw and worked ivory¹³⁸) was imposing the moratorium on all ivory imports before the October meeting because a new review had found that there was no way to distinguish between legal and illegal ivory. "We believe the current international system for controlling ivory trade has failed to protect the elephant, and we have no choice but to halt commercial ivory shipments into the United States," Secretary Lujan said.¹³⁹ On June 6, West Germany announced an immediate ban.¹⁴⁰ And on June 9, the environment ministers of the European Community's 12 member nations voted to impose such a moratorium.¹⁴¹ (The European Community has accounted for about 20 percent of ivory imported from Africa.¹⁴²) The senior vice president of the World Wildlife Fund thereupon declared victory: "The ivory trade has been shut down," said Curtis Bohlen. "The African elephant is now in far less danger of extinction than it was only a week ago."¹⁴³

The unilateral bans, however, turned out to be less than universal. Hong Kong banned only imports of raw ivory;¹⁴⁴ Japan banned imports of raw and worked ivory, but not raw ivory from African countries that are parties to

¹³⁴ Daily Telegraph (London), June 2, 1989, at 9; Reuters (June 1, 1989). These groups included the International Union for the Conservation of Nature and Natural Resources (IUCN) (which had earlier helped initiate the campaign for a CITES treaty, S. Lyster, *supra* note 78, at 239) and the World Wide Fund for Nature, which had earlier opposed a complete ban.

¹³⁵ N.Y. Times, June 2, 1989, at A9.

¹³⁶ N.Y. Times, June 5, 1989, at A8.

¹³⁷ Wash. Post, June 6, 1989, at A6. Bush said: "If their populations continue to diminish at current rates, the wild elephant will soon be lost from this Earth. We urge the nations of the world to join us in this ban." *Id.*

¹³⁸ See *infra* note 175.

¹³⁹ N.Y. Times, June 7, 1989, at A18.

¹⁴⁰ *Id.*

¹⁴¹ N.Y. Times, June 11, 1989, §1, at 6. It turned out, however, that the ban finally adopted would not apply to tusks taken from elephants killed in authorized culls. Reuters (Aug. 17, 1989).

¹⁴² N.Y. Times, June 11, 1989, §1, at 6.

¹⁴³ *Id.* But, Mr. Bohlen added, "We should not fool ourselves that the ban alone will solve the problem." *Id.* Because the Wildlife Fund had not called for a halt to the global ivory trade before June 2, 1989, some other groups that had worked to save the elephant were not impressed. A spokesman for Friends of Animals said: "They are the last ones to jump on the bandwagon . . . ; they only flip-flopped after seeing that the rest of the world had already changed." N.Y. Times, June 9, 1989, at A24.

¹⁴⁴ Reuters (June 18, 1989).

CITES.¹⁴⁵ The Japanese also announced their intent to continue to trade with "managed" states such as South Africa,¹⁴⁶ which refused altogether to join the ban.¹⁴⁷ Southern African producer states, led by Zimbabwe and including South Africa and Botswana, similarly announced their intent to continue to export ivory to the Far East.¹⁴⁸

In October, the parties to CITES met in Lausanne and moved the elephant to Appendix I.¹⁴⁹ They rejected a "split-listing" proposal by southern African states that would have permitted the continued lawful sale of ivory by southern African states. Not surprisingly, five of those states refused to be bound by this outcome, entered reservations, and announced that they would continue to sell ivory.¹⁵⁰

III. THE SHORTCOMINGS OF CITES

It is too soon to assess the impact of the 1989 Lausanne decision to move the elephant from CITES Appendix II to Appendix I,¹⁵¹ or of the unilateral national bans that preceded that action. An analysis of the probable impact

¹⁴⁵ N.Y. Times, June 17, 1989, at 6. Japan has not been at the forefront of the international environmental movement. At about the same time, Japanese officials reiterated Tokyo's intention to kill at least four hundred minke whales next winter, despite demands from the International Whaling Commission that it completely observe the moratorium on whaling imposed in 1986. Besides six species of whales, Japan also engages in trade of skins or products of the Himalayan musk deer and certain species of sea turtles, monitor lizards and crocodiles. In addition, environmentalists accuse Japan of hastening the destruction of the Amazon rain forest by importing tropical timber products from Brazil. *Id.*

¹⁴⁶ ECONOMIST, *supra* note 23, at 16.

¹⁴⁷ South African officials argued that a ban penalizes states with effective elephant conservation programs, such as South Africa and Zimbabwe. Both states cull their elephant populations, and the proceeds from ivory so obtained reportedly go back into conservation. N.Y. Times, June 22, 1989, at A8.

¹⁴⁸ Reuters (Sept. 22, 1989); Sunday Telegraph (London), July 16, 1989, at 14. Malawi, Mozambique and Zambia reportedly will join them. UNEP, in a report released June 29, 1989, was pessimistic about chances of closing down the trade: "[A] complete ban on the ivory trade," it concluded, "is unlikely ever to be successful because world-wide investment in the ivory business is too large." CITES Secretary-General Eugene Lapointe said later, on July 3, 1989, that a worldwide ban on trade in ivory was unlikely to protect endangered African elephants and could create new problems. Sunday Telegraph, *supra*.

¹⁴⁹ See text *supra* at notes 92-95. However, a resolution was passed establishing a set of criteria, based on the African Elephant Conservation Act, that would allow a country to be removed from Appendix I if it were able to comply with the criteria. A panel of experts would be established to review an applicant's program to assess compliance. In any event, there will be no ivory quotas or commercial trade prior to the next conference in Japan in 1992.

¹⁵⁰ Those states are South Africa, Zimbabwe, Zambia, Botswana and Malawi. In addition, China entered a reservation concerning ivory imports, and Britain entered a reservation on behalf of Hong Kong permitting the colony a 6-month trading extension. *Ban on Ivory Takes Effect; Some Nations Defy It*, L.A. Times, Jan. 19, 1990, at 11A. Although Japan abstained from voting for the ban in Lausanne, it subsequently announced that it would abide by it. L.A. Times, Oct. 20, 1989, at 1. "That is probably more important than anything that was decided here," Simon Lyster said. Reuters (Oct. 20, 1989).

¹⁵¹ See *supra* note 95 and accompanying text.

is set forth in part IV below.¹⁵² What is clear is that the international system in effect before Lausanne permitted the trade in illegal ivory to flourish to the point of resulting in the slaughter of almost half of all elephants. As *The Economist* concluded, CITES had proven "utterly powerless" to control the ivory trade.¹⁵³ Without examining how and why that happened, it is difficult to predict whether the elephant is now safe under Appendix I, or to consider what further steps might be indicated.

The International Ivory Trade

Until recently, little was known about the ivory trade.¹⁵⁴ In the spring of 1988, the World Wildlife Fund sponsored a meeting in Lusaka, Zambia, to explore how the elephant could best be protected. Experts from various countries attended. Among the group's conclusions was that the ivory trade required much greater analysis: specifically, of how much ivory is involved, how it moves, and who benefits from it.¹⁵⁵ This point was underscored by David Western, Chairman of the IUCN's African Elephant and Rhino Specialist Group. "We do not, at this point, understand fully how the ivory trade works," he testified. "It is an illusion to believe that we do."¹⁵⁶

Nonetheless, the broader contours of the trade have now emerged.¹⁵⁷ We know, for example, something about the principal countries of origin. In addition to Kenya, they have included Zaire, Tanzania, Botswana, Zambia and South Africa.¹⁵⁸

We know something about the persons engaged in poaching. In Kenya, some of the poaching has been done by Somali bandits, called *shiftas*, armed with modern automatic rifles. The gangs have gotten \$6 a pound for tusks; a poacher can earn \$100 in a single night.¹⁵⁹ (The median income in Africa in 1988 was about \$300 per year.¹⁶⁰)

Other poachers in Kenya have been outsiders; in February 1989, an armed band of Somalian soldiers entered the country and slaughtered six

¹⁵² See *infra* notes 194-231 and accompanying text.

¹⁵³ *ECONOMIST*, *supra* note 23, at 16.

¹⁵⁴ D. FAVRE, *INTERNATIONAL TRADE IN ENDANGERED SPECIES: A GUIDE TO CITES* (1989); R. MARTIN, J. CALDWELL & J. BERZDO, *AFRICAN ELEPHANTS, CITES, AND THE IVORY TRADE* (1986); I. PARKER & M. AMIN, *IVORY CRISIS* (1985).

¹⁵⁵ Bohlen, *supra* note 72, at 6.

¹⁵⁶ 1988 *House Hearings*, *supra* note 114, at 29. "[N]obody has any idea how much is coming out of Africa," Susan Lieberman testified, "because it is impossible to know what the smugglers and poachers are doing everywhere." *Id.* at 25 (testimony of Susan Lieberman, Associate Director of Wildlife and Environment Division, Humane Society of the United States).

¹⁵⁷ See generally S. FITZGERALD, *supra* note 64, at 61-77; Thornton, *The Ivory Trail*, *GREEN-PEACE*, September/October 1989, at 7, 8.

¹⁵⁸ 1988 *House Hearings*, *supra* note 114, at 37 (testimony of W. K. Nduku, Director, Department of National Parks and Wildlife, Zimbabwe); S. COLB, *THE IVORY TRADE AND THE FUTURE OF THE AFRICAN ELEPHANT* (1989); ENVIRONMENTAL INVESTIGATION AGENCY, *A SYSTEM OF EXTINCTION: THE AFRICAN ELEPHANT DISASTER* (1989).

¹⁵⁹ Bohlen, *supra* note 72, at 1.

¹⁶⁰ 1988 *House Hearings*, *supra* note 114, at 3 (testimony of Rep. Anthony Beilenson).

elephants. Kenyan security forces exchanged fire with the raiders, resulting in the death of one Somalian, the capture of another and the injury of three Kenyans. The Government of Kenya lodged a formal protest with the Somalian Embassy.¹⁶¹ The World Wildlife Fund determined that Somalia had sold or stockpiled about 29,000 tusks from 1986 to 1989—even though the country contained fewer than 4,500 elephants in 1987.¹⁶² The President of Somalia, Mohamed Siyaad Barre, explicitly authorized the import into Somalia of raw ivory from neighboring countries.¹⁶³

Poaching has been facilitated, through inadvertence or indifference, by developers. In 1981 the Shell Oil Company constructed roads in the previously isolated Selous game reserve in Tanzania. Its labor force "was not averse to poaching"; since the roads were built, elephants have declined rapidly in number.¹⁶⁴

Poaching has provided a source of revenue for guerrilla movements, which are well equipped to enter the business. Jonas Savimbi's UNITA, which is supported by the United States, has reportedly killed more than 100,000 elephants to finance its 14-year war against the Government of Angola.¹⁶⁵

We know from customs reports that an average of 800 metric tons of ivory has been leaving Africa annually.¹⁶⁶ But in ivory-exporting countries, the value of ivory to the export economy has rarely been greater than 1 percent.¹⁶⁷ Relatively little raw ivory has gone directly to the United States or other end-user countries.¹⁶⁸ For the most part, raw ivory has been transported to *entrepôts*, way stations en route to final ports where ivory is worked and its origin easily concealed.¹⁶⁹ Somalia, the United Arab Emirates and South Africa have been among the principal *entrepôts*.¹⁷⁰ Burundi has ex-

¹⁶¹ The protest stated: "The Government of Kenya takes very great exception to this incident where armed members of the Somalia National Army violate the Kenyan territorial integrity, butcher Kenya's wildlife, and open fire at Kenya security forces, injuring a number of them." FOCUS, May/June 1989, at 1.

¹⁶² *Id.*

¹⁶³ *To Save the Elephant*, *supra* note 1, at 9. In 1983 Sudanese hunters were crossing the border with Zaire in groups of up to 60, armed with Kalashnikovs and G3 automatic rifles. UNEP REPORT, *supra* note 33, at 15.

¹⁶⁴ UNEP REPORT, *supra* note 33, at 16.

¹⁶⁵ Ransdell, *supra* note 37, at 62. "Savimbi admitted to an arms-for-ivory deal with his South African allies in a 1988 interview with *Paris-Match*." *Id.*

¹⁶⁶ Bohlen, *supra* note 72, at 1. In 1987 and 1988 the trade is believed to have dropped to about 500 tons per year, though final figures are not yet available. *To Save the Elephant*, *supra* note 1, at 7.

¹⁶⁷ IVORY TRADE REVIEW GROUP, PUBLIC STATEMENT ON THE IVORY TRADE AND THE FUTURE OF THE AFRICAN ELEPHANT 4 (1989). Most of the profits go to middlemen. *See infra* note 321 and accompanying text.

¹⁶⁸ In 1986, for example, the entire amount of raw ivory imported into the United States represented the tusks of 500 elephants. 1988 HOUSE REPORT, *supra* note 33, at 9.

¹⁶⁹ Bohlen, *supra* note 72, at 6.

¹⁷⁰ *Id.* The UAE was a party to CITES but has withdrawn (the only party to do so). *See* note 187 *infra*.

ported most of the ivory from East Africa, even though it has no elephant population itself.¹⁷¹ Macao and Singapore also have participated in the illegal ivory trade.¹⁷²

From these intermediary countries, the raw ivory has been shipped to countries where it is "worked," or carved. Hong Kong and Japan have been among the most prominent of such states. As controls in Hong Kong were tightened, the main carving industry appeared to be moving to Macao.¹⁷³ Japan alone has consumed close to 75 percent of Africa's raw ivory production.¹⁷⁴

The worked ivory has then been either sold domestically or shipped to consumer states such as the United States. The United States has imported about 30 percent of worked ivory that enters the international trade.¹⁷⁵ About a third of Hong Kong's worked ivory exports have been sent to the United States.¹⁷⁶ It has been estimated that about 80 percent of the ivory sold in the United States was obtained illegally.¹⁷⁷

Why the Ivory Trade Flourished under CITES

However incomplete our current picture of the international ivory trade, it nonetheless seems fair to conclude that throughout the 1980s, the trade boomed despite the CITES protective regime for a fairly obvious reason: CITES did not sufficiently diminish the incentives of producers, middlemen or consumers.

Producer states faced a variety of problems. The vast profits available from poaching, or merely looking the other way, made the corruption of enforcement personnel a recurrent difficulty.¹⁷⁸ Game wardens, *The Economist* observed, "can make more from a couple of contraband tusks than they do in a year's honest work. Fat profits made government officials fairly easy to suborn."¹⁷⁹ Grinding poverty, as noted above, also has played a major role.¹⁸⁰

¹⁷¹ C. MOSS, *supra* note 2, at 299. The CITES Secretariat estimates that in 1986 at least 300 tons of ivory left Africa illegally, much of it from Burundi via the United Arab Emirates for Singapore. Analysis of the stocks registered in Burundi revealed that 40% originated in Zaire, 30% in Tanzania, 20% in Zambia, and 10% in other African countries. UNEP REPORT, *supra* note 33, at 35.

¹⁷² *To Save the Elephant*, *supra* note 1, at 7.

¹⁷³ *ECONOMIST*, *supra* note 23, at 17.

¹⁷⁴ 1988 HOUSE REPORT, *supra* note 33, at 9.

¹⁷⁵ *Id.* According to the *New York Times*, however, the figure is much smaller; total U.S. imports of both raw and carved ivory amount to only 10-15% of the amount traded annually. *N.Y. Times*, June 2, 1989, at A9.

¹⁷⁶ Booth, *Africa Is Becoming an Elephant Graveyard*, 243 *SCIENCE* 732 (1989).

¹⁷⁷ *N.Y. Times*, Oct. 29, 1988, at 29.

¹⁷⁸ The Central African Republic's Emperor Bokassa reportedly presided over a government rife with ivory smugglers. *To Save the Elephant*, *supra* note 1, at 7.

¹⁷⁹ *The Slaughter of Elephants*, *ECONOMIST*, Apr. 15, 1989, at 49, 50.

¹⁸⁰ See text *supra* at notes 159-60. The gross domestic product per capita for Somalia, in 1982, was about \$200; for Kenya, in 1986, about \$230; for Tanzania, in 1987, about \$240; for Zaire, in 1986, about \$140. U.S. CENTRAL INTELLIGENCE AGENCY, *THE WORLD FACTBOOK* (1988).

Even producer states that purposefully undertook the task of protecting their elephant populations from poachers faced a shortage of resources. Their game wardens frequently were overwhelmed by the poachers' firepower,¹⁸¹ to the extent that Kenya—a nation that has come to take wildlife conservation seriously—asked Britain for helicopter gunships, spotter planes, transports and automatic weapons for its new, paramilitary Anti-Poaching Unit.¹⁸² By one estimate, the cost of surveillance, fencing and support equipment needed to halt poaching entirely in Kenya's Tsavo National Park was \$200 per square mile per day—which worked out to \$1.6 million a day.¹⁸³

Producer states seemed little affected by the quota system they established under CITES. The system has been entirely voluntary and had no binding effect on the parties. Consequently, if a producer state exceeded its quota or even declined to supply a quota to the CITES Secretariat, other CITES parties had no legal basis under CITES for refusing entry to that producer state's ivory.¹⁸⁴ Moreover, the quotas have been based on ridiculously high estimates of sustainable yields provided by the producing countries.¹⁸⁵ "The quota system," the World Wildlife Fund concluded, "has proved to be little more than a procedure for ivory-producing states to notify the CITES Secretariat of the number of tusks they plan to export in a given year."¹⁸⁶

Entrepôt states thrived on the ivory trade under CITES. Burundi, which was not a party to CITES until 1987, and the United Arab Emirates, the only state to sign CITES and then withdraw,¹⁸⁷ operated free of constraints.¹⁸⁸ As conservationist pressures increased, individual middlemen stored raw ivory within Africa in the hope that those pressures would someday ease.¹⁸⁹

It is interesting to compare these income statistics with those of countries that have conducted more successful elephant conservation programs. The gross domestic product per capita for South Africa, in 1987, was about \$1,700; for Zimbabwe, in 1986, \$540; for Botswana, in 1985, \$880. *Id.*

¹⁸¹ See *supra* note 37. In March 1989, when 24 elephants were killed on a foreign-owned ranch in Kenya, one soldier was killed and another wounded in a battle with the poachers. A few days later, the same gang apparently was responsible for the killing of 17 elephants in the Tsavo Park, alongside the ranch. *ECONOMIST*, *supra* note 179, at 50.

¹⁸² Ransdell, *supra* note 37, at 64.

¹⁸³ *Id.* Zimbabwe, with a model elephant conservation program, spends about \$160 per kilometer per day. Most of Africa spends about 50 cents. Booth, *supra* note 176, at 732.

¹⁸⁴ 1988 *House Hearings*, *supra* note 114, at 35 (remarks of Clark Bavin, Chief, Law Enforcement Division, U.S. Fish and Wildlife Service).

¹⁸⁵ "In 1986," *The Economist* reported, "CITES authorities authorized the export of some 108,000 tusks. That would have represented more than 50,000 dead elephants—ten times the annual figure that some conservationists regard as Africa's sustainable yield." *ECONOMIST*, *supra* note 23, at 16.

¹⁸⁶ *To Save the Elephant*, *supra* note 1, at 8. In addition, WWF concluded, most of the export quotas have been set arbitrarily, without regard to the status of the respective elephant populations. *Id.*

¹⁸⁷ C. Moss, *supra* note 2, at 299.

¹⁸⁸ See *id.* When Burundi joined CITES, its Government announced a total ban on ivory trade. *Id.*

¹⁸⁹ *To Save the Elephant*, *supra* note 1, at 8.

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Consumer states faced little incentive to cut back on ivory importation. There is no requirement in CITES that worked ivory be identified by country of origin when imported. Consequently, the worked ivory trade has not been controlled;¹⁹⁰ the U.S. Fish and Wildlife Service has not required that the country of origin be declared.¹⁹¹ In the past, this loophole has been exploited by intermediary countries that are parties to the Convention to avoid the CITES restrictions on raw ivory. "Traders in Hong Kong, for example, imported ivory from Dubai, a free-trade zone in the United Arab Emirates, where the tusks were superficially carved. This allowed Hong Kong traders to import 'ivory artwork' from Dubai . . ."¹⁹² A report by the United Nations Environment Programme observed: "Already ivory carvers are being moved to places such as the United Arab Emirates, Dubai and Taiwan—where there are few import controls on even raw ivory—so that the partly worked products can then be freely imported into the major centers."¹⁹³

Prior to the Lausanne Conference in October 1989, therefore, CITES failed to protect the elephant. Whether it will do so as a result of the changes made in Lausanne is problematic, for reasons that will be discussed next.

IV. MAKING CITES WORK

Two Models of Protection: Management and Embargo

When the Lausanne Conference began, two very different models of wildlife protection were competing for acceptance. The two approaches had earlier split the conservation community¹⁹⁴ and set southern Africa against East Africa.¹⁹⁵ One I will call the "embargo" model; the other, the "management" model.

The embargo model derived from the practical impossibilities inherent in distinguishing illegal ivory from legal ivory. It would attempt to close down

¹⁹⁰ *Id.* at 7.

¹⁹¹ 1988 House Hearings, *supra* note 114, at 14 (remarks of Ronald Lamertson, Chairman, Standing Committee, CITES; Regional Director for the Northeast Region, U.S. Fish and Wildlife Service); *id.* at 36 (remarks of Clark Bavin, Chief, Law Enforcement Division, U.S. Fish and Wildlife Service). "It is generally accepted that it should be, but we don't hold up shipments for that not being on there." *Id.* But see *supra* note 111.

¹⁹² Booth, *supra* note 176, at 732. Hong Kong indicated in August 1989 that it would require all carved ivory to be accompanied by permits confirming its legal origin. *Id.*

¹⁹³ UNEP REPORT, *supra* note 33, at 37. On June 6, 1989, however, Crown Prince Sheikh Maktoum bin Rashid al-Maktoum of Dubai issued an order banning "all activities relating to manufacture and trade in elephant and rhinoceros tusks." Reuters (June 6, 1989).

¹⁹⁴ Compare, e.g., testimony of David Western, Chairman, African Elephant and Rhino Specialist Group, 1988 House Hearings, *supra* note 114, at 29, and William K. Reilly, President, World Wildlife Fund, *id.* at 23, with testimony of Susan Lieberman, Associate Director, Wildlife and Environment Division, Humane Society of the United States, *id.* at 26.

¹⁹⁵ "On the one side you have those who believe in conservation, which implies utilization of wildlife as an economic resource; on the other you have those who believe purely in protection, and their pressure on public opinion in the West is enormous," CITES Deputy Secretary-General Jacques Berney said. Reuters (July 9, 1989). At a 4-day meeting of elephant experts and governmental officials from 26 countries held in Botswana in July 1989, Kenyan and Zimbabwean representatives barely exchanged a word. *Id.* See also L.A. Times, July 8, 1989, at 4.

the trade in ivory by completely prohibiting it. Its proponents reasoned that the more legal ivory is traded, the easier it will be for poachers to place illegal ivory into the trade stream. "By keeping the ivory trade going," one expert said, "there is no question that illegal trading will go on."¹⁹⁶ Kenyan President Moi, a leader of the proembargo forces, thus set fire to 2,500 ivory tusks, worth \$3 million.¹⁹⁷ "We could sell the ivory, and use the money for conservation," his conservation minister said, "but we believe that that is only fueling the market."¹⁹⁸

The management model would attempt to limit and control the ivory trade, rather than banning it altogether. Proponents of management would permit the sale of ivory from several sources: (1) supplies of confiscated poached ivory; (2) elephants that die a "natural death"; and (3) culling operations in states where elephant populations exceed the available habitat. They argued that such ivory is best placed on the market to provide revenues for stricter enforcement efforts. A ban would simply drive the trade underground and propel the price of ivory ever upwards. Thus, ivory should be marketed to relieve supply pressures created by the black market.¹⁹⁹ Moreover, management proponents contended, the *people* in these (largely) underdeveloped countries should not be left to starve while convertible "white gold" was being accumulated by their governments.

In good part, therefore, each model defined itself in terms of the shortcomings of the other. The embargo model insisted that the purely "legal" ivory trade presupposed by the management model was fanciful. The continuing lawful supply of ivory, its adherents contended, would enable poachers to hide illegal ivory, which can be mixed with the legal and rendered indistinguishable.²⁰⁰ Underpinning the management model, on the other hand, was the argument that the *termination* of ivory trading presupposed by the embargo model was fanciful. The continuing demand for ivory—lawful or unlawful—its adherents contended, would lure poachers into meeting that demand.

Which model is valid? Each proceeds from principles of economic theory that render its conclusions entirely plausible. That those conclusions are mirror images derives from differing answers to an *empirical* question: can the ivory trade be substantially ended? Because the issue is empirical, it may be illuminated by examining international efforts to limit or control trade in

¹⁹⁶ N.Y. Times, June 22, 1989, at A8 (comment of Richard E. Leakey).

¹⁹⁷ Wash. Post, July 19, 1989, at 1. The tusks represented more than two thousand elephants shot during the past 4 years. N.Y. Times, July 19, 1989, at A4.

¹⁹⁸ Sunday Telegraph (London), July 16, 1989, at 14.

¹⁹⁹ "If the elephant died from natural mortality or natural culling, I see no reason the ivory shouldn't be used. Most African countries are very poor, and this is one of the few natural resources they can exploit. But right now it is in a crisis situation," said Diana E. McMeekin, vice president of the African Wildlife Foundation. Chicago Trib., Mar. 12, 1989, at 5C.

²⁰⁰ According to Tanzania's proposal to CITES to move the elephant to Appendix I, the CITES registered legal ivory trade in 1987 was only 20% of the total estimated world trade of 771 tons. 54 Fed. Reg. 24,760 (1989). On June 1, 1989, a consortium of wildlife conservation groups concluded that "the legal (i.e., government controlled) and illegal trades have become virtually indistinguishable." *Id.*

other contraband substances. To the extent that the trade in these other substances resembles the ivory trade, the successes and failures of those efforts will be instructive.¹

Perhaps the substance that leaps first to mind is cocaine. That the effort to close down the international trade in cocaine has thus far failed dismally is a proposition that need hardly be elaborated. What is of interest is how the cocaine trade compares with the ivory trade. Are efforts to apply an embargo to the ivory trade likely to fare as poorly?

At first blush, the similarities between the cocaine and ivory trades seem apparent.²⁰¹ Each is demand-driven. Eliminate demand, one may think, and the trade in both will end. Permit demand to continue, and supply will continue. Suppress supply, one may suppose, and price will increase, which, in turn, will increase supply—coca growing and ivory poaching. Increase supply, and price will drop.²⁰²

Yet there are several crucial differences. First, whereas the potential supply of ivory is largely inelastic, at least at present, the potential supply of coca is not. Deregulation of the ivory trade would thus increase the price by rapidly depleting the supply; deregulation of the international cocaine trade would deflate the price of cocaine by increasing supply.²⁰³ Second, the objective of enforcement is the opposite in the two trades. Cocaine enforcement aims at eliminating the supply by eradicating or severely limiting the source (coca), but enforcement designed to close down the ivory trade aspires to preserve its source—elephants. The effect of these differing objectives suffuses the relationship between the supply and demand of each substance and skews other possible parallels. Consequently, the failure to suppress the cocaine trade is not instructive; the dynamics of that trade are simply too different.

Efforts to eradicate the trade in other contraband substances also invite comparison, but there, too, parallels are inexact and analogies suspect. The trade in stolen art, for example, seems beguilingly similar. Professor Paul Bator, discussing the international trade in looted art, noted that finding a domestic deterrent is "especially acute in societies where the administration

²⁰¹ In fact, wildlife smugglers not infrequently smuggle narcotics as well. S. FITZGERALD, *supra* note 64, at 19.

²⁰² This is in fact what has occurred in the international cocaine trade. From 1985 to 1989, worldwide coca production has increased by 50%, from 162,700 metric tons to 229,990 metric tons. The supply glut is reflected in plummeting prices: in 1980, the wholesale price of cocaine was \$50,000–\$55,000 per kilogram; by 1988, the price hit an all-time low of \$10,000–\$12,000. DEMOCRATIC STUDY GROUP, U.S. HOUSE OF REPRESENTATIVES, SPECIAL REPORT, RHETORIC VS. RESOURCES: "JUST SAYING NO" TO FUNDS FOR ANTI-DRUG EFFORTS DURING THE REAGAN-BUSH ADMINISTRATION 27 (1989).

However, as the supply of ivory dropped over recent months, contrary to some predictions, its price actually declined—perhaps because demand dropped even faster. In Zaire, its price has dropped by 50%; in Hong Kong, by 30%. Perlez, *The World Looks for a Way to Save the Elephant*, N.Y. Times, Oct. 15, 1989, at E6. *The Economist* nonetheless predicted that, in the long term, the Lausanne action would cause the price of ivory to rise. *The Price of a Tusker*, *supra* note 65.

²⁰³ See D. AARONSON, PUBLIC POLICY AND POLICE DISCRETION: PROCESSES OF DECRIMINALIZATION (1984).

of criminal justice is generally inefficient or corrupt." Much the same can be said of ivory poachers. Detection is difficult, and until then, there is no one to complain; and "[e]ven when there is complaint, the harm is often not widely appreciated. . . ." ²⁰⁴ The suppression of a lawful supply can drive a certain amount of supply underground: "The harder it is to obtain objects within that category legally, the more intense the demand to acquire them on the black market." ²⁰⁵ And as the embargo on exports becomes more effective, "the number of purchasers willing to deal illegally and the amount of funds available on the illegal market also increases." ²⁰⁶

Yet raw ivory, unlike many art objects, is fungible, creating different enforcement problems—and possibilities. A stolen art object, for example, can sometimes be identified and confiscated; a piece of worked ivory made from a poached tusk normally cannot be. A potential buyer of ivory can be made aware through mass educational efforts that the substance was probably taken unlawfully; generalized publicity campaigns are rarely possible with respect to stolen art objects. Hence, like the drug trade, the trade in stolen art seems not altogether parallel.

The international trade in other contraband substances is also too *dissimilar* on the whole to permit reliable analogy. ²⁰⁷ That applies equally to trade in a substance from a species often compared to the elephant in conservationist debates: the black rhinoceros.

The specter of the black rhino has loomed like a dark spirit over the debate on how to save the elephant. ²⁰⁸ A ban on trade in its horn was put in place when it was moved to Appendix I in 1983, yet the animal has been hunted to virtual extinction. ²⁰⁹ In 1970 there were 70,000 black rhinos; in 1988, 3,800. ²¹⁰ This dismal precedent is perhaps the most frequently made argument of proponents of the management model for the elephant. It was relied upon by South Africa in arguing against the ban. ²¹¹

Yet there are significant differences between the trade in ivory and the trade in rhino horn. ²¹² Elephant tusks sell for much less than the highly

²⁰⁴ Bator, *An Essay on the International Trade in Art*, 34 STAN. L. REV. 275, 311 (1982).

²⁰⁵ *Id.* at 318.

²⁰⁶ *Id.*

²⁰⁷ Unlike the international trade in ivory, for example, that in blood has a more limited supply and a less elastic demand. See *Blood Banks: Precious Drops*, ECONOMIST, Oct. 14, 1989, at 28, 33; Altman, *Europe Supplying Blood for the U.S.*, N.Y. Times, Sept. 5, 1989, at A1; R. TITMUS, *THE GIFT RELATIONSHIP: FROM HUMAN BLOOD TO SOCIAL POLICY* (1970).

²⁰⁸ See generally S. FITZGERALD, *supra* note 64, at 105–14; E. MARTIN, *THE INTERNATIONAL TRADE IN RHINOCEROS PRODUCTS* (1980); Knox, *Horns of a Dilemma*, SIERRA, November/December 1989, at 58.

²⁰⁹ N.Y. Times, May 12, 1989, at A6.

²¹⁰ D. Western & P. Olindo, *Conservationists Worldwide Are Determined to Save the Elephant*, N.Y. Times, June 26, 1989, at A18.

²¹¹ N.Y. Times, June 22, 1989, at A8. Even after the bans were announced, the rhino precedent was still cause for concern. N.Y. Times, June 11, 1989, §1, at 6. See also Simmons & Kreuter, *Wildlife Preservation: Save an Elephant—Buy Ivory*, Wash. Post, Oct. 1, 1989, at D3.

²¹² See generally THE STATUS AND CONSERVATION OF AFRICA'S ELEPHANTS AND RHINOS, PROCEEDINGS OF THE JOINT MEETING OF IUCN/SSC AFRICAN ELEPHANT AND RHINO SPECIALIST GROUPS AT HWANGE SAFARI LODGE, ZIMBABWE (1981). I am indebted to Frank Wissmuth for helpful comments on this issue.

valuable rhino horn, which is used for handles for ceremonial daggers in North Yemen²¹³ and is reputed in Asia to work in its powdered form as an aphrodisiac.²¹⁴ The price paid for raw ivory in 1989 was \$100 per pound;²¹⁵ rhino horn sells for \$13,000 a pound.²¹⁶ Rhino horn is believed (wrongly) to have medicinal value;²¹⁷ ivory is not. Rhino horn is transported much more easily; because of its mythic medicinal properties, it can be ground into powder and fitted into covert containers. Ivory is much harder to hide (even an uncut rhino horn measures only 2 feet in length). All in all, the embargo approach to protecting the elephant seems highly unlikely to cause it to suffer the tragic fate of the black rhino.

A more apposite analogy—in fact, probably the precedent most on point—can be made with the leopard.²¹⁸ Once mercilessly overhunted, leopards have recovered splendidly²¹⁹ since placement on CITES Appendix I.²²⁰ In large part, that recovery has been brought about by a broad-gauged educational campaign undertaken by nongovernmental conservation organizations. The campaign largely succeeded, to the extent that it has now become socially unacceptable to wear a leopard-skin coat.²²¹ The ivory campaign is directed at similarly educable people, many of whom were previously ignorant of the threat to the species and would gladly forgo purchasing derivatives to help save it. (In contrast, the publics in Yemen and various Asian countries continue to regard a rhino-horn dagger handle as a status symbol.)

The matter is not free from doubt, but the most reasonable conclusion is that the elephant would be better protected by the embargo approach than by the management approach. The management model works best in protecting nonendangered or formerly endangered animals, such as the American alligator and beaver, under a “sustainable use” regime.²²² Earlier arguments against a prophylactic ban on ivory trading were more plausible when developed countries would have had to initiate the ban over African opposition. Now that African states have taken the lead, the situation has changed. Among other things, their leadership role may lessen the possibil-

²¹³ The daggers sell for up to \$12,000. Vollers, *A War to Save the Black Rhino*, TIME, Sept. 7, 1987, at 62, 63.

²¹⁴ N.Y. Times, June 11, 1989, §1, at 6.

²¹⁵ FOCUS, May/June 1989, at 2; N.Y. Times, June 2, 1989, at A9.

²¹⁶ Cohn, *Halting the Rhino's Demise*, 38 BIOSCIENCE 740 (1988).

²¹⁷ Vollers, *supra* note 213, at 63.

²¹⁸ See generally S. MILLER & D. EVERETT, *CATS OF THE WORLD: BIOLOGY, CONSERVATION, AND MANAGEMENT* (1986).

²¹⁹ ECONOMIST, *supra* note 23, at 16. The argument that the leopard was never truly endangered to begin with (see Simmons & Kreuter, *supra* note 211) misses the point: whatever the level at which the leopard subsisted when moved to Appendix I, nearly all agree that that placement was in part responsible for its subsequent increase in number.

²²⁰ See D. FAVRE, *supra* note 154, at 95. Since 1983, a special quota has allowed the export of lawfully obtained leopard skins, but such skins may not be intended for resale. S. FITZGERALD, *supra* note 64, at 45–46.

²²¹ See generally Lemonick, *Coming Back from the Brink*, TIME, July 20, 1987, at 70.

²²² S. FITZGERALD, *supra* note 64, at 9.

ity that enforcement difficulties will prove insurmountable.²²³ The knowledge that *all* ivory in international commerce is there illegally would make effective control easier.²²⁴ Prior to the Lausanne Conference, the U.S. Fish and Wildlife Service announced that it would oppose a move at the sessions to allow countries to trade in ivory. It gave this reason: "It is very doubtful that legal trade of ivory stocks could be accomplished without providing cover for illegal trade."²²⁵ That position was correct then, and it is correct now.²²⁶

Nevertheless, that is not the solution that emerged from Lausanne. The solution that did emerge is a hybrid of the two models, and therein lies its defect. Although in principle a listing under Appendix I represents a CITES endorsement of the embargo model with respect to a certain species, in reality no bona fide embargo is put in place since CITES permits parties to enter reservations.²²⁷ Thus, under the post-Lausanne CITES regime, notwithstanding the elephant's Appendix I listing, it remains legal for ivory-producing states to sell ivory, and six have indicated their intent to do so²²⁸—even though a majority of the CITES parties recognized that termination of the trade is essential to protecting the elephant and major consumer states have agreed to ban imports.

The legality of continued ivory sales does not preclude nontrading states from attempting to compel trading states to stop. Such legislation has been introduced in the United States Congress and is directed at both producer²²⁹ and consumer²³⁰ states. Because of the highly pernicious effect on the ban of the actions of the continuing ivory traders, it would be entirely

²²³ Richard Leakey pointed out that in June 1989, 22 poachers were killed in Kenya and "not one elephant." Wash. Post, July 19, 1989, at A1. In Tanzania in that same month, authorities launched a crackdown on elephant and rhinoceros poachers, rounding up several hundred suspects and seizing elephant tusks, rhino horns and police and army uniforms presumably used as disguises. Reuters (June 29, 1989).

²²⁴ *Contra* D. FAVRE, *supra* note 154, at 123; *ECONOMIST*, *supra* note 23, at 15.

²²⁵ 54 Fed. Reg. 37,027 (1989).

²²⁶ However, it may not be correct a few years from now. See *infra* notes 315–20 and accompanying text.

²²⁷ See *supra* note 87 and accompanying text.

²²⁸ In addition, China and Hong Kong continue to import ivory. *Ban on Ivory Takes Effect*, *supra* note 150, at 11A. See *supra* text at notes 149–50.

²²⁹ H.R. 2519, 101st Cong., 1st Sess. (1989), introduced by Rep. John R. Kasich, would ban the importation of all ivory products into the United States and would revoke most-favored-nation treatment for elephant-producing countries that do not have or enforce appropriate elephant protection programs. See 135 CONG. REC. H2250 (daily ed. May 31, 1989). The bill was referred jointly to the Committees on Foreign Affairs and Ways and Means.

²³⁰ Sen. Daniel Patrick Moynihan has proposed to make actions that undermine agreements such as CITES "unfair trade practices" under §301 of the Trade Act of 1974, Pub. L. No. 96-39, 93 Stat. 295 (19 U.S.C. §2411 (1988)). See S. 261, 101st Cong., 2d Sess. (1989). Sen. Moynihan said:

If countries such as Japan or Hong Kong fail to follow through with the moratorium on ivory trade—or continue to import ivory from African countries should the CITES secretariat designate the African elephant an endangered species this October—retaliatory action should, for example, fall on sophisticated electronics or automotive products, or whatever would be most effective.

appropriate for the international community and individual states to impose sanctions on them. It must be made clear—multilaterally, if possible; unilaterally, if necessary—that *all* ivory trading is impermissible; so long as any trade is permitted, the embargo will be eviscerated because the legal trade will simply draw ivory poached from areas where herds are endangered. As Zambia's tourism minister put it in endorsing the ban, it will be useless unless it includes all the nations involved.²³¹

Carrots as well as sticks are available to the international community to produce the desired order. Indeed, when considered in the context of a comprehensive structure of global environmental resources, rights and obligations, the primary tools for compliance clearly ought to be incentives rather than disincentives.

Global Environmental Resources, Rights and Obligations

If the embargo model is to be preferred over the management model as the optimal approach to elephant protection, it does not follow that ivory-producing states should themselves absorb the cost of such programs or, for that matter, that "elephant-excess" states should themselves shoulder the opportunity cost of forgoing the sale of ivory from culling operations or confiscation. The equitable allocation of costs should be a function of the actual distribution of benefits. This principle, in a nutshell, animates the notion of global environmental resources, rights and obligations. Ali Hassan Mwinyi, President of Tanzania, succinctly alluded to these concepts in a recent speech: "That Tanzania has a rich wildlife resource is an accident of geography. It belongs to all mankind. The international community should therefore contribute to its survival."²³²

These ideas are not new; their elements, in one form or another, pervade the recent literature on international environmental preservation.²³³ Nor are they limited to leaders of the Third World. President George Bush,

135 CONG. REC. S7377 (daily ed. June 22, 1989). Such retaliatory action would be consistent with GATT, which allows trade restrictions for conservation purposes. General Agreement on Tariffs and Trade, Art. XX, Oct. 30, 1947, TIAS No. 1700, 55 UNTS 188.

²³¹ Reuters (July 14, 1989) (comments of Pickson Chitambala). Nonetheless, Zambia is one of the five producing states that entered a reservation and continue to export ivory. *Ban on Ivory Takes Effect*, *supra* note 150, at 11A.

²³² Address by President Ali Hassan Mwinyi (n.d.), *quoted in The Launch*, MIOMBO: THE NEWSLETTER OF THE WILDLIFE CONSERVATION SOCIETY OF TANZANIA, July 1988, at 9.

²³³ See, e.g., Stone, *Tax Nations to Repair the Earth*, L.A. Times, Aug. 25, 1989, §II, at 7; Chopra, *Whales: Towards a Developing Right of Survival as Part of an Ecosystem*, 17 DEN. J. INT'L L. & POL'Y 255 (1989); Magraw, *International Law and Park Protection: A Global Responsibility*, in OUR COMMON LANDS: DEFENDING THE NATIONAL PARKS (D. Simon ed. 1988); Hahn & Richard, *The Internationalization of Environmental Regulation*, 30 HARV. INT'L L.J. 421 (1989); Sands, *The Environment, Community and International Law*, *id.* at 393; BLUEPRINT FOR THE ENVIRONMENT: A PLAN FOR FEDERAL ACTION 227-28 (T. Comp ed. 1989); Sandbrook, *Towards a Global Environmental Strategy*, in ENVIRONMENTAL POLICIES (C. Park ed. 1986); Myers, *Endangered Species in the North-South Dialogue*, in ECONOMICS OF ECOSYSTEM MANAGEMENT (D. Hall, N. Myers & N. Margolis eds. 1985); N. MYERS, A WEALTH OF WILD SPECIES (1983); McDougal & Schneider, *The Protection of the Environment and the World Public Order*, in WORLD PRIORITIES 81 (B. Preger, H. Lasswell & J. McHale eds. 1977).

addressing the United Nations on September 25, 1989, noted that the United States had banned ivory imports and added: "The environment belongs to all of us. In this new world of freedom the world citizens must enjoy this common trust for generations to come."²³⁴

Yet it was not long ago that the international system placed far greater emphasis on national sovereignty over natural resources than on global interdependence. As recently as 1972, states were thought to have absolute control over all natural resources located within their boundaries. Principle 21 of the Stockholm Declaration on the Human Environment provided that "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources."²³⁵ Less-developed countries were particularly vigorous in asserting "permanent sovereignty over natural resources" and a correlative right to dispose of resources fully and freely.²³⁶ Even the new *Restatement of Foreign Relations Law* cautiously limits its discussion of international environmental law to transfrontier pollution.²³⁷

Since 1972, however, so many states have adopted laws directed at preserving their environment that it probably is no longer correct to think that states have unlimited authority to injure the environment in any manner so long as the injury is restricted to their own territory.²³⁸ States also have bound themselves increasingly by treaty to protect unique international treasures.²³⁹ The UN General Assembly, in the 1982 World Charter for Nature, affirmed general principles of conservation to which "[a]ll areas of the earth" are subject.²⁴⁰ Professor David Caron criticized the narrow approach of the *Restatement* and summed up emerging thought as follows:

[A]s humanity believes increasingly that in a theoretical sense the planet belongs to all . . . , the notion of legitimate interests seems to extend far beyond traditional notions of harm. Consequently, there is a perception that all have an interest in preventing the loss of a species, the destruction of cultural heritage, and the waste of natural resources.²⁴¹

²³⁴ N.Y. Times, Sept. 26, 1989, at A8.

²³⁵ UNITED NATIONS CONFERENCE ON THE HUMAN ENVIRONMENT, REPORT at 3, 5, UN Doc. A/CONF.48/14/Rev.1, UN Sales No. E.73.II.A.14 (1973).

²³⁶ See General Assembly Resolutions: 1803 (XVII) (Dec. 14, 1962), 2692 (XXV) (Dec. 11, 1970), 3016 (XXVII) (Dec. 18, 1972), 3201 (S-VI), para. 4e (May 1, 1974), 3202 (S-VI), sec. 8 (May 1, 1974). See generally O. SCHACHTER, SHARING THE WORLD'S RESOURCES 124-34 (1977).

²³⁷ RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, pt. VI (1987) [hereinafter RESTATEMENT].

²³⁸ "General principles common to the major legal systems" constitute a supplementary source of customary international law. *Id.* §102(4). See Statute of the International Court of Justice, 59 Stat. 1055 (1945), TS No. 993, Art. 38(1)(c) (directing the Court to apply "the general principles of law recognized by civilized nations").

²³⁹ Such treaties include not only CITES, *supra* note 41, and other wildlife protection instruments, *infra* notes 261 and 264, but also treaties protecting other "internal" resources such as cultural heritage. See, e.g., Convention Concerning the Protection of the World Cultural and Natural Heritage, Nov. 23, 1972, 27 UST 37, TIAS No. 8226.

²⁴⁰ World Charter for Nature, *supra* note 53, Principle 3.

²⁴¹ Caron, *The Law of the Environment: A Symbolic Step of Modest Value*, 14 YALE J. INT'L L. 528, 529 (1989).

Professor Oscar Schachter has pointed out that the earlier concern of have-not states derived from fears of "economic penetration by transnational companies,"²⁴² an issue that arose in nationalization disputes and the placement of regulatory limits on foreign firms.²⁴³ Today these considerations no longer arise with the same intensity in the context of wildlife protection in the Third World.

International law has been moving steadily to protect wider humanitarian interests and to prevent environmental degradation, even at the cost of eroding state sovereignty. Where once states were seen to have *carte blanche* to do what they would to persons within their own territory,²⁴⁴ later they were viewed as owing certain obligations to aliens, and now they are thought to owe such obligations to their own nationals as well.²⁴⁵ Where once states were free to pollute the "global commons" and the oceans, today they are enjoined against injuring unoccupied islands, ice floes and Antarctica;²⁴⁶ and they are obliged to prevent injury to the marine environment by pollution²⁴⁷ and to protect global wetlands.²⁴⁸ Indeed, as early as 1974, the UNEP Council viewed certain species as constituting "the common heritage of mankind."²⁴⁹

It is now possible to conclude that customary international law requires states to take appropriate steps to protect endangered species. Customary norms are created by state practice "followed by them from a sense of legal obligation."²⁵⁰ Like highly codified humanitarian law norms that have come to bind even states that are not parties to the instruments promulgating them,²⁵¹ wildlife protection norms also have become binding on nonparties as customary law. Closely related to this process of norm creation by practice is that of norm creation by convention: customary norms are created by international agreements "when such agreements are intended for adherence by states generally and are in fact widely accepted."²⁵² Several such

²⁴² O. SCHACHTER, *supra* note 236, at 125.

²⁴³ *Id.* at 124.

²⁴⁴ See Henkin, *The Internationalization of Human Rights*, in 6 GENERAL EDUCATION SEMINAR, PROC. 7 (1977). It was "unthinkable that international law should concern itself with protecting the interests of the individual against his own government, even less that it might give the individual international remedies against his own government." L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, *INTERNATIONAL LAW: CASES AND MATERIALS* 980 (2d ed. 1987).

²⁴⁵ RESTATEMENT, *supra* note 237, §702; Henkin, *supra* note 244.

²⁴⁶ See Convention on the Regulation of Antarctic Mineral Resource Activities, Art. 4(2), June 2, 1988, reprinted in 27 ILM 868 (1988). See generally RESTATEMENT, *supra* note 237, pt. VI (Introductory Note), §601.

²⁴⁷ RESTATEMENT, *supra* note 237, §603.

²⁴⁸ See Convention on Wetlands of International Importance, Especially as Waterfowl Habitat, Feb. 2, 1971, reprinted in 11 ILM 963 (1972).

²⁴⁹ See Nanda & Ris, *The Public Trust Doctrine: Viable Approach to International Environmental Protection*, 5 ECOLOGY L.Q. 291, 294 (1976).

²⁵⁰ RESTATEMENT, *supra* note 237, §102(2). See also ICJ Statute, *supra* note 238, Art. 38(1)(b) (directing the Court to apply "international custom, as evidence of a general practice accepted as law").

²⁵¹ See T. MERON, *HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW* 3 (1989).

²⁵² RESTATEMENT, *supra* note 237, §102(3).

agreements are directed at wildlife protection,²⁵³ and CITES is one of them. It is intended for adherence by states generally²⁵⁴ and is accepted by the 103 states that have become parties. In addition, some nonparties comply with certain CITES documentary requirements so as to trade with parties.²⁵⁵ CITES is not "rejected by a significant number of states";²⁵⁶ only the United Arab Emirates has withdrawn from the agreement. In such circumstances, the International Court of Justice has observed, international agreements constitute state practice and represent law for nonparties.²⁵⁷

Moreover, customary norms are created by "the general principles of law recognized by civilized nations."²⁵⁸ Because CITES requires domestic implementation by parties to it,²⁵⁹ and because the overall level of compliance seems quite high,²⁶⁰ the general principles embodied in states' domestic endangered species laws may be relied upon as another source of customary law.²⁶¹ Even apart from the CITES requirements, states that lack laws protecting endangered species seem now to be the clear exception rather than the rule.²⁶² That there exists *opinio juris* as to the binding character of this obligation²⁶³ is suggested by the firm support given endangered species

²⁵³ See, e.g., Convention on Wetlands of International Importance, *supra* note 248; Convention Relative to the Preservation of Flora and Fauna in their Natural State, Nov. 8, 1933, 172 LNTS 241; International Convention for the Regulation of Whaling, Dec. 2, 1946, 62 Stat. 1716, TIAS No. 1849, 161 UNTS 72; International Convention for the Protection of Birds, Oct. 18, 1950, 638 UNTS 186.

There are several regional wildlife preservation conventions. See, e.g., Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere, Oct. 12, 1940, 56 Stat. 1374, TS No. 981, 161 UNTS 193; African Convention on the Conservation of Nature and Natural Resources, Sept. 15, 1968, 1001 UNTS 3; Convention on European Wildlife and Natural Habitats, Sept. 19, 1979, ETS No. 104, 1982 Gr. Brit. T.S. No. 56 (Cmd. 8738).

²⁵⁴ CITES parties, in a preambular provision, *supra* note 41, "recogniz[e] that peoples and States are and should be the best protectors of their own wild fauna and flora."

²⁵⁵ See *supra* text at note 96.

²⁵⁶ RESTATEMENT, *supra* note 237, §102 comment i.

²⁵⁷ North Sea Continental Shelf (FRG/Den.), 1969 ICJ REP. 3, 28–29, 37–43 (Judgment of Feb. 20). See also RESTATEMENT, *supra* note 237, §102 comment i.

²⁵⁸ ICJ Statute, *supra* note 238, Art. 38(1)(c). See also RESTATEMENT, *supra* note 237, §102 comment l.

²⁵⁹ See *supra* text at notes 97–99.

²⁶⁰ See S. LYSTER, *supra* note 78, at 264–69, 276–77. In 1986 the World Wildlife Fund described CITES as "perhaps the most effective conservation treaty in existence." WORLD WILDLIFE FUND, FACTSHEET: CITES, December 1986. But see Kosloff & Trexler, *The Convention on International Trade in Endangered Species: No Carrot, But Where's the Stick?*, 17 ENVTL. L. REP. 10,222 (1987).

²⁶¹ Several major legal systems contain legislation that protects certain species or sets aside protected areas for certain species. See generally C. DU SAUSSAY, LEGISLATION ON WILDLIFE, HUNTING AND PROTECTED AREAS IN SOME EUROPEAN COUNTRIES (UN Food and Agriculture Organization Legis. Study No. 20, 1980).

²⁶² Virtually all European countries have such laws. NATIONAL STRATEGIES FOR THE PROTECTION OF FLORA, FAUNA AND THEIR HABITATS, UN Doc. ECE/ENVWA/4, UN Sales No. E.88.II.E.2 (1988).

²⁶³ The ICJ found that *opinio juris* may be deduced from consent to General Assembly resolutions (in that case, the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States). Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Merits, 1986 ICJ REP. 14, 99–100 (Judgment of June 27).

protection by the UN General Assembly and various international conferences.²⁶⁴

While the existence of a norm requiring the protection of endangered species thus seems likely, its scope remains uncertain. To the extent that the norm derives from CITES and laws implementing CITES, that scope would be fairly narrow, for the norm would cover only species in international trade, not those taken for domestic consumption or those endangered by threats to their habitat. Even if it could be shown that major legal systems generally comprise endangered species legislation, more work needs to be done to determine exactly what elements those laws have in common.²⁶⁵ What constitutes an "endangered species," for example, is debatable. Is it one that is endangered in *every* state, or only in the state making the assessment? And to what lengths must a state go in protecting a species it finds "endangered"? Must it do everything necessary to protect that species, notwithstanding the cost or the ecological significance of the species?²⁶⁶

As to the elephant in particular, it is hard to argue under customary international law that states such as South Africa and Zimbabwe are prohibited from selling ivory by a new customary norm, corresponding generally to the CITES restrictions. In the *North Sea Continental Shelf* case, the International Court of Justice said:

Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and *virtually uniform* in the sense of the provision invoked . . .²⁶⁷

The nonparticipation of southern African states suggests that any such custom is not "virtually uniform." In fact, the southern African elephant

²⁶⁴ In the World Charter for Nature, *supra* note 53, the General Assembly proclaimed that "the population levels of all life forms, wild and domesticated, must be at least sufficient for their survival." *Id.*, Principle 2.

See also Conference on Security and Co-operation in Europe (CSCE), Final Act, Aug. 1, 1975, 73 DEP'T ST. BULL. 323 (1975) (participating states agreed to cooperate in the conservation of existing genetic resources, especially rare animal species); Declaration on the Conservation of Flora, Fauna and their Habitats (adopted by the ECE at its 43d annual session in 1988, Decision No. E(43) (members agree to take necessary measures to prevent and reduce damage to flora, fauna and their habitats, and to implement national legislation for their conservation)).

²⁶⁵ It is clear, however, that in a number of instances such legislation preceded CITES. See, e.g., Belgian Law No. 1268 of July 12, 1973, on the Preservation of Nature, Art. 5, 1973 Bulletin Usuel des Lois et Arrêtés 831; French Law No. 76-629 of July 10, 1976, on Protection of Nature, Art. 5, J.O. July 11, 1976, at 4203, 59 Bulletin Législatif Dalloz 308 (1976).

²⁶⁶ In *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978), the U.S. Supreme Court construed the ESA as requiring the courts to enjoin the operation of the virtually completed Tellico Dam when it had been determined that its operation would eradicate an endangered species, the snail darter, a small fish that eats snails. The district court had determined that saving the genetically unique fish would mean wasting a large portion of the \$78 million spent on the dam. *Tennessee Valley Authority v. Hill*, 419 F.Supp. 753, 760 (E.D. Tenn. 1976).

²⁶⁷ 1969 ICJ REP. at 43 (emphasis added).

"excess" states might be seen as partaking in a regional custom of the sort considered in the *Asylum* case.²⁶⁸ Or they might be seen as "persistent objectors" to an emerging norm during the inchoate stages of its development.²⁶⁹

It thus appears doubtful that a customary norm concerning the elephant or any other endangered species can yet play any significant role in its protection.²⁷⁰ But the trend cannot be doubted; and once its contours are more clear, the customary norm requiring states to protect endangered species ought to take on the character of an obligation *erga omnes*. Ordinarily, claims for the violation of an international obligation may be made only by the state to which the obligation is owed.²⁷¹ Obligations *erga omnes*, however, run to the international community as a whole; thus, their breach is actionable by any state since such matters are "[b]y their very nature . . . the concern of all States. . . . [T]hey are obligations *erga omnes*."²⁷²

The action *erga omnes* has its roots in the Roman law right of any citizen to bring an action (*actio popularis*) to protect the public interest.²⁷³ So, too, does another concept pertinent to states' environmental responsibilities: the public trust doctrine.²⁷⁴ Roman law recognized "common properties" (*res communis*);²⁷⁵ the seashores were "subject to the guardianship of the Roman people."²⁷⁶ "The central idea of the public trust is preventing the destabilizing disappointment of expectations of use of resources held in common but without formal recognition such as title."²⁷⁷ Authorities differ,²⁷⁸ but the U.S. Supreme Court has stated that Roman law regarded wildlife as part of the public trust,²⁷⁹ and the Court clearly considers it as such under U.S.

²⁶⁸ *Asylum* (Colom./Peru), 1950 ICJ REP. 266 (Judgment of Nov. 20).

²⁶⁹ See generally RESTATEMENT, *supra* note 237, §102 comment d; Stein, *The Principle of the Persistent Objector in International Law*, 26 HARV. INT'L L.J. 457 (1985); Waldock, *General Course in International Law*, 106 RECUEIL DES COURS 1, 49-53 (1962 II).

²⁷⁰ The only international environmental norms recognized by the RESTATEMENT, *supra* note 237, involve transfrontier pollution, §§601-602, and injury to the marine environment, §603.

²⁷¹ *Id.* §§901, 902.

²⁷² *Barcelona Traction, Light & Power Co., Ltd. (Belg. v. Spain)*, Second Phase, 1970 ICJ REP. 3, 32 (Judgment of Feb. 5). For an earlier argument along these lines, see Weiss, *supra* note 49.

²⁷³ This was pointed out by the ICJ in the earlier *South West Africa* cases. In those cases, however, the Court declined to accept this theory. *South West Africa* (Ethiopia v. S. Afr.; Liberia v. S. Afr.), Second Phase, 1966 ICJ REP. 6, 47 (Judgment of July 18). For a useful discussion of the origins of the doctrine, see T. MERON, *supra* note 251, at 188-93.

²⁷⁴ For an informative and creative discussion of this doctrine, see Nanda & Ris, *supra* note 249. See also Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970).

²⁷⁵ See Sax, *Liberating the Public Trust Doctrine from Its Historical Shackles*, in THE PUBLIC TRUST DOCTRINE IN NATURAL RESOURCES LAW AND MANAGEMENT: CONFERENCE PROCEEDINGS 6 (H. Dunning ed. 1981).

²⁷⁶ T. SANDARS, THE INSTITUTES OF JUSTINIAN 159 (1865).

²⁷⁷ Sax, *supra* note 275, at 7.

²⁷⁸ See Nanda & Ris, *supra* note 249.

²⁷⁹ *Geer v. Connecticut*, 161 U.S. 519, 522-23 (1896) (upholding Connecticut's statutory prohibition against taking certain wildlife on the theory that wild animals have been seen as common property since Roman times).

law.²⁸⁰ Today, state courts employ the doctrine to protect aesthetic, as well as economic, interests²⁸¹ in holding the government responsible to the public for the preservation of property subject to a public trust.²⁸² At least in some states within the United States,²⁸³ a breach of that obligation can be challenged by any citizen. This development accords with long-standing principles of American jurisprudence that have viewed certain things that lack traditional property status as nonetheless generating property-like expectations.²⁸⁴ Indeed, a powerful case has been made for regarding natural objects themselves as having legal rights.²⁸⁵ Influenced by Professor Stone's ground-breaking essay,²⁸⁶ three Supreme Court Justices in *Sierra Club v. Morton* endorsed that approach.²⁸⁷

These considerations suggest the outline of a general framework for the protection of endangered species under customary international law. Although such principles may still represent *lex ferenda* with regard to a particular species (or other resource), they appear to constitute emerging *opinio juris* on a broader structure of global environmental resources, rights and obligations that might be summarized as follows.

A *global environmental resource* is a natural resource located within the territory of one country but broadly enjoyed, and arguably needed, by the world community as a whole. Tropical rain forests, described as the "lungs of the world" by Indonesian President Suharto,²⁸⁸ are a good example. Unique cultural artifacts are another. That these exist within specific states is largely an accident of geography; but for their presence, the life of all would be diminished. For the reasons outlined in this article, and in light of the tremendous worldwide concern generated recently over its possible extinction, the elephant seems properly regarded as a global environmental resource.

A *global environmental right* arises in connection with a global environmental resource. It refers to the right of all states to expect that the resource will be protected by the state in which it is found. States are trustees, responsible for the preservation of species within their territories. That obligation runs to the international community as a whole: any state should be regarded as suffering legally cognizable injury when that obligation is breached by another state. That states have a global environmental right to expect that the

²⁸⁰ *Lacoste v. Department of Conservation*, 263 U.S. 545, 549 (1924).

²⁸¹ See Nanda & Ris, *supra* note 249, at 303 (discussing cases).

²⁸² *Id.*

²⁸³ For a discussion of use of the doctrine by California courts with respect to water rights, see Dunning, *Instream Flows and the Public Trust*, in *INSTREAM FLOW PROTECTION IN THE WEST* (MacDonnell, Rice & Shupe eds. 1989).

²⁸⁴ See Sax, *supra* note 275, at 6. See also Tribe, *Ways Not to Think About Plastic Trees: New Foundations for Environmental Law*, 83 YALE L.J. 1315 (1974); Reich, *The New Property*, 73 YALE L.J. 733 (1964).

²⁸⁵ See R. NASH, *THE RIGHTS OF NATURE* (1989).

²⁸⁶ Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972).

²⁸⁷ 405 U.S. 727, 741–60 (1972) (Douglas, Blackmun and Brennan, JJ., dissenting).

²⁸⁸ Reuters (Aug. 16, 1989).

elephant will be protected is confirmed by emerging norms of customary international law pertaining to endangered species, discussed above.²⁸⁹ "The protection of the elephant," UNEP has said, "is an obligation of humankind"²⁹⁰

Global environmental obligation refers to the duty of states to share in preserving global environmental resources. There are two tiers of such obligations: *custodial* obligations, which refer to the preservation duties of states in which the resource is physically located; and *support* obligations, which refer to the duties of other states to contribute to the conduct of custodial obligations. First World states often complain about the failure of Third World states to meet their custodial obligations (concerning, for example, their elephant populations, rain forests and archaeological treasures), but few of the complainers have met their support obligations. *The Economist* put it well: "Logically, if the rest of the world wants the elephant to survive, then it should not only compensate Africa for \$60 million of lost exports, but help to foot the bill—of perhaps \$80m–\$100m—for an effective war on poachers."²⁹¹

The point bears elaboration. Support obligations are appropriately seen as applying to two sets of costs incurred by ivory-producing states: the opportunity cost of forgoing the sale of ivory from natural elephant deaths and confiscated poached ivory, as well as the cost of running conservation programs.

East African states such as Tanzania and Kenya should not be forced to shoulder the entire burden of running conservation programs themselves. All who benefit from elephant protection should share the cost. As the international system is structured, they do so indirectly, through assistance by their governments. Such assistance ought to be provided through an international authority able to administer and oversee an aid program to African states. UNEP, which is headquartered in Nairobi, seems to be the logical existing vehicle. Assumption of this task would entail something of a change of mission and restructuring for UNEP, which was conceived of more as a coordinating/monitoring agency than as an executive/administrative one.²⁹²

Until a multilateral approach can be instituted, unilateral assistance is appropriate, perhaps in the innovative form of "debt swaps." Debt swaps involve monetary concessions by lenders in exchange for enhanced resource management by borrower states that are unable to keep current on debt payments. Much of the attention paid to the idea has derived from concern

²⁸⁹ See *supra* text at notes 240–80.

²⁹⁰ Reuters (July 3, 1989).

²⁹¹ *ECONOMIST*, *supra* note 23, at 17.

²⁹² See generally Robinson, *Introduction: Emerging International Environmental Law*, 17 *STAN. J. INT'L L.* 229, 249–58 (1981).

An African Elephant Coordinating Group has been established, consisting of major nongovernmental donor organizations and the United States and EEC, to develop a coordinated funding program aimed at assisting protection and management of 42 key elephant populations. France, in the name of the EEC, has called for a donor conference in Paris in March 1990 to further coordinate assistance activities and implement the African Elephant Action Plan developed by the Coordinating Group.

about the disappearing tropical rain forests. Conservation International, for example, arranged to have Bolivia's external debt reduced by \$650,000 in exchange for that country's protection of 3.7 million acres of Amazonian forest.²⁹³ Costa Rica has also received debt reduction in return for setting aside certain tracts of land from development.²⁹⁴ Senator Joseph Biden proposed a plan to pay off the foreign debt of cocaine-producing countries in South America if they would fund crop substitution and eradication programs.²⁹⁵ "In the long run," Biden said, "the best way to cut coca production is to provide economic incentives to grow other crops."²⁹⁶

The same approach can be employed to further wildlife conservation in less-developed countries. Recently, in fact, the World Wildlife Fund (WWF) arranged with Madagascar to buy \$2.1 million of debt in return for expenditures of local currency on several conservation projects, including an additional four hundred park rangers.²⁹⁷ WWF also signed a debt-for-nature swap with Zambia under which WWF purchased \$2.27 million of debt owed by Zambia to commercial banks in return for the Government's agreement to expend an equivalent amount in local currency on conservation, including protection of the rhino and elephant.²⁹⁸ There is no reason for nongovernmental organizations or lending institutions to bear the burden; they should be reimbursed through initiatives by the public sector.²⁹⁹ One of the major such initiatives was taken by the Senate Foreign Relations Committee in the Foreign Relations Authorization Act, Fiscal Year 1990. The Global Environmental Protection Act, included in the bill, would have authorized the Agency for International Development to award grants to private conservation groups to purchase a country's commercial debt on the open market, usually at a highly discounted price, and offer the debt to the host government in exchange for a long-term financial or policy commitment to support a particular project.³⁰⁰

It is also appropriate for the international community to reimburse "elephant-excess" states such as Botswana and Zimbabwe for the cost of *not* selling ivory, if they were persuaded to do so. After all, revenues from the export of ivory help pay for conservation programs³⁰¹ (as was noted by the CITES Secretariat in opposing the effort to move the elephant to Appendix I³⁰²).

²⁹³ See Spitler, *Exchanging Debt for Conservation*, 37 BIOSCIENCE 781 (1987).

²⁹⁴ *What Can Americans Do?*, TIME, Sept. 18, 1989, at 85; Arias Sánchez, *For the Globe's Sake, Debt Relief*, N.Y. Times, July 14, 1989, at A13.

²⁹⁵ Reuters (Aug. 30, 1989).

²⁹⁶ *Id.*

²⁹⁷ *A Debt to Nature*, ECONOMIST, Aug. 19, 1989, at 31.

²⁹⁸ Reuters Library Report (Aug. 15, 1989).

²⁹⁹ "If the rain forest standing really has a greater value than the rain forest destroyed," *The Economist* said, "the world's consumers have the money to prove it." *The Month Amazonia Burns*, ECONOMIST, Sept. 9, 1989, at 16.

³⁰⁰ S. 1160, 101st Cong., 1st Sess. §§601-661 (1989); S. REP. NO. 46, 101st Cong., 1st Sess. 12 (1989).

³⁰¹ ECONOMIST, *supra* note 23, at 15.

³⁰² In recommending against movement of the elephant to Appendix I, the CITES Secretary-General warned: "Denied the opportunity to sell ivory through natural mortality, control

Estimates vary as to how much it would cost to meet *all* global environmental support obligations concerning the elephant, those deriving from both real and opportunity costs. Professor David Pearce of the University of London's Environmental Economics Center has calculated that Western donors would have to give Africa up to \$100 million in aid a year to compensate for lost revenue and to help governments strengthen anti-poaching patrols.³⁰³ Others suggest that the cost may be less. Professor David Favre, on the other hand, has written that in South Africa, from 1967 to 1989, the total retail value of the illicit ivory sold at auction to the local carving industry came to only \$2 million.³⁰⁴ One thing is clear, however: if live elephants really have a greater value than dead ones, "the world's consumers have the money to prove it."

Steps to Saving the Elephant

In sum, unless the elephant is to continue down the road of the black rhino, a number of steps must be taken.

1. *The ivory trade must be stopped immediately.* As discussed above, halting the ivory trade requires effective steps to dry up both supply and demand and to cut out middlemen. Kenya's President Moi put it well: "To stop the poacher, the trader must also be stopped and to stop the trader, the final buyer must be convinced not to buy ivory."³⁰⁵ States that do not comply with the international ban must be appropriately pressured into doing so, at least until the elephant is safe and an internationally controlled ivory-marking system is in place.

2. *Antipoaching squads and other enforcement units must be strengthened.* We ought not to be deluded into believing that domestic enforcement of the criminal law in producer countries can easily be tightened up. Corruption among law enforcement authorities is not unknown in those countries where the elephant is most threatened. This problem was exemplified by a

operations and confiscation, producer states would lose significant revenues which could otherwise be used to finance anti-poaching and enforcement operations." Letter from Eugene Lapointe, Secretary-General, CITES, to all CITES Management Authorities (June 8, 1989) (on file with author).

It has been reported that from 1985 to 1989, the CITES Secretariat has received \$200,000 from ivory traders, including at least one alleged poacher. Thornton, *supra* note 157, at 8.

³⁰³ Reuters (June 19, 1989). This figure includes the cost of buying off ivory traders, paying game park wardens more so they do not poach, buying and maintaining vehicles for patrols, and equipping personnel properly. Pearce, Britain's leading environmental economist, argues that we should value not only assets that are generally recognized as such—property, machinery, roads, housing—but also environmental assets such as clean water, clean air, forests, wetlands, wildlife, the ozone layer, even natural beauty. We may not pay for these assets, but the cost of replacing them is so high that it is vital to value them correctly. See Daily Telegraph (London), Aug. 16, 1989, at 13. Pearce's approach is set out in Pearce, *Optimal Prices for Sustainable Development*, in *ECONOMICS, GROWTH, AND SUSTAINABLE ENVIRONMENTS* 57 (Collard, Pearce & Ulph eds. 1988); *THE VALUATION OF SOCIAL COST*, *supra* note 49; D. PEARCE, *ENVIRONMENTAL ECONOMICS* (1976).

³⁰⁴ D. FAVRE, *supra* note 154, at 122.

³⁰⁵ N.Y. Times, July 19, 1989, at A4.

1989 incident involving the Indonesian Ambassador to Tanzania. The ambassador, Joesoef Hussein, was caught trying to leave Dar es Salaam with 184 elephant tusks stowed in his luggage. He apparently expected no problem and claimed diplomatic immunity. Rather than asking the Indonesian Government for a waiver so that Tanzania could prosecute, the local government officials reportedly tried to cover up the incident.³⁰⁶

Even when there is a will to succeed, it is hard to take seriously a commitment to elephant conservation that sends game wardens armed with pre-World War I carbines against poachers using machine guns.³⁰⁷ A multilateral entity such as the CITES Secretariat or UNEP should undertake to arrange appropriate assistance. If that means some form of paramilitary or police training—or operational, down-in-the-trenches participation—that agency ought to be empowered to call upon appropriate countries to help, much as the Security Council may call upon members of the United Nations when military units are needed.³⁰⁸ The objective should be “united international police action to eliminate the illegal ivory trade.”³⁰⁹

3. *Environmentally sustainable development must be supported as an essential prerequisite to elephant protection.* The elephant simply will not be safe as long as unlawful conduct pays so much more than lawful conduct. In the long term, enhanced law enforcement can only be a stopgap measure unless economic incentives to poach are greatly reduced.³¹⁰ This is true even though, in the short run, development and conservation can conflict at times. A principal means of development in have-not countries, for example, is agriculturalization, but agriculturalization deprives the elephant of its habitat; funds spent to build a dam are not available to buy spotter planes for game wardens.

At a certain point, therefore, some weighing of the value of development relative to that of elephant protection remains unavoidable in determining how many elephant populations to protect, and at what price. The questions that arise here are difficult and timeless. Above all, development is directed at the preservation and enrichment of *human* life.³¹¹ It is easy for Ameri-

³⁰⁶ *His excellency the ivory smuggler*, NEW AFRICAN, April 1989, at 13. In Kenya, the wildlife department fired or transferred 40 of its own officials suspected of participating in poaching. L.A. Times, May 8, 1989, at 6.

³⁰⁷ 1988 House Hearings, *supra* note 114, at 21 (testimony of William K. Reilly, President, World Wildlife Fund).

³⁰⁸ See UN CHARTER Art. 43(1).

³⁰⁹ 1988 House Hearings, *supra* note 114, at 145 (testimony of Iain Douglas-Hamilton).

³¹⁰ See *supra* notes 159–60 and 179–80 and accompanying text.

³¹¹ See generally A. GUPTA, *ECOLOGY AND DEVELOPMENT IN THE THIRD WORLD* (1988); MacKellar & Vining, *Natural Resource Scarcity: A Global Survey*, in *POPULATION GROWTH AND ECONOMIC DEVELOPMENT: ISSUES AND EVIDENCE* (D. Johnson & R. Lee eds. 1987); O. SCHACHTER, *supra* note 236. For a discussion of the problem of reconciling development with wildlife conservation, see Note, *Wildlife in the Third World: Current Efforts to Integrate Conservation with Development*, 5 B.C. THIRD WORLD L.J. 83 (1984). The clash between development and environmental preservation often arises in industrialized countries as well. See, e.g., J. MCPHEE, *ENCOUNTERS WITH THE ARCHDRUID* (1971), for a readable and provocative presentation of arguments for and against mining in wilderness areas in the United States.

cans, watching wildlife programs on color television in air-conditioned homes, to support elephant protection; it is not always so easy where the elephants actually live.³¹²

Yet, in the end, sustainable economic growth will be the elephant's best insurance, particularly growth that gives the local populace a concrete stake in the elephant's survival.³¹³ It is no accident that relatively rich countries have been more able than relatively poor ones to protect the elephant.³¹⁴

4. *An internationally operated ivory-marking system using the latest technology should be instituted.* Recent advances in the science of wildlife forensics have been impressive.³¹⁵ It is now possible not only to identify ivory by species of origin,³¹⁶ but also to mark ivory tusks so that parts of lawfully taken tusks are subsequently identifiable—easily and inexpensively.³¹⁷ In fact, secretly marked ivory is already in the stream of international commerce. The integrity of a tagging system depends upon that of the officials who operate it;³¹⁸ if they are corrupt and accept bribes to mark poached ivory, or if they permit the tagging technology to fall into the hands of poachers, the system loses its reliability. For this reason, international control at this point seems essential. If it eventually proves desirable to move from the embargo model to a management model—that is, if the elephant someday gets “back on its feet” in countries where it is now threatened³¹⁹—such a system could operate in the following way: An international authority such as UNEP or the

³¹² Zimbabwe officials called the drive for a ban on ivory trade “cultural imperialism” by outsiders. Chicago Trib., July 9, 1989, at 21. One Zambian wildlife manager, referring to Western conservationists, said: “The dimension they forget is that of people.” Reuters (July 9, 1989).

³¹³ In one of the more innovative programs aimed at generating local support for conservation, the Government of Kenya charged a “bed fee” for each bed used by a tourist in Amboseli lodges. The fee was passed on to the Masai, who in return agreed to move out of the elephant's watering areas. May, *Preservation for Profit*, N.Y. Times, Sept. 12, 1987, §6 (Magazine), at 146. Kenya's new conservation minister, Richard E. Leakey, said: “Tourism and the diversification of tourism are fundamental. I cannot let you think that I would see wildlife as anything but an integral part of development.” N.Y. Times, May 23, 1989, at A1. “We should be using elephants and wildebeest, in terms of the money they generate, to build good schools, to put in cattle dips and clinics, to buy books,” he said. *Id.* Kenya plans to use money generated by the parks for schools, health clinics and water systems. Allman, *supra* note 32, at 58.

³¹⁴ See *supra* note 180.

³¹⁵ Wiehl, *New Forensics Lab Joins War on Wildlife Crime*, N.Y. Times, Aug. 11, 1989, at A5.

³¹⁶ This is useful because, as the price of ivory has soared, other ivory-producing species such as the walrus have also faced increased pressure from poachers; enforcement efforts are aided if the source of the ivory can be identified.

³¹⁷ Telephone interview, official of United States Fish and Wildlife Service, Department of the Interior (Sept. 14, 1989) (name withheld at official's request).

³¹⁸ Efforts to tag ivory and other specimens with permits, certificates or other paper work have proven notoriously unsuccessful. When a wildlife smuggler was arrested in 1975, a search of his files revealed “a dazzling array of documents from all over the world—Africa, Asia, Australia—which hinted at extensive smuggling, double-invoicing, and other false documentation.” P. & A. EHRLICH, *supra* note 61, at 195. “Getting the paperwork is easy,” another observer noted. “CITES permits for ivory are sold and traded by smugglers.” Thornton, *supra* note 157, at 8.

³¹⁹ Richard Leakey has estimated that this could take 5–10 years. UPI (Sept. 22, 1989).

CITES Secretariat could be established at regular intervals in all countries where ivory is lawfully taken. The governments of those countries could then bring ivory, up to the amount permitted in their quota, to the marking authority's clearinghouse for tagging. Certain aspects would have to be public to avoid bribes and corruption, but the tagging itself would have to be conducted privately to keep the technology confidential. A comprehensive and enforceable marking system could not be put in place immediately;³²⁰ however, the upshot is that modern science seems finally to have eliminated the problem most responsible for the elephant's decline: the indistinguishability of lawfully and unlawfully taken ivory.

5. *A long-term solution requires several modifications of CITES.* First, the CITES restrictions must be made applicable to worked, as well as raw, ivory. Middlemen, not producing states, have skimmed off the bulk of the profits of the ivory trade.³²¹ They are able to do so in good part because CITES effectively carves out a role for them: inasmuch as CITES does not apply to the trade in worked ivory,³²² it provides an incentive for "working" illegal tusks superficially so as to remove them from the CITES constraints. This incentive can and should be eliminated by the parties; indeed, the Convention itself already points the way. Article I(b)(3) provides for the express listing of "specified parts and derivatives" of already listed animals. A resolution was adopted at the first special session of the parties in Geneva that would have created a minimum list of readily recognizable parts and derivatives.³²³ However, no such list has been drawn up, in part because of concern that it would be a "maximum," rather than a "minimum," list.³²⁴ This concern, while perhaps valid at the time, seems to have been overtaken by events at Lausanne and should now give way to countervailing considerations—namely, that the failure to produce a "parts and derivatives" list has contributed mightily to the undoing of CITES. The parties should draw up a list, formalizing what was left implicit at Lausanne, and worked ivory should be on it.

This step is essential for another reason. The agility of middlemen at leapfrogging new restrictions has often been noted, though it takes little prescience to predict their next line of attack. If CITES continues to be

³²⁰ It is possible to determine the date on which an individual elephant was killed within a period of plus-or-minus 2 years. This means that only a 4-year age window can be ascertained with respect to any unmarked tusk. Consequently, under current technology, a marking system that is initiated in, say, 1992 would not provide effective enforcement possibilities until 1996, since unmarked ivory taken before 1992 could not be said with certainty to have been poached.

³²¹ 1988 House Hearings, *supra* note 114, at 166 (testimony of William K. Reilly, President, World Wildlife Fund). The entire ivory trade nets African countries only \$35 million per year. N.Y. Times, June 2, 1989, at A9. Total exports of ivory represent only 0.2% of Africa's merchandise exports (excluding South Africa and the Mediterranean states). *ECONOMIST*, *supra* note 23, at 16.

³²² See *supra* text at notes 91 and 190-93.

³²³ Special Working Session of the Conference of the Parties, Conf. Doc. 2.18, in *PROCEEDINGS OF THE FIRST MEETING OF THE CONFERENCE OF THE PARTIES* 23-24 (1976).

³²⁴ See D. FAVRE, *supra* note 154, at 18; Favre, *Tension Points within the Language of the CITES Treaty*, 5 B.U. J. INT'L L. 247, 259 (1987); S. LYSTER, *supra* note 78, at 242.

construed as permitting international trade in worked ivory, middlemen will be encouraged to move their carving facilities to the producing states; as a result, the principal international trade will be in an uncontrolled item, worked ivory. There is evidence, in fact, that this movement has already begun.³²⁵ Some might applaud the establishment of carving facilities in producer countries; the economic boost would be welcome and some of the proceeds, at least theoretically, could be put to the best use in conserving remaining elephant populations. Yet, in the end, the move would only prolong the ivory trade and continue to threaten a species that CITES now officially views as "threatened with extinction."³²⁶ If the values sought to be vindicated by CITES are to be protected effectively, its application to the international trade in worked ivory is imperative.

Second, CITES must be further modified to permit the provisional listing of a species on Appendix I, and a new, broader treaty must be negotiated that is not tied to commerce. Because no such provisional listing is possible, the international system not only has failed the elephant, but also has inadvertently accelerated the killing of elephants. The flurry of unilateral bans on ivory importation announced by various governments in June 1989 derived from a justifiable concern that movement of the elephant to Appendix I by the CITES parties meeting in Lausanne the following October would result in an "orgy" of killing,³²⁷ as poachers anticipated tighter international controls. CITES provides no mechanism by which an international entity (such as the CITES Secretariat) can promulgate a provisional ban subject to subsequent approval by a conference of the parties.³²⁸ It may be that some parties would not delegate this much authority to the secretariat, at least as currently constituted. It may also be that the process of settling upon a provisional listing would itself generate anticipated killing; a measure of confidentiality would be required that could prove difficult to achieve. Yet without such a procedure, any public effort to move a highly visible species up to Appendix I to prevent poaching—and virtually every effort to do so will be public because international publicity generates the necessary support—is almost guaranteed, in the short term, to bring about more killing of the species, not less. If the elephant is safer today than it was a year ago,³²⁹ thanks are due to the individual governments that banned

³²⁵ 1988 House Hearings, *supra* note 114, at 163 (testimony of William K. Reilly, President, World Wildlife Fund). Reportedly, one infamous poacher has held talks in the Congo, Zaire and the Central African Republic to move equipment and Chinese carvers from Hong Kong to Africa. *Id.*

³²⁶ CITES, *supra* note 41, Art. II(1). See *supra* note 95 and accompanying text.

³²⁷ See *supra* text at note 135.

³²⁸ CITES is "paid by the ivory trade," Iain Douglas-Hamilton said. "The result is, in the last five years there has been a complete decline of the elephant." Boston Globe, May 30, 1989, at 2. As noted above, the CITES Secretary-General urged parties not to move the elephant to Appendix I. See *supra* note 302.

³²⁹ At first blush, this appears to be the quintessential situation, discussed by Professor Richard Bilder, in which unilateral state action, because of its promptness, was effectively brought to bear against conduct threatening environmental injury. See Bilder, *Unilateral State Action*, 14 VAND. J. TRANSNAT'L L. 51, 79 (1981). As Bilder warned, however, "[p]rohibiting

ivory imports and the international wildlife organizations that spurred them to act, not the international legal system.

Further lessons about CITES taught by the elephant's plight can be generalized only to a point. Some species are threatened by poachers.³³⁰ Others face threats apart from poaching, most often loss of habitat.³³¹ The shortcomings of CITES that so hurt the elephant have little application to the difficulties those species confront. Yet the very inaptness of CITES to their problems is perhaps the most damning criticism of all: CITES does not even seek to protect those species, since its only concern is with endangerment posed by international trade. It is time for a new, worldwide treaty that broadly safeguards endangered species irrespective of commerce.³³²

6. *The broad-based educational campaign already successfully undertaken by nongovernmental organizations must be continued.* It is not enough to educate buyers of ivory to the horrors of its origins. Ultimately, protection of the elephant and other endangered species will require a change in mind set by both individuals and governmental institutions that have viewed concern about animals with a certain derision. Robert Nozick began his review of Thomas Regan's book with the following observations: "Animal rights seems a topic for cranks. Who else would devote major energy to promote changes in our treatment of animals or write a book on the subject?"³³³ Past failures by the United States to pay its dues to organizations such as CITES, the Senate Foreign Relations Committee said, "have called into question its commitment to these agreements."³³⁴ When the committee added a provision to the Foreign Relations Authorization bill for fiscal year 1990³³⁵ strengthening protection of the elephant,³³⁶ the *Washington Post* chided the

importation of endangered species or their products in one nation will not protect such species if other states increase their imports of such products by an equivalent amount." *Id.* at 85. We do not yet possess adequate data to assess the impact of the unilateral state bans of June 1989 on ivory imports. We do know that the bans were not universally adopted, and that some major consumer states such as Japan did not join in the bans; but we do not know whether ivory normally imported by banning states such as the United States, Britain and France was merely diverted to Japan. "[S]ome environmental problems," Bilder concludes, "may be incapable of solution if each nation acts alone . . ." *Id.* at 80.

³³⁰ See generally J. NICHOL, *THE ANIMAL SMUGGLERS* (1987). Species include the giant panda; their skins have been sold for \$4,000. Only about a thousand remain in the wild. Branson, *Poaching the Pandas*, *WORLD PRESS REV.*, March 1989, at 53.

³³¹ For an excellent overview of this problem in East Africa, see R. YEAGER & N. MILLER, *supra* note 30.

³³² Costa Rican President Arias Sánchez has written: "Efforts to negotiate as common resources our shared elements—such as atmosphere, the oceans and biodiversity—should be encouraged and expedited." Arias Sánchez, *supra* note 294, at A13.

³³³ Nozick, *supra* note 60, at 1.

³³⁴ S. REP. NO. 46, *supra* note 300, at 12. The committee reported legislation authorizing \$1,511,000 to meet U.S. obligations for dues and arrearages. S. 1160, *supra* note 300.

³³⁵ See S. 1160, *supra* note 300, §641.

³³⁶ The provision would have restricted ivory imports into the United States to those from countries that enforce the existing ban on the illegal hunting of elephants or on the illegal trade in ivory. S. REP. NO. 46, *supra* note 300, at 39. The bill was filed on June 8, three days after President Bush announced the U.S. ban. See *supra* note 137. The floor manager (and author of

senators for turning out a "global grab bag" of "hobby-horses" reflecting a "somewhat disoriented world view."³³⁷

Animating this view is the same uneasiness revealed in the Governor's complaint to Laurençot (who also prefers live elephants) in Gary's *The Roots of Heaven*:

Don't you think that there are in the world, at the present time, causes, liberties, well . . . let's say values, which have a rather better claim than the elephants to [our] devotion . . . ? There are still some of us who refuse to despair, to throw up the sponge and go over to the other species for solace. There are men fighting and dying at this very moment, in the streets, on the barricades and in the prisons . . . One may still be allowed to prefer to take an interest in them.³³⁸

That sentiment may lie behind the *Post*'s belittlement of concern about the elephant's impending demise: there are more important causes, *human* causes, worth fighting for; to ignore those causes out of concern for the elephant is, if not to "go over" to their side, at least to demonstrate a fixation with the peripheral, the marginal, the "small"—to imply in some cranky way that the two species are somehow equally worthy of protection.

The responses to these criticisms made by characters in *The Roots of Heaven* are still persuasive. One is Laurençot's: "But the elephants are part of that fight. Men are dying to preserve a certain splendor of life. Call it freedom, or dignity . . . They are dying to preserve a certain natural splendor."³³⁹ Another is Father Fargue's: "Perhaps the lepers and the people with sleeping sickness aren't the whole story."³⁴⁰ But perhaps the best, for those concerned about wasting energy on nonhuman suffering, is that of Morel: "Today you say that elephants are archaic and cumbersome, that they interfere with roads and telegraph poles, and tomorrow you'll begin to say that human rights too are obsolete and cumbersome, that they interfere with progress"³⁴¹

The struggle to protect beings without reference to any "objective," mathematically quantifiable utility enriches our spirit. Even if this is not a struggle to ensure our own survival, it is a battle to clarify our character, to define what we hold dear, for ourselves and our descendants.³⁴² It is the character of our species that is at issue. Who can say, on the day the last elephant dies, that the human race will ever again be the same?

the provision), Sen. Claiborne Pell, thus announced in presenting the bill to the Senate that "the President has preempted my provision by banning the importation of ivory." 135 CONG. REC. S7963 (daily ed. July 14, 1989).

³³⁷ Dewar, *State Dept. Spending Bill is Cornucopia of Pet Projects; Elephants, Ben Franklin's House Embraced*, Wash. Post, May 31, 1989, at A1. By including provisions such as that relating to the elephant, the committee basically "dabbled and tinkered, with members pursuing their own agendas, often in small or symbolic ways." *Id.* at A5.

³³⁸ R. GARY, *supra* note 58, at 60.

³³⁹ *Id.*

³⁴⁰ *Id.* at 149.

³⁴¹ *Id.* at 142.

³⁴² See Weiss, *supra* note 49, at 499; see also Agora: *What Obligation Does Our Generation Owe to the Next? An Approach to Global Environmental Responsibility*, *infra* at p. 190.

PROLONGED MILITARY OCCUPATION: THE ISRAELI-OCCUPIED TERRITORIES SINCE 1967

*By Adam Roberts**

To what extent are international legal rules formally applicable, and practically relevant, to a prolonged military occupation? The question has assumed prominence because of the exceptional duration of the occupation by Israel of various territories that came under its control in the war of June 5–10, 1967. The situation there has had two classic features of a military occupation: first, a formal system of external control by a force whose presence is not sanctioned by international agreement; and second, a conflict of nationality and interest between the inhabitants, on the one hand, and those exercising power over them, on the other. In highlighting these features, the Palestinian uprising, or *intifada*, which began in Gaza and the West Bank in December 1987, has added urgency to the question of the law applicable to prolonged occupations.

There is a simple answer, and a perfectly serious one, to the central question addressed here. Israel has given express commitments over the years to implement the terms of a large number of treaties, and is also, like all states, bound by international customary law. These are solemn obligations. There is no need to engage in the laborious business of seeking to prove that any or every commitment passes an artificial test of “applicability” in a given situation. Rather, the burden of proof lies on an obligated state to show, if it can, that in the actual situation a given commitment does not apply. Hence, it can be asserted, simply but also persuasively, that the Israeli occupation of various territories has been, and continues to be, covered by a wide range of agreements, with which Israel must conform.

This simple answer, though important as a starting point, is not the last word on the subject because of two main considerations, which form the *raison d'être* of this article. First, in a number of statements Israeli spokesmen and courts have suggested that certain international rules were never formally applicable to the occupied territories, or else that their application may be qualified in some ways owing to special circumstances, one being the long duration of the occupation. The validity of these Israeli statements needs to be examined. Second, even if it is accepted that the rules governing occupations should be applied (whether out of formal legal obligation or as a matter of policy), the question remains whether these rules are relevant to the practical problems that arise in a prolonged occupation—and, indeed,

* Montague Burton Professor of International Relations, Oxford University; and Fellow of Balliol College.

This is an extensively revised version of a paper presented at a conference on the administration of occupied territories, Jerusalem, Jan. 22–25, 1988, organized by al-Haq, Ramallah. A book of papers from the conference, edited by Emma Playfair, will appear in due course.

whether implementation of the rules is likely to serve their underlying purposes. In particular, are the rules a straitjacket that inhibits political, legislative and economic change?

Although the present writer is a specialist in international relations rather than international law, the focus here is on legal issues. There are good reasons for this so far as the Israeli-occupied territories are concerned. First, the very concept of occupation, with its implicit assertion that external military control is temporary, is a triumph of legal thinking. Second, the appeal to general norms and standards has had great practical significance as regards the Israeli occupation: much of the international comment on it, especially within the framework of the United Nations, has emanated from legal as well as other considerations, or at least has been expressed in legal language.

Nevertheless, there are some hazards in discussing burning political issues in legal terms. Other methodologies—those of history and political science, even strategy and arms control—are necessary complements to law, and may be just as likely to assist understanding and to promote solutions. Moreover, while most international lawyers are, quite properly, cautious in their application of rules and principles to particular cases, sometimes law may get misused. The language of law can easily become a language of right and wrong, of moralistic reproach, of the clothing of interest in the garments of rectitude, of the concealment of factual changes with legal fictions, of refined scholasticism in the face of urgent practical problems, and of the facile application of general rules without a deep understanding of situations that are unique. Such approaches are hardly the highest expressions of law; nor are they necessarily the best way of addressing complex and multi-layered international problems such as those encountered in the occupied territories.

Addressing as it does the single question of the rules applicable in a prolonged occupation, this article makes no attempt to assess the conduct of the Israeli occupation overall, or to cover the huge range of legal and practical issues to which it has given rise. For example, nothing is said here on such important and frequently raised matters as ill-treatment of detainees, since the basic pertinent rules are clear and are not affected by the duration of the occupation.

The article is divided into nine parts. The first three, which examine the law on occupations, are the most general; the rest deal centrally with the Israeli-occupied territories.

I. PURPOSES OF THE LAW ON OCCUPATIONS

There is no single authoritative exegesis of the various purposes served by that part of the laws of war relating to military occupations—what is called here the “law on occupations.” However, those purposes can be inferred from the principal conventions, from the events that gave rise to them, from their negotiating history, from military manuals, from court judgments and from writings.

The law on occupations is both permissive (accepting that an occupant exercises certain powers) and prohibitory (putting limits on the actions of various parties, including occupying powers). Briefly summarized, it can have the following purposes:

- Ensuring that those who are in the hands of an adversary are treated with humanity. (In this respect the rules on occupations serve a similar purpose to those on prisoners of war and internees.)
- Harmonizing these humanitarian interests with the military needs of the occupant.
- Preventing the imposition of disruptive changes in the occupied territory, and preserving the rights of the sovereign there. (Where the eventual disposition of territories awaits the outcome of peace negotiations, or the hold of the occupant might be reversed by the fortunes of war, there is a need for rules to inhibit any unilateral, drastic and permanent changes in the political, economic, social and legal orders.)
- Preserving military discipline among the occupying forces. (Occupations typically present problems—such as uncontrolled exercise of power, numerous points of friction between occupants and inhabitants—that can easily lead to looting, general disorder and a breakdown of military discipline. A modicum of rules is one safeguard against these dangers.)
- Reducing the risk that relations between occupant and occupied will get out of hand and lead to renewed conflict.
- Improving the chances that, if an occupant finds part of its own territory occupied, its population will in turn be treated with due regard to international norms. (Sometimes military occupations in war are concurrent, with each side holding some of the other's territory; or they may be consecutive, with a country that had been an occupant having part of its territory occupied. Either circumstance can give an additional incentive for observing rules.)
- Helping to maintain friendly relations between the occupying power and foreign states—whether allies, adversaries or neutrals.
- Facilitating the prospects for an eventual peace agreement.¹ (The prohibition of annexation of occupied territory, and the rules against transfers of populations into and from occupied territories, partly reflect this purpose.)

Whether the law has always succeeded in serving these purposes may be debated. Moreover, in any given situation determining the particular policies that will best reflect these purposes may well be a matter of delicate political judgment. However, the purposes themselves are enduring. They are not purely and simply humanitarian, but also practical—arising as they do from the interests and experiences of states over a long period.

As far as prolonged occupations are concerned, some or all of these purposes may remain important. Yet some may come to be seen as of less

¹ This can be inferred from, e.g., D. A. GRABER, *THE DEVELOPMENT OF THE LAW OF BELLIGERENT OCCUPATION 1863–1914: A HISTORICAL SURVEY* 37–40 (1949).

importance: to the extent that this is so, the detailed rules intended to reflect these purposes may be called into question.

II. PROLONGED OCCUPATIONS AS A DISTINCT CATEGORY

An important, but implicit, assumption of much of the law on occupations is that military occupation is a provisional state of affairs, which may end as the fortunes of war change, or else will be transformed into some other status through negotiations conducted at or soon after the end of the war. However, many episodes during this century have called into question the assumption that occupations are of short duration. As Doris Appel Graber already noted in 1949:

Considering the complexity of modern occupations, such as those during World War I and II in which large areas were occupied for long periods of time, raising a multitude of legal questions about the rights and duties of occupants in particular situations and the legal effects of the occupant's actions after the war, the rules laid down in the landmark codes of the 1863–1914 period and expounded in the literature and in military manuals seem fragmentary indeed and inadequate to guide occupation policies. But . . . they were developed in a relatively peaceful period in which no major wars occurred and in which belligerent occupations were generally of short duration so that occupants were not forced to assume the full governmental burdens which had rested on the displaced sovereign. Consequently, while general principles were evolved, few specific rules developed because of a lack of factual situations requiring application of specific rules often enough to permit their growth into law.²

In the period since the Second World War, there has been no shortage of cases of prolonged occupation, many of which have raised complex questions about the applicability and utility of international rules—rules that have of course developed significantly since Graber wrote. These occupations seem yet another proof of the paradox “*Rien ne dure comme le provisoire*.”

The precise definition of “prolonged occupation” is likely to be a pointless quest. For the purpose of this article, it is taken to be an occupation that lasts more than 5 years and extends into a period when hostilities are sharply reduced—i.e., a period at least approximating peacetime.

A few examples from the post-1945 period are mentioned below. While by no means the only cases that might be viewed as prolonged occupations, they are sufficient to indicate how varied in character and purpose such occupations can be. Many of them have raised difficult questions: what body of international law applies in circumstances where the entire purpose of an occupation is (or ought to be) to bring about political change, rather than simply to preserve the status quo? And what rules apply when an occupation takes place (or continues) in peacetime?

² *Id.* at 290–91.

The Allied Occupations of Germany and Japan

The Allied occupations of Germany and Japan after the Second World War lasted for 10 and 6 years, respectively.³ They defied the neat legal categories on which the law on occupations often seems to be based. These were not cases of subjugation and annexation; hence, they were military occupations of a kind. However, the victors wished to exercise their powers freely, and to make drastic political changes. They were not willing to be formally bound by the Hague Regulations.⁴ One of the most cogent presentations of the argument for the Allied position suggested that the law of belligerent occupation had been designed to serve two purposes: (1) to protect the sovereign rights of the legitimate government of the occupied territory, and (2) to protect the inhabitants from being exploited for the prosecution of the occupant's war. Since neither of these purposes had much bearing on the situation the Allies faced, to have applied the law would have been "a manifest anachronism."⁵ While this view of the applicability of the Hague Regulations was by no means uncontested, it did largely prevail. For those who found the Hague Regulations inapplicable, what rules of international law did apply to the Allied occupation of Germany after its unconditional surrender? Theodor Schweisfurth has said convincingly that this phase was subject to "such rules of international law as limit the right of any Government to commit acts which constitute crimes against peace and crimes against humanity."⁶ Clearly, in these exceptional cases of prolonged occupation, any rules that could be interpreted as limiting the Allies' right to bring about significant political changes in the former Axis countries were deemed to be irrelevant.

Current and future military occupations, even postsurrender ones, cannot be governed by so few formal international rules as were these post-1945 cases. This is due to two legal developments. First, the fourth Geneva Convention would appear to be applicable to a future postsurrender occupation by virtue of its common Article 2.⁷ Second, the development of

³ The U.S. military occupation of Japan ended on Apr. 28, 1952, with the entry into force of the Peace Treaty between the two countries. The occupation by the three Western powers of West Germany ended on May 5, 1955. The Soviet occupation of East Germany can be said to have formally ended with the opening of diplomatic relations between the two countries on Sept. 20, 1955, following a Soviet government statement of Mar. 25, 1954. The city of Berlin remains in some technical sense occupied, and hence qualifies as a case of prolonged occupation, but the powers of the Allies are minimal.

⁴ Convention respecting the Laws and Customs of War on Land, with annexed Regulations, Oct. 18, 1907, 36 Stat. 2277, TS No. 539, 205 Parry's TS 277.

On the UK discussion about the legal status of defeated Germany, see especially F. S. V. DONNISON, *CIVIL AFFAIRS AND MILITARY GOVERNMENT: CENTRAL ORGANIZATION AND PLANNING* 125-36 (1966).

⁵ Jennings, *Government in Commission*, 23 BRIT. Y.B. INT'L L. 112, 135-36 (1946).

⁶ *Germany, Occupation After World War II*, [Instalment] 3 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 191, 196-97 (R. Bernhardt ed. 1982).

⁷ Convention relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 UST 3516, TIAS No. 3365, 75 UNTS 287. See COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949: GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 22 (J. Pictet ed. 1958) [hereinafter Pictet]; G. VON GLAHN,

international human rights law since 1945 has greatly enlarged the scope of rules of international law that place limits on the right of any government to commit whatever actions it pleases against those under its control. (This point will be discussed in part VI below.)

The U.S. occupation of the Ryukyu Islands, including Okinawa, lasted for 27 years, ending on May 14, 1972, in accord with the terms of the U.S.-Japanese Okinawa treaty of June 17, 1971.⁸

South Africa's Occupation of Namibia

The presence of South Africa in Namibia after its international mandate there was terminated by the United Nations in 1966 was increasingly viewed as an occupation—especially after the advisory opinion of the International Court of Justice in 1971.⁹ In this case, as in that of the Israeli-occupied territories, the international community made clear that it would like to see certain positive changes introduced, leading to the emergence of a new sovereign state. Agreements signed in New York on December 22, 1988, specified that the South African presence in Namibia would come to an end after elections in November 1989.¹⁰

THE OCCUPATION OF ENEMY TERRITORY: A COMMENTARY ON THE LAW AND PRACTICE OF BELLIGERENT OCCUPATION 281, 283 (1957); UK WAR OFFICE, THE LAW OF WAR ON LAND: BEING PART III OF THE MANUAL OF MILITARY LAW 140 (1958); and M. GREENSPAN, THE MODERN LAW OF LAND WARFARE 216–17, 224–27 (1959).

There might thus seem to be at least a theoretical possibility that a future postsurrender occupation would be subject to the Geneva Convention but not to the Hague Regulations, inasmuch as the latter stress mainly the preservation of the status quo against the background of war, while the former puts somewhat more emphasis on the protection of the individual inhabitants. (Israeli courts have to some extent reversed this formula, having relied more on the Hague than the Geneva rules.) However, most, if not all, future postsurrender occupations would be brought within the ambit of the Hague Regulations because of several factors, including (1) they are customary in character; and (2) in relations between powers bound by the 1899 or 1907 Hague Conventions, the fourth Geneva Convention (Art. 154) states that it is “supplementary” to the Hague Regulations.

⁸ Agreement concerning the Ryukyu Islands and the Daito Islands with related arrangements, June 17, 1971, United States-Japan, 23 UST 446, TIAS No. 7314. See also KEESING'S CONTEMPORARY ARCHIVES 24,715 (1971).

⁹ Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), 1971 ICJ REP. 16 (Advisory Opinion of June 21).

Key UN resolutions on Namibia include the following. Before 1971: GA Res. 2145 (XXI) (Oct. 27, 1966) (terminating South Africa's mandate); GA Res. 2372 (XXII) (June 12, 1968) (referring several times to South Africa's “occupation” of South West Africa and proclaiming that it “shall henceforth be known as Namibia”); and SC Res. 284 (July 29, 1970). After the Court's advisory opinion, a consistent stream of UN resolutions referred specifically to South Africa's “illegal occupation” of Namibia. See, e.g., SC Res. 301 (Oct. 20, 1971); SC Res. 366 (Dec. 17, 1974); SC Res. 385 (Jan. 30, 1976); GA Res. 2871 (XXVI) (Dec. 20, 1971); GA Res. 41/39 (Nov. 20, 1986); SC Res. 601 (Oct. 30, 1987); and GA Res. 43/26 (Nov. 17, 1988).

¹⁰ See Agreement among the People's Republic of Angola, the Republic of Cuba, and the Republic of South Africa, Dec. 22, 1988, UN Doc. S/20346 (1988), reprinted in 28 ILM 957 (1989) (providing for implementation of SC Res. 435 (Sept. 29, 1978) on steps to establish

This occupation raised the question of what bodies of international law should be applied. In its 1971 advisory opinion, the International Court of Justice said that some multilateral conventions "such as those of a humanitarian character" may be viewed as binding as regards the occupation of Namibia.¹¹ For the purposes of the question it was addressing, it was not essential for the Court to specify which humanitarian conventions it had in mind: the important point is the endorsement of the applicability of international rules even though this occupation was seen as being marked by several exceptional features. In 1971 the UN General Assembly specifically urged South Africa to comply with the third and fourth 1949 Geneva Conventions in Namibia.¹²

The occupation of Namibia also raised the question of the legitimacy of resistance movements. This old and difficult question in the laws of war received in this case a simple answer. The General Assembly consistently supported the legitimacy of the armed struggle of the South West Africa People's Organization.¹³ So, notably, did Vice-President Ammoun in his separate opinion to the 1971 ICJ judgment on Namibia.¹⁴

Some Other Recent Cases of Prolonged Occupation

The presence of Turkish forces in northern Cyprus since the invasion of July 20, 1974, has been viewed in some resolutions of the UN General Assembly as an occupation.¹⁵

The presence of Moroccan forces in Western Sahara since they intervened in December 1975 and January 1976 has similarly been viewed in some resolutions of the General Assembly as an occupation.¹⁶

The presence of Vietnamese forces in Kampuchea following the invasion of December 27, 1978, was also seen in some General Assembly resolutions as an occupation.¹⁷ On April 5, 1989, the Governments of the three countries of Indochina (Vietnam, Laos and Kampuchea) announced that all Vietnamese "volunteer troops" would be withdrawn from Kampuchea by

Namibian independence); *Agreement between the Government of the Republic of Cuba and the Government of the People's Republic of Angola for the Conclusions of the Internationalist Mission of the Cuban Military Contingent*, Dec. 22, 1988, UN Doc. S/20345 (1988), *reprinted in* 28 ILM 959 (1989) (providing for staged withdrawal of Cuban troops from Angola). Elections to a constituent assembly were held in Namibia on Nov. 7-11, 1989. The last South African troops stationed in Namibia withdrew to their own country on Nov. 23-24, 1989.

¹¹ 1971 ICJ REP. at 55.

¹² See, e.g., GA Res. 2871, *supra* note 9.

¹³ See, e.g., *id.*; GA Res. 2403 (XXIII) (Dec. 16, 1968); and GA Res. S-14/1 (Sept. 20, 1986).

¹⁴ 1971 ICJ REP. at 70.

¹⁵ See GA Res. 33/15 (Nov. 9, 1978); GA Res. 34/30 (Nov. 20, 1979); and GA Res. 37/253 (May 13, 1983). In subsequent years, the question of Cyprus has been deferred by the General Assembly.

¹⁶ GA Res. 34/37 (Nov. 21, 1979); and GA Res. 35/19 (Nov. 11, 1980). Subsequent resolutions do not use the term "occupation" but do reaffirm the need for self-determination. See, e.g., GA Res. 43/33 (Nov. 22, 1988).

¹⁷ GA Res. 37/6 (Oct. 28, 1982); GA Res. 40/7 (Nov. 5, 1985); and GA Res. 43/19 (Nov. 3, 1988).

September 30, 1989, regardless of whether or not a political solution to the Kampuchean conflict had been found.¹⁸

Many other situations quite widely viewed as occupations could be cited. For example, the intervention of Soviet forces in Afghanistan between December 1979 and the conclusion of their phased departure on February 15, 1989, was called an occupation by many governments.¹⁹

* * * *

The idea that "prolonged occupation" is a special category of occupation should be set in the proper context, namely, that there are many different types of occupation: the present writer has tentatively suggested seventeen types—a listing that is far from exhaustive. Neither the law as laid down in international conventions nor state practice justifies the restrictive approach of viewing the law on occupations as applying only to the classic case of belligerent occupation, in which one belligerent occupies the territory of another belligerent during an armed conflict. The law on occupations has in fact been applied to a wider range of cases than this: it is properly viewed as being formally applicable to, and capable of being applied in, many types of occupation—and, indeed, many situations to which the opprobrious term "occupation" is not actually attached. It contains some notable elements of flexibility.²⁰

While the frequent occurrence of long occupations is beyond dispute, there are some grounds for doubt about the value of regarding them as constituting a special category. The danger in making such a suggestion is that it may seem to imply the further suggestion that those parts of the laws of war that deal with military occupations may not be fully applicable, and that departures from the law may be permissible. These conclusions would pose problems, especially if the applicability of major conventions were put in doubt, if the criteria for permitting departures from the law were vague and subjective, or if it were unclear what bodies have authority to suggest or make departures. However, it may be that departing from occupation law is not the only legal issue to be faced. There may also be some scope for variations *within* the framework established by existing international law. The laws of war treaties that govern occupations contain some scope for variations.

¹⁸ KEESING'S RECORD OF WORLD EVENTS 36,588 (1989). Vietnam was subsequently reported to have completed this withdrawal in the week ending Sept. 30, 1989, but without supervision by international observer forces.

¹⁹ See, e.g., British statement of July 13, 1982, *quoted in* 53 BRIT. Y.B. INT'L L. 352 (1982).

²⁰ Occupations that have differed in some respects from the classic case of a belligerent occupation include that of the Rhineland after 1918, the Franco-Belgian occupation of the Ruhr in 1923–1925, the German occupation of Bohemia and Moravia from March 1939, and Namibia since 1971. In these cases, certain courts and tribunals have accepted the use of the term "occupation" and the applicability of international rules, including, e.g., the Hague Regulations. Roberts, *What Is a Military Occupation?*, 55 BRIT. Y.B. INT'L L. 249, 275, 278, 291–92 (1984).

Further, in a prolonged occupation the applicability of other bodies of law—including the international law of human rights—assumes special importance.

While there may be some dangers in regarding “prolonged occupation” as a special category, there are also very good reasons for doing so. At present, there is a distinct risk that the law on occupations, if not adapted to special problems arising in a prolonged occupation, could be used or abused in such a way as to contribute to leaving a society politically and economically undeveloped. During a long occupation, many practical problems may arise that do not admit of mere temporary solutions based on the idea of preserving the status quo ante: decisions may have to be taken about such matters as road construction, higher education, water use, electricity generation and integration into changing international markets. Such decisions, although they involve radical and lasting change, cannot be postponed indefinitely. Nor can the setting up of political institutions be postponed indefinitely without creating the theoretical possibility (and in the West Bank and Gaza it is more than theoretical) that the law on occupations could be so used as to have the effect of leaving a whole population in legal and political limbo: neither entitled to citizenship of the occupying state, nor able to exercise any other political rights except of the most rudimentary character. If there is any risk at all that the law on occupations might provide, paradoxically, the basis for a kind of discrimination that might bear comparison with apartheid, the causes of that risk need to be identified, and possible solutions explored.

The category of prolonged occupation overlaps in certain respects with another category—peacetime occupation. Some writers have taken the view that in peacetime occupations the rights accruing to an occupant may be more limited than in the classic case of belligerent occupation. Thus, F. Llewellyn Jones wrote in 1924:

In the case of pacific occupation it is clear that the rights of the occupant are very much curtailed as compared with those of a belligerent occupant. In the latter case the occupant is an enemy, and has to protect himself against attack on the part of the forces of the occupied State, and he is justified in adopting measures which would justly be considered unwarranted in the case of pacific occupation. . . . Belligerent military occupation is now largely regulated by the provisions of the Hague Convention, 1907, and obviously a pacific military occupant can have no powers more extensive than those laid down in the Articles of this Convention.²¹

Following this general approach, it could be argued that in a prolonged occupation, as in a pacific one, the rights of the occupants are vastly curtailed. This conclusion is very persuasive; and it conforms with the approach adopted in the fourth Geneva Convention, discussed in the next part. However, this conclusion can hardly follow automatically in all cases, or on all issues. For example, if there is extensive and violent opposition to the occu-

²¹ Jones, *Military Occupation of Alien Territory in Time of Peace*, 9 GROTIIUS SOC'Y, TRANSACTIONS 149, 159–60 (1924). See also Roberts, *supra* note 20, at 273–79.

pation, or a general terrorist threat to the nationals of the occupying power, there may be a situation somewhat akin to war, in which the prolongation of certain emergency measures can be justified.

In a prolonged occupation there may be strong reasons for recognizing the powers of an occupant in certain specific respects—for example, because there is a need to make drastic and permanent changes in the economy or the system of government. At the same time, there may be strong reasons for limiting the occupant's powers in other respects. An examination of past occupations suggests that any variations in the rules may have a more complex and multifaceted character than simply the curtailment of the rights of one party or another.

III. PROLONGED OCCUPATIONS IN THE PRINCIPAL CONVENTIONS

The following are the main conventions that set out rules relating to the conduct of military occupations. All of them entered into force within 1–3 years of the date of signature.

The fourth 1907 Hague Convention has 37 states parties.²² Whether or not a state is a party to this Convention is of limited significance, because the annexed Hague Regulations have since at least 1946 been widely and authoritatively viewed as embodying customary international law.²³

The fourth 1949 Geneva Convention (like the other three 1949 Geneva Conventions) has 166 states parties.²⁴ This remarkably high number is one of several factors that have strengthened arguments that the Conventions are, in whole or in substantial part, declaratory of customary international law.²⁵

²² Also, 18 out of the 48 states parties formally bound by the very similar terms of the second 1899 Hague Convention did not become parties to the 1907 agreement. Convention with respect to the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803, TS No. 403. Most of the provisions of the regulations annexed to these two Conventions are identical.

Information about states parties to the second 1899 Convention and the fourth 1907 Convention supplied by the depositary (the Netherlands Ministry of Foreign Affairs), and valid as of July 1, 1988. See DOCUMENTS ON THE LAWS OF WAR 44 and 58–59 (A. Roberts & R. Guelff 2d ed. 1989) [hereinafter Roberts & Guelff].

In addition, some states became bound by these two Hague Conventions through general declarations of succession to treaties (e.g., at the time of independence), even if they have not so notified the depositary. This explains why some sources give higher figures for states parties. According to the U.S. Department of State, the number of parties to the second 1899 Convention and the fourth 1907 Convention are 56 and 43, respectively. DEPARTMENT OF STATE, TREATIES IN FORCE: A LIST OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES IN FORCE ON JANUARY 1, 1989, at 363 and 363–64.

²³ For the leading judgment to this effect, see 22 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG 497 (1948). Note also Meron's statement that "the customary law status of the Regulations annexed to the Convention is universally recognized." T. MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 226 (1989).

²⁴ International Committee of the Red Cross [ICRC], List of Signatures, Ratifications, etc. (Jan. 31, 1989); and Addendum (Feb. 7, 1989).

²⁵ For an excellent discussion, see Meron, *The Geneva Conventions as Customary Law*, 81 AJIL 348 (1987). See also T. MERON, *supra* note 23, at 41–62.

The 1954 Hague Cultural Property Convention has 75 states parties; 63 of these are also bound by the 1954 Hague Protocol.²⁶ Various important powers—including China, Japan, the United Kingdom and the United States—are not yet formally bound by this Convention.

The 1977 Geneva Protocol I has 92 states parties.²⁷ Several important powers—including France, India, Indonesia, Japan, the United Kingdom and the United States—are not formally bound by this Protocol. However, some of its provisions are viewed as embodying customary law; and other provisions may be viewed, even by nonparties, as meriting inclusion in the rules governing their military operations.²⁸

In none of the above agreements is any formal limit set on the duration of an occupation. Inasmuch as the subject of duration is addressed at all, it is more in writings and judgments than in conventions.²⁹ Meir Shamgar is correct in saying:

According to International Law the exercise of the right of military administration over the territory and its inhabitants had no time-limit, because it reflected a factual situation and pending an alternative political or military solution this system of government could, from the legal point of view, continue indefinitely. Military government does not derogate from the potential rights of either party but represents a minimum standard imposed by the Law of Nations and is co-extensive in time and space to the effective rule of the military.³⁰

This is certainly a good starting point for considering the whole question of prolonged occupation. The proposition that the basic rules codified in the law on occupations must continue to be observed for as long as the occupation lasts is a useful compass bearing to guide one through this difficult subject.

²⁶ Convention and Protocol for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 UNTS 240. Information about states parties supplied by the depositary (UNESCO), and valid as of July 1, 1988. See Roberts & Guelff, *supra* note 22, at 367–70.

²⁷ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), *opened for signature* Dec. 12, 1977, 1125 UNTS 3. For information about states parties, see ICRC, List of Signatures, Ratifications, etc. (Nov. 3, 1989). The figure 92 includes the USSR, which ratified this Protocol (and Protocol II, on noninternational armed conflicts) on Sept. 29, 1989.

²⁸ See, e.g., President Reagan's Letter of Transmittal of Protocol II to the U.S. Senate, S. TREATY DOC. NO. 2, 100th Cong., 1st Sess., at III (1987); and T. MERON, *supra* note 23, at 62–70.

²⁹ Although a great deal of published writing has some bearing on the subject, very few papers or articles have been specifically devoted to prolonged occupation either in general or in the Arab-Israeli context. There have not been any such articles in some of the journals where they might have been expected, e.g., the *Israel Yearbook on Human Rights*, the *Revue Egyptienne de Droit International* and the *Palestine Yearbook of International Law*. Falk, *Some Legal Reflections on Prolonged Israeli Occupation of Gaza and the West Bank*, 2 J. REFUGEE STUD. 40 (1989), is very much the exception.

³⁰ Shamgar, *Legal Concepts and Problems of the Israeli Military Government—the Initial Stage*, in 1 MILITARY GOVERNMENT IN THE TERRITORIES ADMINISTERED BY ISRAEL: THE LEGAL ASPECTS 13, 43 (M. Shamgar ed. 1982) [hereinafter MILITARY GOVERNMENT]. For statements on the same issue in Supreme Court judgments, see *infra* text at notes 177 and 178.

The "One Year After" Provision of 1949

While the condition of military occupation (or, more euphemistically, "military administration") may continue indefinitely, there is, or used to be, one formal provision for variation of the rules on the grounds of duration. This was Article 6, paragraph 3 of the fourth 1949 Geneva Convention:

In the case of occupied territory, the application of the present Convention shall cease one year after the general close of military operations; however, the Occupying Power shall be bound, for the duration of the occupation, to the extent that such Power exercises the functions of government in such territory, by the provisions of the following Articles of the present Convention: 1 to 12, 27, 29 to 34, 47, 49, 51, 52, 53, 59, 61 to 77, 143.³¹

These provisions represent one attempt to address the issue of prolonged occupation. However, they are of little importance, for four main reasons.

First, Article 6, paragraph 3 has featured very little in legal analyses of prolonged occupations in the past 40 years; and the Israeli authorities have never invoked it as a means of reducing their obligations.³²

Second, in particular cases, including the Israeli-occupied territories, there might be scope for debate about whether, or when, there was, in the words of Article 6, a "general close of military operations."³³ The renewed outbreak of international war in 1973 has been only one of several events that might have given rise to the argument that, even if military operations had earlier been viewed as closed, they had now reopened and, in consequence, the fourth 1949 Geneva Convention was again applicable *in toto*.

Third, even if Article 6, paragraph 3 were invoked, many important provisions of the Convention would remain in force. The burden of the article is that from 1 year after the general close of military operations an occupying power is only obliged to observe 43 of the 159 articles of the Convention. However, these 43 do include no less than 23 of the 32 articles of that part of the Convention—section III—which deals most specifically with occupied territories. The 43 articles are important, covering as they do such matters as the humane treatment of protected persons.

In section III (Articles 47–78), the nine articles by which the occupying power would cease to be bound in a long occupation are 48 (dealing with

³¹ Fourth Geneva Convention, *supra* note 7, Art. 6, para. 3.

³² E. COHEN, *HUMAN RIGHTS IN THE ISRAELI-OCCUPIED TERRITORIES 1967–1982*, at 51 (1985). Cohen also reports the opinion of Shabtai Rosenne, a legal adviser to the Israeli foreign ministry, given in a 1977 interview, that

the period of one year after the general cessation of hostilities set by the framers of Article 6 was arbitrary. While not admitting to the applicability of the Convention to the Israeli occupied territories, he felt that all the humanitarian provisions of the Convention, and not just those provided in Article 6, should be applied *de facto* . . .

Id. at 62 n.103.

³³ For an analysis written in 1969 or 1970 claiming that there had been no "general close of military operations" and that the Geneva Convention therefore remained fully applicable, see Hammad, *The Culprit, the Targets and the Victims*, in 2 *THE ARAB-ISRAELI CONFLICT* 366 (J. N. Moore ed. 1974).

foreign nationals in occupied territory), 50 (care and education of children), 54 (status of public officials and judges), 55 (food and medical supplies of the population), 56 (medical and hospital services), 57 (requisitioning of civilian hospitals), 58 (ministers of religion and articles for religious needs), 60 (relief consignments) and 78 (assigned residence and internment). The contents of these articles suggest that the framers of the 1949 Geneva Conventions may have optimistically assumed that, in the course of time, the rigors of occupation would gradually ease, and more and more responsibilities would be handed over to the institutions of the occupied territory.

The records of the 1949 Diplomatic Conference confirm this assumption. They show that the "one year after" provision in Article 6 was the subject of much debate.³⁴ In his *Commentary*, Jean Pictet states that in drawing up this provision, "the delegates naturally had in mind the cases of Germany and Japan." He goes on to defend the provision on the grounds that "if the Occupying Power is victorious, the occupation may last more than a year, but as hostilities have ceased, stringent measures against the civilian population will no longer be justified."³⁵

The final reason for doubting the importance of the provisions of Article 6, paragraph 3 of the fourth Geneva Convention is that Article 3(b) of Additional Protocol I effectively abrogates the "one year after" provision—at least so far as the parties to the Protocol are concerned. It states that "the application of the Conventions and of this Protocol shall cease, . . . in the case of occupied territories, on the termination of the occupation." Bothe, Partsch and Solf say of this abrogation:

Article 6(3) of the Fourth Convention . . . was a special *ad hoc* provision for certain actual cases, namely the occupation of Germany and Japan after World War II. There is no reason to continue to keep in force such provisions designed for specific historic cases. In 1972 the majority of government experts expressed a wish to abolish these time limits.³⁶

The abrogation of the "one year after" rule may reflect in part the proper desire of the international community to maintain the applicability of the law to occupations in general, and to areas occupied by Israel since 1967 in particular. However, the abandonment of Article 6, paragraph 3 has had little practical relevance to the Israeli-occupied territories. This was more because of the factor already mentioned (these provisions of Article 6 were

³⁴ See, e.g., 2A FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949, at 623–25.

³⁵ Pictet, *supra* note 7, at 62–63. In addition, Pictet suggests that where there has been no military resistance, no state of war and no armed conflict, the Convention will remain fully applicable as long as the occupation lasts. However, it is far from clear (1) whether this was the intention of the negotiators; and (2) what the logic is in treating such occupations differently.

³⁶ M. BOTHE, K. PARTSCH & W. SOLF, NEW RULES FOR VICTIMS OF ARMED CONFLICTS 59, also 57 (1982). See also COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 68 (Y. Sandoz, C. Swinarski & B. Zimmermann eds. 1987).

not invoked by Israel anyway) than because of the more legalistic point that Israel has neither signed nor ratified Protocol I.

In general, the "one year after" provision of 1949 must be viewed as a legal oddity. It may have correctly identified a problem—that the rules designed for belligerent occupation during a war may require some modification in a prolonged occupation—but the solution it proposed was not equally appropriate to all occupations, and it has not commended itself greatly to military administrators, inhabitants of occupied territories or international lawyers.

Other Possibilities of Variations

The main conventions relating to military occupations do not provide for any other variation in the rules specifically because of the length of an occupation. This omission does not mean that the conventions are inflexible or cumbersome on this matter. Rather, they contain a modest number of rules, intended primarily to prevent repetition of the worst excesses of previous occupation regimes. They do not govern all aspects of life, and their provisions leave substantial room for different policies, practices and administrative systems. There are in fact many general possibilities for variations, and these could be germane in a prolonged occupation, as well as in other cases.

The scope for variation within the existing conventions is illustrated by the matter of the occupant's structure of authority, which can assume many different forms. The 1907 Hague Regulations refer variously to "the hostile army," "the occupant," "a commander-in-chief," "the commander in the locality occupied," "an army of occupation" and "the occupying State" as the bodies or individuals that exercise authority in occupied territory.³⁷ The fourth Geneva Convention, which refers throughout to the "Occupying Power" as the body with authority in occupied territory, says nothing about the precise administrative form of the occupation regime. Protocol I is identical in this regard. There is widespread agreement that the occupying power has substantial discretion as to whether it operates through a military or a civil administration, and whether through an imposed administrative system or indigenous authorities.³⁸

³⁷ 1907 Hague Regulations, *supra* note 4, Arts. 42, 43, 48, 49, 51, 52, 53 and 55.

³⁸ In *K.N.A.C. v. State of the Netherlands*, 16 Ann. Dig. 468 (Dist. Ct. The Hague 1949), the court said:

Though the régime envisaged by the Hague Regulations for occupied territory comprised a military administration with civil departments subordinate to it, the setting up by the Occupant of a separate civil administration to control the existing civil administration left functioning, was not forbidden and must, on the contrary, be held to be a permissible complement of the maintenance of the latter administration in office.

Id.

In the Ansar Prison case (No. H.C. 593/82) (July 13, 1983), telex transcript 13, the Israeli Supreme Court said, apropos of Israel's occupation of parts of Lebanon: "the application of the third chapter of the Hague Rules or of the parallel instructions in the Fourth [Geneva] Convention are not conditioned upon the establishment of a special organizational framework in the

Some possibilities of variations are also evident in the rules on taxation. The Hague Regulations state in Article 48:

If, in the territory occupied, the occupant collects the taxes, dues, and tolls imposed for the benefit of the State, he shall do so, as far as is possible, in accordance with the rules of assessment and incidence in force, and shall in consequence be bound to defray the expenses of the administration of the occupied territory to the same extent as the legitimate Government was so bound.³⁹

Commenting on this article, Ernst Feilchenfeld says:

The provision would not seem to exclude, as has been asserted, taxation increases, particularly such changes as have been made desirable through war conditions or, in the case of an extended occupation, general changes in economic conditions.

. . . [I]f the occupation lasts through several years the lawful sovereign would, in the normal course of events, have found it necessary to modify tax legislation. A complete disregard of these realities may well interfere with the welfare of the country and ultimately with "public order and safety" as understood in Article 43.⁴⁰

Special agreements between the high contracting parties are allowed for in the fourth Geneva Convention. Such agreements can be about practically any matter, as long as the principle spelled out in Article 7, paragraph 1 is observed: "No special agreement shall adversely affect the situation of protected persons, as defined by the present Convention, nor restrict the rights which it confers upon them." In section III (on occupied territories), Article 47 further specifies that protected persons shall not be deprived of the benefits of the Convention "by any agreement concluded between the authorities of the occupied territories and the Occupying Power."⁴¹

IV. THE ISRAELI-OCCUPIED TERRITORIES

In the wake of the June 1967 war, Israel was in control of the following territories.

The West Bank. This is the area, previously under Jordanian rule, that lies between the River Jordan and Israel proper (i.e., Israel in its pre-1967 borders). On December 17, 1967, the Israeli military government issued an order stating that "the term 'the Judea and Samaria Region' shall be identi-

form of a Military Government . . ." For extracts and a short summary of this leading judgment, see 13 ISR. Y.B. HUM. RTS. 360 (1983).

On various possible forms of administrative structure under occupation, see U.S. DEP'T OF THE ARMY, THE LAW OF LAND WARFARE 10, 139 and 141 (Field Manual No. 27-10, 1956); and UK WAR OFFICE, *supra* note 7, at 145. For an indication that there are limits to the constitutional changes an occupying power may bring about, see Pictet, *supra* note 7, at 273.

³⁹ 1907 Hague Regulations, *supra* note 4, Art. 48.

⁴⁰ E. FEILCHENFELD, THE INTERNATIONAL ECONOMIC LAW OF BELLIGERENT OCCUPATION 49 (1942).

⁴¹ Fourth Geneva Convention, *supra* note 7, Arts. 7(1) and 47.

cal in meaning for all purposes . . . to the term 'the West Bank Region'." This change in terminology, which has been followed in Israeli official statements since that time, reflected a historic attachment to these areas and rejection of a name that was seen as implying Jordanian sovereignty over them.⁴² The 1978 Camp David accords, signed by Egypt and Israel, contained extensive provisions for a "self-governing authority" in the West Bank and Gaza; these provisions—heavily criticized by Arab governments, by the leadership of the Palestine Liberation Organization (PLO) and by the residents of the territories—were never implemented.⁴³

The Gaza Strip. This area was administered from 1948 to 1967 by Egypt, which did not claim sovereignty over it. Israeli official statements generally refer to it as "the Gaza Region." Gaza was mentioned both in the 1978 Camp David accords and in the 1979 Israel-Egypt Treaty of Peace (see below).

East Jerusalem. This area, previously part of the West Bank, came under Israeli law, with extended boundaries, on June 28, 1967, and was formally annexed on July 30, 1980.⁴⁴

The Golan Heights. This area, part of Syria, has been under Israeli control since 1967. In the 1973 Middle East war, Israel gained additional Syrian territory in the area. Following the 1974 Israeli-Syrian disengagement agreement, Israel withdrew from all this additional territory, and also from some areas occupied in the 1967 war, including the devastated town of Quneitra.⁴⁵ Israeli law was extended to the Golan Heights on December 14, 1981.⁴⁶

The Sinai Peninsula. This area, part of Egypt, came under Israeli control in 1967. For administrative purposes, the Israeli authorities divided it into two military government units: Northern Sinai (which was comparatively more inhabited), and Central and Southern Sinai (containing only a sparse Bedouin population). Israel withdrew progressively from Sinai—initially under two partial disengagement agreements, concluded in 1974 and 1975;⁴⁷ and

⁴² Rubinstein, *The Changing Status of the "Territories" (West Bank and Gaza): From Escrow to Legal Mongrel*, 8 TEL AVIV U. STUD. IN L. 61 (1988). On Jordan's 1988 disengagement from the West Bank, see *infra* text at note 120.

⁴³ Camp David Agreements, Sept. 17, 1978, Egypt-Israel-United States, 17 ILM 1466 (1978).

⁴⁴ The enabling legislation for the extension of Israeli law and of municipal boundaries was the Municipalities Ordinance (Amendment No. 6) Law, June 27, 1967, 21 LAWS OF THE STATE OF ISRAEL 75 (1967). The act of annexation was the Basic Law: Jerusalem, Capital of Israel, July 30, 1980, 34 *id.* at 209 (1980). For a succinct Israeli exposition, see Y. BLUM, *THE JURIDICAL STATUS OF JERUSALEM* (Jerusalem Papers on Peace Problems No. 2, Hebrew University, 1974).

⁴⁵ Agreement on Disengagement between Israeli and Syrian Forces, May 31 and June 5, 1974, 13 ILM 880 (1974). The Israeli military withdrawal to the new lines was completed by June 26, 1974.

⁴⁶ Golan Heights Law, Dec. 14, 1981, 36 LAWS OF THE STATE OF ISRAEL 7 (1982).

⁴⁷ Agreement on Disengagement of Forces in Pursuance of the Geneva Peace Conference, Jan. 18, 1974, Egypt-Israel, 13 ILM 23 (1974), which provided for the withdrawal of all Israeli forces from the areas they had held west of the Suez Canal since the cease-fire at the end of the

then under the 1979 Peace Treaty, which laid down a timetable for phased total Israeli withdrawal, completed on April 25, 1982.⁴⁸ In 1989 Israel withdrew, additionally, from a small remaining disputed area at Taba.⁴⁹

Although East Jerusalem and the Golan Heights have been brought directly under Israeli law, by acts that amount to annexation, both of these areas continue to be viewed by the international community as occupied, and their status as regards the applicability of international rules is in most respects identical to that of the West Bank and Gaza.⁵⁰

In addition to the above territories, Israel briefly occupied parts of southern Lebanon during the Litani operation of March–June 1978. It occupied larger areas of Lebanon following the invasion of June 1982, and has maintained a security zone in the south since its withdrawal from the rest of the country in 1985. Although Israel did not establish a formal military-administrative system in Lebanon along the same lines as in other areas, its position was properly viewed as that of an occupant.⁵¹

For the most part, the Israeli occupation of territories since 1967 does belie the assumption that occupation is temporary. However, this brief listing shows that prolonged occupation does not necessarily mean permanent control: at least some areas, Sinai and part of the Golan, were returned (to Egypt and Syria, respectively) after long spells under Israeli control.

A full political analysis of the reasons for the exceptional length of this occupation is beyond the scope of this article. The problems of ethnicity and nationhood in the Middle East, which are thrown into such sharp relief in

1973 war, and for an Israeli pullback east of the canal to the area covered by the Mitla and Giddi Passes; and Agreement on the Sinai and Suez Canal, Egypt-Israel, Sept. 4, 1975, and various associated agreements, 14 ILM 1450 (1975), which provided for an Israeli withdrawal from a further 2,500 square miles of occupied Egyptian territory in Sinai, including the oil fields at Ras Sudar and Abu Rudeis, in return for certain Egyptian political undertakings, and on the basis of major pledges and commitments by the United States. Full implementation of the latter agreement was completed on Feb. 22, 1976.

On the background, content and implementation of these agreements, and the role of the United States and United Nations, see KEESING'S CONTEMPORARY ARCHIVES 26,317, 27,429 and 28,381 (1974, 1975 and 1977).

⁴⁸ Treaty of Peace, Mar. 26, 1979, Egypt-Israel, 18 ILM 362 (1979). Article II stated: "The permanent boundary between Egypt and Israel is the recognized international boundary between Egypt and the former mandated territory of Palestine . . . without prejudice to the issue of the status of the Gaza Strip."

⁴⁹ Agreement Regarding the Permanent Boundary Between Egypt and Israel, Feb. 26, 1989, 28 ILM 611 (1989). This Agreement followed the Egypt-Israel arbitral tribunal award of Sept. 29, 1988, 27 ILM 1421 (1988). The disputed area at Taba was returned to Egypt on Mar. 15, 1989.

⁵⁰ See, e.g., UN General Assembly and Security Council resolutions, *infra* notes 79, 86–88 and 153. The Israeli laws on the status of East Jerusalem and the Golan Heights do not use the word "annexation" and do not extend Israeli citizenship to the local population.

⁵¹ It was so viewed by the Israeli Supreme Court in the Ansar Prison case, *supra* note 38, 13 ISR. Y.B. HUM. RTS. at 362–63. A question in the Knesset on Mar. 23, 1983, yielded the answer that the provisions of the fourth Geneva Convention were applied in Lebanon "on humanitarian grounds," implying that the Convention was not viewed as formally applicable. Rubinstein, *supra* note 42, at 63.

the occupied territories, have deep historical roots. The outside powers involved in the area in the past, including Britain, did not resolve these problems and may have made them worse. Throughout this century, most attempts to achieve a negotiated settlement of Jewish-Arab tensions in the Middle East have failed. Since 1967, Israel has maintained its occupation for a mixture of reasons that have included understandable security concerns, religious-fundamentalist expansionism and inertia. The situation was made more difficult to the extent (which is a matter of debate) that the PLO, Arab states and/or Israel failed to come forward with credible proposals for the future of the occupied territories. Such proposals necessarily involve grasping many extremely painful nettles: acceptance of the existence of Israel; the creation of a Palestinian state that might be radical, or unstable, or both; and possible conflict within Arab states, or between them, if the Palestinian cause or the PLO leadership is alleged to have been "betrayed" in a diplomatic compromise. Numerous other real or presumed obstacles to political settlement could be cited: various aspects of PLO, and Israeli, activities and pronouncements; and Israel's refusal to engage in direct talks with the PLO. At the superpower level, there has been a long history of disagreement between the United States and the USSR on the nature of the Middle East conflict and possible means of its amelioration. In this, as in some other cases of prolonged occupation, there can be no assumption that apportionment of blame for the length of the occupation will be a productive exercise, or will yield simple answers.

The Israeli occupation since 1967 has contained many special features quite apart from its unusual duration. These features, which inevitably inform the discussion in this article, include (1) the undecided previous legal status of the West Bank and Gaza; (2) the dispute over whether the Palestinians constitute an appropriate unit of self-determination; (3) the persistence of a threat to Israel itself, and of various types of violent incidents, all of which have tended to erode neat distinctions between "war" and "peace"; and (4) the existence among Israelis of expansionist and annexationist ideas of various kinds, which call into doubt the very idea of Israel as having only a provisional role in the occupied territories.

V. APPLICABILITY OF THE LAW ON OCCUPATIONS TO THE ISRAELI OCCUPATION

To consider how the law may be interpreted or varied to take account of the prolonged character of a particular occupation, it is first necessary to survey, at least briefly, some of the main viewpoints on what laws of war rules have been viewed as applicable to that occupation anyway.

The facts about states parties to treaties are straightforward: the states most directly involved (Israel, Egypt, Jordan and Syria) are formally bound by the principal international agreements governing occupations as follows:⁵²

⁵² See *supra* notes 22-27 for the sources of depositary information about the states parties to these agreements, their customary law status, and details of declarations, reservations, etc.

The fourth 1907 Hague Convention. None of the states involved has ever been a formal party. However, in view of the customary law status of the Regulations annexed to the Convention, all are bound.

The four 1949 Geneva Conventions. Israel and Jordan ratified these agreements in 1951, Egypt in 1952, and Syria in 1953.

The 1954 Hague Cultural Property Convention, and Protocol. Egypt ratified both in 1955, Jordan both in 1957, and Syria both in 1958; Israel ratified the Convention in 1957, and registered its accession to the Protocol in 1958.

The 1977 Geneva Protocol I. Israel has not made any indication of adherence; Egypt has signed but not ratified; Jordan ratified in 1979; and Syria acceded in 1983.⁵³

The Official Israeli View

Israeli positions on the applicability of international legal norms in the occupied territories are complex and occasionally misunderstood. There have been some variations over time, and in different forums. They have to be seen against the background of changing political views about the significance or otherwise of the "green line" separating Israel proper from the land held since 1967; and official use of such terms as "administered territories," rather than the blunter "occupied territories." The seminal legal statement remains that by Shamgar in 1971, which first advanced the argument that the terms of an agreement whose *de jure* applicability might be in doubt could nevertheless be applied on a *de facto* basis.⁵⁴

This principle applies particularly to the fourth 1949 Geneva Convention. Since the end of the June 1967 war, Israel has never stated that the Convention is formally applicable in the occupied territories on a *de jure* basis. However, it has indicated, along the lines advanced by Shamgar in 1971, that it is willing to observe the "humanitarian provisions" of this Convention.⁵⁵ For some years, Israel's voting on UN General Assembly

⁵³ Syria, at accession in November 1983, made a declaration that its accession to Protocol I in no way amounts to recognition of Israel or the establishment of any relations with it regarding the application of the Protocol.

In a note to the depositary, Israel objected to this declaration: "the Geneva Conventions and the Protocols are not the proper place for making such hostile political pronouncements, which are, moreover, in flagrant contradiction to the principles, objects and purposes of the Conventions and the Protocols." The Syrian declaration "cannot in any way affect whatever obligations are binding . . . under general international law or under particular conventions." As for the substance of the matter, Israel would adopt towards Syria "an attitude of complete reciprocity." Roberts & Guelff, *supra* note 22, at 466-67.

⁵⁴ Shamgar, *The Observance of International Law in the Administered Territories*, 1 ISR. Y.B. HUM. RTS. 262-77 (1971). This very influential article was first presented at a symposium at Tel Aviv University in 1971, when the author was Attorney General.

⁵⁵ *Id.* at 266; and Rubinstein, *supra* note 42, at 63. The latter refers to Order No. 3 as evidence that immediately after the 1967 war it seemed clear that the Convention would apply to the territories. However, that proclamation was in fact issued during the war; and, as he notes, the section mentioning the Convention was repealed soon after the war.

resolutions reflected the view that the applicability of the Convention was an open question; but since 1977, it has voted against *de jure* applicability.⁵⁶

As to the 1907 Hague Regulations, whose provisions are briefer and more general, the present position is simpler. Their applicability, whether on a *de facto* or a *de jure* basis, is widely accepted.⁵⁷ Esther Cohen has gone so far as to say that "no problem arises in regard to the Hague Regulations . . . The official Israeli position is that these Regulations are applicable to the Israeli-occupied territories . . ." She has indicated that the only real question about the applicability of the Regulations concerns areas (East Jerusalem and the Golan Heights) that Israel has in effect sought to annex.⁵⁸ However, in the late 1970s, some authoritative statements cast doubt on the formal applicability of the Hague Regulations.⁵⁹ Some Supreme Court judgments before 1979 avoided expressing a view on whether the Hague Convention applied to the administered areas.⁶⁰ Since the 1979 decision of the Supreme Court in the *Beth-El* case, a more positive view about the applicability and justiciability of the Hague Regulations has prevailed, based largely on acceptance that they are part of customary law.⁶¹

Israel deserves credit for acknowledging openly, albeit inadequately, the relevance of international legal standards. Its position contrasts with those of the many occupying powers in the past 40 years that have avoided expressing any view on the applicability of international legal agreements: such powers have included the Soviet Union in Hungary (1956), Czechoslovakia (1968) and Afghanistan (1979); and South Africa in Namibia. Israel also deserves credit for cooperating with the International Committee of the Red Cross, which has played an important role in the occupied territories by performing a wide range of tasks, including, in particular, monitoring conditions of detention.⁶²

Nevertheless, Israel's position regarding the fourth Geneva Convention is unsatisfactory in several respects, and merits closer scrutiny. The scope of

⁵⁶ Resolutions on the applicability of the fourth Geneva Convention on which Israel abstained: GA Res. 3092A (XXVIII) (Dec. 7, 1973); GA Res. 3240B (XXIX) (Nov. 29, 1974); and GA Res. 31/106B (Dec. 16, 1976). Since 1977, Israel has always voted against the applicability of the Convention: see *infra* note 87.

⁵⁷ See Shamgar, *supra* note 54; see also Shamgar, *supra* note 30, at 48; Nathan, *The Power of Supervision of the High Court of Justice over Military Government*, in *MILITARY GOVERNMENT*, *supra* note 30, at 109, 129, 131-32 and 163-66. Nathan says re the Preamble to the Hague Convention: "This language would appear to express the intention of the parties . . . that insofar as the Regulations embody norms of international law, these are binding as minimum standards of international law, even in situations not directly covered by the Regulations." *Id.* at 132.

⁵⁸ E. COHEN, *supra* note 32, at 43, 51 and 58 nn.49, 50.

⁵⁹ For elements of such doubt about the fourth Hague Convention, see the Israeli Ministry of Foreign Affairs, Memorandum of Law (Aug. 1, 1977), 17 ILM 432, 432-33 and 442 (1978) (on offshore oil exploration in the Gulf of Suez). See also *infra* note 162 and accompanying text.

⁶⁰ See *infra* note 175 and accompanying text.

⁶¹ See *infra* text at notes 166-79.

⁶² See the ICRC statement on the 20th anniversary of the occupation, ICRC BULL., No. 137, June 1987, at 1, noting that the ICRC has had free access to all the occupied territories, but listing a number of "persistent violations" of the fourth Geneva Convention.

application of the Convention is stated in common Article 2, whose first two paragraphs read as follows:

In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.⁶³

The publicly stated grounds for Israel's skepticism about the applicability of the Convention relate to the pre-1967 status of the West Bank and Gaza. Before 1967, Israel did not accept that these territories were part of Jordan and Egypt, respectively. The territories therefore could not be viewed as "the territory of a High Contracting Party" within the meaning of the second paragraph of common Article 2; rather, they had been under Jordanian and Egyptian occupation. Israel expressed concern that by accepting the automatic application of the Convention, it might appear to accord Jordan and Egypt the status of an ousted sovereign with reversionary rights.⁶⁴

This Israeli interpretation is open to several serious objections. Four principal ones are: (1) It has sometimes been based on what appears to be a technical error. To refer to the terms of the *second* paragraph of common Article 2 is of limited relevance, because it is in fact the *first* paragraph that applies when a belligerent occupation begins during a war. As shown above, this paragraph says nothing about "the territory of a High Contracting Party," referring simply to "all cases of declared war or of any other armed conflict" arising between two or more of the high contracting parties.⁶⁵ (2) The Israeli interpretation was never relevant to those occupied territories (Sinai and the Golan) whose pre-1967 status was not disputed by Israel,

⁶³ Fourth Geneva Convention, *supra* note 7, Art. 2, paras. 1-2.

⁶⁴ The clearest expositions of this Israeli view are in Blum, *The Missing Reversioner: Reflections on the Status of Judea and Samaria*, 3 ISR. L. REV. 279 (1968); Shamgar, *supra* note 30, at 13-60; and Farhi, *On the Legal Status of the Gaza Strip*, in MILITARY GOVERNMENT, *supra* note 30, at 61-83.

Crown Prince Hassan Bin Tallal of Jordan has denied that Jordan's position in the West Bank up to 1967 was that of occupant. He does not specify the precise status Jordan did have there. He argues that even if Jordan was a belligerent occupant up to 1967, it would not follow that Israel was free of legal limitations after 1967—especially in light of the provisions of the Geneva Convention. H. BIN TALLAL, *PALESTINIAN SELF-DETERMINATION: A STUDY OF THE WEST BANK AND GAZA STRIP* 67-68 (1981).

⁶⁵ For an authoritative Israeli statement relying on the second paragraph of common Article 2, see Shamgar, *supra* note 54, at 262-77. See also his revised presentation (responding to the argument that the relevant paragraph is the first, not the second) in Shamgar, *supra* note 30, at 37-40.

For a commentary on Article 2, see Pictet, *supra* note 7, at 21, which leaves little room for doubt that it is the first paragraph that is relevant to the territories occupied by Israel in the 1967 war.

which were therefore clearly "the territory of a High Contracting Party." (3) It has not been advanced consistently: similar objections could be, but seldom have been, made about the applicability of the Hague Regulations, which contain a similar assumption; namely, that occupied territory is "territory of the hostile state." (4) The Israeli position ignores or understates the precedents for viewing the laws of war, including the law on occupations, as being formally applicable even in cases that differ in some respect from the conditions of application spelled out in the Hague Regulations and the Geneva Conventions.⁶⁶

In fact, Israel has got into a little-noted logical muddle on the applicability of the Hague and Geneva Conventions. Distinguished Israeli lawyers have asserted that the status of belligerent occupation is dependent on the continued existence of a state of war between two countries. As Yoram Dinstein put it in 1978: "Belligerent occupation continues as long as the occupant remains in the area and war goes on. That is to say, it is terminated if the occupant withdraws from the area or the war comes to a close (either with the occupant's victory or his defeat)."⁶⁷ Likewise, the Supreme Court indicated in a judgment on March 15, 1979, that the application of the law was linked to a state of belligerency.⁶⁸ However, since the Israeli-Egyptian Peace Treaty of March 26, 1979, there has been no state of belligerency between Israel and Egypt. Thus, the Gaza Strip has even more certainly than before not been "territory of the hostile state." Yet Israel has continued to justify its powers and actions there with reference to the law of belligerent occupation, including the Hague Regulations.⁶⁹ This is reasonable; but it shows that Israel itself, when it chooses, is prepared to depart from its own strict legal logic about the circumstances in which the relevant rules and conventions are applicable.

Several Israeli writers have argued that whether the fourth Geneva Convention is formally applicable or not is academic because of Israel's stated willingness to observe the "humanitarian provisions."⁷⁰ However, formal applicability versus *de facto* application is not always a distinction without a

⁶⁶ See *supra* note 20.

⁶⁷ Dinstein, *The International Law of Belligerent Occupation and Human Rights*, 8 ISR. Y.B. HUM. RTS. 105 (1978).

⁶⁸ Justice Witkon, judgment in the Beth-El case (H.C. 606/78 and 610/78), translated in MILITARY GOVERNMENT, *supra* note 30, at 371, 374:

Each of us obviously knows of recent political developments that have occurred in our region, of the peace negotiations . . . We deal with the rights of the parties according to the existing situation prevailing between Israel and the Arab countries. This situation is one of belligerency, and the status of the respondents in respect of the occupied territory is that of an occupying power.

On the Beth-El case, see also *infra* text at notes 166-71.

⁶⁹ See Dinstein, *The Israel Supreme Court and the Law of Belligerent Occupation: Reunification of Families*, 18 ISR. Y.B. HUM. RTS. 173, 173-74 (1988).

⁷⁰ See, e.g., Haim H. Cohn, *Foreword to THE RULE OF LAW IN THE AREAS ADMINISTERED BY ISRAEL*, at vii-viii (Israel National Section of the International Commission of Jurists, 1981); M. BENVENISTI, *THE WEST BANK DATA PROJECT: A SURVEY OF ISRAEL'S POLICIES* 37 (American Enterprise Institute, 1984); and Shamgar, *supra* note 30, at 32-33 and 42-43.

difference, for three main reasons. First, although the term "humanitarian provisions" is often interpreted to mean all of the provisions, Israel has never definitively clarified this point by specifying which provisions it regards as humanitarian. Second, the rejection of formal applicability has frequently been referred to in Israeli court proceedings, and has in the past been one of several factors making the courts reluctant to base their decisions fairly and squarely on the fourth Geneva Convention.⁷¹ Third, the hint of *ex gratia* about Israel's application of the Convention could be construed as carrying an implication that it might unilaterally interpret, or eventually abrogate, its terms.

Israel's refusal to accept the full *de jure* applicability of the fourth Geneva Convention has not proved persuasive. It has been criticized by many legal writers, including some in Israel itself;⁷² and, as mentioned below, it has been decisively rejected by virtually all the members of the international community—at least if their votes in the United Nations are a guide.⁷³

PLO Views

There has never been a full and authoritative exposition of PLO views on the international legal status of the territories occupied by Israel since 1967. The PLO has been in something of a quandary, principally because of the organization's commitment in the 1968 Palestinian National Covenant: "Palestine, with the boundaries it had during the British mandate, is an indivisible territorial unit."⁷⁴ Consequently, for a long time the PLO was reluctant to draw clear legal distinctions between the lands controlled by Israel before and after June 1967. The fact that until 1984 the PLO had no specialized agencies concerned with legal aspects of the Palestine question contributed to the confusion.⁷⁵

The PLO has sometimes advanced the view that Israel is an aggressor or illegal occupant, and as such has no rights over the inhabitants under international law. The concept of "illegal occupation," and the related proposition that an illegal occupant has no rights, have precedents, not least in the writings of some Soviet and Polish lawyers about the Nazi occupations in the Second World War.⁷⁶ In 1970 a PLO Research Center Publication took this

⁷¹ On the Supreme Court's position in this regard, see *infra* text at notes 165–73.

⁷² For a reasoned account and criticism by a leading Israeli international lawyer, see Dinstein, *supra* note 67, especially at 106–08. See also E. COHEN, *supra* note 32, at 51–56; and Rubinstein, *supra* note 42, at 63–67. For a critical view by a British academic, see J. R. GAINSBOROUGH, *THE ARAB-ISRAELI CONFLICT: A POLITICO-LEGAL ANALYSIS* 159 (1986).

⁷³ See *infra* notes 86–88 and accompanying text.

⁷⁴ Art. 2, Palestinian National Covenant, adopted by the PLO at its National Congress in Cairo in July 1968. The boundaries of Palestine during the British Mandate (which ended in 1947) encompassed all of the territory of Israel in its 1949–1967 frontiers, plus the Gaza Strip and the West Bank; they had also encompassed Jordan until 1922. For the text and exposition of Article 2, including discussion of whether it involves a claim to Jordan, see Y. HARKABI, *THE PALESTINIAN COVENANT AND ITS MEANING* 33–39 and 113 (1979).

⁷⁵ 2 *PALESTINE Y.B. INT'L L.* 191 (1985).

⁷⁶ See especially Trainin, *Questions of Guerrilla Warfare in the Law of War*, trans. from Russian and reprinted in 40 *AJIL* 534, 535 (1946).

line.⁷⁷ Likewise, in 1981 a PLO document submitted to UNESCO about Military Order 854 of July 6, 1980 (which sought to bring higher education in the occupied territories under Israeli control), challenged the right of the Israeli authorities to justify it "on the basis of statements 'under international law' made by foreign authors in completely different contexts . . . because the existing occupation . . . has been illegalized by the Community of Nations which unanimously requested putting an end to it on various occasions and in many resolutions."⁷⁸

What these Palestinian writers appear to be suggesting is not that the law on occupations is not applicable at all, but rather that Israel cannot claim any rights under that law. This argument is questionable on several grounds. First, it is debatable whether Israel was an "aggressor" in 1967, or acted out of a basically defensive intent. There is also reason to doubt whether the occupation itself (as distinct from some of the actions by the occupying power) has been definitively considered illegal by the international community.⁷⁹ But these points pale into insignificance beside the cardinal principle that the laws of war, including the law on occupations, are widely viewed as applying equally to all states, whether aggressors or victims of aggression. Moreover, it seems strange to insist that Israel or any other country could be expected to carry out all its obligations under the conventions, without at the same time having certain rights, or at least being "suffered" by international law to take certain actions.

This Palestinian view has not commanded any significant international support, and by no means all Palestinian writers on these matters have

⁷⁷ F. YAHIA, *THE PALESTINE QUESTION AND INTERNATIONAL LAW* 184 (PLO Research Center, Beirut, 1970).

⁷⁸ UNESCO Doc. 22 C/18 (Aug. 30, 1983).

⁷⁹ The term "illegal occupation" has been used sparingly in UN resolutions. As regards the Israeli-occupied territories, GA Res. 32/20 (Nov. 25, 1977) expressed concern "that the Arab territories occupied since 1967 have continued, for more than ten years, to be under illegal Israeli occupation." The term was also used in GA Res. 33/29 (Dec. 7, 1978). These resolutions were the exception rather than the rule. The voting figures for each resolution, showing countries for and against and abstentions (102-4-29 and 100-4-33, respectively), contain substantially fewer votes in favor than most General Assembly resolutions criticizing the Israeli occupation attracted in those years.

Some resolutions have implied the illegality of the occupation per se, without actually using the term "illegal occupation." For example, GA Res. 43/54A (Dec. 6, 1988) "[c]ondemns Israel's continued occupation of the Palestinian territory occupied since 1967, including Jerusalem, and the other occupied Arab territories, in violation of the Charter of the United Nations, the principles of international law and the relevant resolutions of the United Nations." Voting was 103-18-30.

The great majority of the numerous resolutions of the UN General Assembly and the Security Council on the Israeli occupation have not stated that it is illegal per se. They have deplored Israel's conduct of the occupation, have condemned as illegal the purported annexation of parts of the occupied territories (including Jerusalem), and have called upon Israel to put an end to its occupation of Arab territories—but have not stated that the fact of the occupation is in itself illegal. See, e.g., GA Res. 41/63 (Dec. 3, 1986) and GA Res. 43/58A-G (Dec. 6, 1988). The omission of the term "illegal occupation" from most UN resolutions on the Arab-Israeli conflict is in sharp contrast to its repeated use in those on Namibia. See *supra* note 9.

subscribed to it.⁸⁰ In statements in the last few years, the PLO has not reiterated the view, and indeed may have retreated from it in changing its policy in the direction of gradual acceptance of the existence of Israel.⁸¹ However, there does not appear to have been a clear PLO statement formally renouncing this view.

The Idea of "Trustee Occupation"

International laws and institutions, including the United Nations, have long recognized the reality that certain territories and peoples are not self-governing, and that outside powers can exercise certain trustee-like functions in such territories.⁸² Could Israel's occupation be viewed as at least an analogous case?

The idea that Israel's occupation of the West Bank might be of a special kind termed "trustee occupation" was advanced by Allan Gerson in 1973 and 1978.⁸³ His reasoning in support of this proposition was, briefly, as follows: Since Israel's rights to sovereignty over the West Bank are not superior to those of either Jordan or the indigenous population, Israel's status is that of occupant, not lawful sovereign. Yet the law of belligerent occupation imposes heavy constraints on the alteration of the political status quo ante—constraints that may be contrary to the interests of the inhabitants of the West Bank, as any momentum towards self-determination may be stifled. This reasoning reflects real concerns and points to a central problem in applying the law on occupations in these territories.

Nevertheless, there is doubt about the extent to which "trustee occupation" can usefully be viewed as a distinct legal category. Gerson himself leaves some doubt about what body of law would apply in such a case. In fact, as noted above, under its common Article 2, the fourth Geneva Convention is applicable to a wide range of occupations and not just to "belligerent occupation" narrowly defined. Moreover, some idea of "trusteeship" is implicit in all occupation law anyway. Finally, the central question, which has become even more difficult since Gerson wrote, is whether Israel could be viewed, either by Palestinians or by the international community, as an appropriate trustee for Palestinian interests. However, he does frankly accept that Israel has not in fact assumed the role of "trustee occupant."⁸⁴

⁸⁰ Palestinian works that appear to accept that the occupied territories are subject to the normal rules relating to occupations include R. SHEHADEH, *OCCUPIER'S LAW: ISRAEL AND THE WEST BANK* (Institute for Palestine Studies, Washington, D.C., 1985); and Kassim, *Legal Systems and Developments in Palestine*, 1 PALESTINE Y.B. INT'L L. 19, 29-32 (1984). However, neither of these studies contains a sustained and concentrated discussion of what parts of international law are applicable in the occupied territories.

⁸¹ See *infra* text at note 121.

⁸² See, e.g., the provisions regarding non-self-governing territories, and also regarding the trusteeship system, in UN CHARTER Arts. 73-85.

⁸³ Gerson, *Trustee Occupant: The Legal Status of Israel's Presence in the West Bank*, 14 HARV. INT'L L.J. 1 (1973); A. GERSON, *ISRAEL, THE WEST BANK AND INTERNATIONAL LAW* 78-82 (1978).

⁸⁴ A. GERSON, *supra* note 83, at 82.

The View of the International Community

The view that the fourth Geneva Convention is applicable, and should be applied, in all the territories occupied by Israel since 1967 has been very widely held internationally. Indeed, a remarkable degree of unanimity prevails on this matter. Countless international organizations, both intergovernmental and nongovernmental, have taken this view.⁸⁵ Within the UN General Assembly, it has been upheld from the beginning of the occupation.⁸⁶ Since 1973, Israel has completely lacked positive support in the voting on General Assembly resolutions on this specific issue.⁸⁷ Since the beginning of the occupation, the Security Council has also consistently urged the applicability of the Convention.⁸⁸

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⁸⁵ The ICRC has done so consistently. See ICRC, *Annual Reports* for 1968 and subsequent years; and its statement, *supra* note 62.

⁸⁶ The first such resolution, urging in general terms respect for the principles contained in the third and fourth 1949 Geneva Conventions, was GA Res. 2252 (ES-V) (July 4, 1967) (116-0-2) (the figures in parentheses are votes for, votes against and abstentions).

In 1968 came the first of a stream of resolutions making specific comments about the occupied territories, and calling on Israel to comply with the fourth Geneva Convention, as well as with various other agreements, including the 1948 Universal Declaration of Human Rights. See GA Res. 2443 (XXIII) (Dec. 19, 1968) (60-22-37). Similar resolutions in the first 5 years of the occupation included GA Res. 2727 (XXV) (Dec. 15, 1970) (52-20-43); and GA Res. 3005 (XXVII) (Dec. 15, 1972) (63-10-49). The resolutions in this period attracted less support than the 1967 resolution cited above, and less than those from 1973 onwards mentioned in note 87. There are many possible reasons for this: one that should not be overlooked is that in these years the resolutions tended to combine statements about what law was applicable with other, more contentious statements.

⁸⁷ See, e.g., the following resolutions (in all cases of a negative vote, i.e., from 1977 onwards, it is Israel's):

GA Res. 3092A (XXVIII)	(Dec. 7, 1973)	(120-0-5)
GA Res. 3240B (XXIX)	(Nov. 29, 1974)	(121-0-7)
GA Res. 32/5	(Oct. 28, 1977)	(131-1-7)
GA Res. 35/122A	(Dec. 11, 1980)	(141-1-1)
GA Res. 38/79B	(Dec. 15, 1983)	(146-1-1)
GA Res. 41/63B	(Dec. 3, 1986)	(145-1-6)
GA Res. 43/58B	(Dec. 6, 1988)	(148-1-4)

The United States voted for these resolutions in some years (1973, 1974 and 1980), and abstained in the others. However, the United States continued to state that it viewed the Convention as applicable. "The United States recognizes Israel as an occupying power in all of these territories and therefore considers Israeli administration to be subject to the Hague Regulations of 1907 and the 1949 Fourth Geneva Convention concerning the protection of civilian populations under military occupation." U.S. DEPARTMENT OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1987, 100th Cong., 2d Sess. 1189 (1988).

⁸⁸ For example, SC Res. 237 (June 14, 1967), adopted unanimously (4 days after the cease-fire came into effect), recommended to the governments concerned "the scrupulous respect of the humanitarian principles governing the treatment of prisoners of war and the protection of civilian persons in time of war contained in the Geneva Conventions of 12 August 1949."

SC Res. 446 (Mar. 22, 1979), adopted by 12 votes to none, with 3 abstentions (Norway, the United Kingdom and the United States), reaffirmed the applicability of the fourth Geneva Convention, as well as opposing the establishment of Israeli settlements in the occupied territories.

None of the various attempts to argue that Israel's occupation of foreign territory is such a special case that some of the normal provisions of the law on occupations do not apply to it has proved persuasive: indeed, all these attempts have been based, in varying degrees, on dubious interpretations of the body of conventional and customary law relating to occupations. The better view is that both the fourth 1949 Geneva Convention and the 1907 Hague Regulations are applicable. However, serious problems remain: not only of getting their applicability accepted, and seeing that their basic provisions are applied, but also of relating the law to particular problems of prolonged occupation.

VI. APPLICABILITY OF HUMAN RIGHTS LAW

This is not the place to examine all the arguments concerning the applicability of the international law of human rights to military occupations generally.⁸⁹ Suffice it to say that (1) this question is but a part of the larger one of the applicability of multilateral conventions in occupied territories;⁹⁰ (2) the main impetus for UN action after 1945 to develop human rights law was the near-universal reaction against Nazi oppression in Germany and in German-occupied territories in the Second World War;⁹¹ (3) the scope-of-application provisions of human rights accords do not exclude their applicability in principle, even if they do, as noted below, permit certain derogations in time of emergency; (4) the idea of "respect for human rights in armed conflicts" has been stressed in numerous UN and other resolutions since at least the late 1960s;⁹² and (5) in some decisions, international courts and tribunals have affirmed the applicability of human rights law in occupied territories either implicitly (Namibia⁹³) or explicitly (northern Cyprus⁹⁴).

SC Res. 605 (Dec. 22, 1987) was strongly critical of Israeli conduct and reaffirmed that the Convention "is applicable to the Palestinian and other Arab territories occupied by Israel since 1967, including Jerusalem." This resolution was adopted by 14 votes to none, with one abstention (the United States). Two weeks later, SC Res. 607 (Jan. 5, 1988), adopted unanimously, reaffirmed the applicability of the Convention.

⁸⁹ See Roberts, *The Applicability of Human Rights Law During Military Occupations*, 13 REV. INT'L STUD. 39 (1987).

⁹⁰ See Meron, *Applicability of Multilateral Conventions to Occupied Territories*, 72 AJIL 542 (1978), reprinted (with slight alterations) in *MILITARY GOVERNMENT*, *supra* note 30, at 217.

⁹¹ W. BISHOP, JR., *INTERNATIONAL LAW: CASES AND MATERIALS* 470 (3d ed. 1971).

⁹² See, e.g., GA Res. 2444 (XXIII) (Dec. 19, 1968) (adopted unanimously), which is on respect for human rights in armed conflicts generally; and the numerous General Assembly resolutions urging respect for human rights in specific armed conflicts and occupations, including those on the Israeli-occupied territories cited in note 99 *infra*.

⁹³ In its advisory opinion on Namibia, the International Court of Justice may have had human rights law in mind (as well as the laws of war, often called international humanitarian law) when it pointed to the applicability of "certain general conventions such as those of a humanitarian character." 1971 ICJ REP. at 46, 55 and 57.

⁹⁴ The European Commission of Human Rights ruled applications by the Government of Cyprus in respect of the Turkish occupation admissible in *Cyprus v. Turkey*. See 1975 Y.B. EUR. CONV. ON HUM. RTS. 82 (Nos. 6780/74 and 6950/75, Decision of May 26, 1975); and 1978 *id.* at 100 (No. 8007/77, Decision of July 10, 1978). The European Convention for the

The more specific question of the applicability of human rights law in the Israeli-occupied territories has been extensively discussed.⁹⁵ Cohen has suggested that in a prolonged occupation certain human rights accords may provide a useful guide for an occupying power, and should therefore be followed as a matter of policy:

[T]he concept of human rights was taken into account in drafting the Geneva Conventions, including the Fourth Geneva Convention.

Nevertheless, the Fourth Convention was designed to protect the civilian population under an essentially temporary occupation. While the Convention remains applicable to a large extent during the prolonged belligerent occupation phase, it is insufficient to ensure adequate protection for the needs of the civilian population during that phase. Further protection is called for. It is submitted that the Universal Declaration and the International Covenants on Human Rights may be used to guide the belligerent occupant in the administration of the territory occupied, just as civilian governments may be guided by these laws in the administration of their own territories.

Thus, in certain areas not covered by the Convention, such as economic rights, which involve a certain dynamism and initiative in order to avoid the stagnation which would result in their violation, the concept of human rights can serve to breathe new life into an otherwise stalemated situation.⁹⁶

The Israeli Government has frequently indicated a skeptical attitude towards the applicability of human rights instruments. One official publication has implied that human rights are totally dependent on the existence of peace; it has cited Article 4 of the 1966 International Covenant on Civil and Political Rights selectively, conveniently omitting all reference to those clauses of the article which spell out that certain general obligations, and certain specific provisions of the Covenant, continue to apply even in time of public emergency.⁹⁷

Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 UNTS 221, Art. 1, states that the high contracting parties shall secure certain rights and freedoms to everyone "within their jurisdiction." The Commission found:

[T]his term is not equivalent to or limited to "within the national territory" of the High Contracting Party concerned. . . . [T]he High Contracting Parties are bound to secure the said rights and freedoms to all persons under their actual authority and responsibility, not only when that authority is exercised within their own territory but also when it is exercised abroad.

1978 Y.B. EUR. CONV. ON HUM. RTS. at 230.

⁹⁵ See particularly Meron, *The International Convention on the Elimination of All Forms of Racial Discrimination and the Golan Heights*, 8 ISR. Y.B. HUM. RTS. 222 (1978); and Meron, *West Bank and Gaza: Human Rights and Humanitarian Law in the Period of Transition*, 9 *id.* at 106 (1979); see also Meron, *supra* note 90.

⁹⁶ E. COHEN, *supra* note 32, at 29.

⁹⁷ MINISTRY OF DEFENCE, CO-ORDINATOR OF GOVERNMENT OPERATIONS IN JUDEA-SAMARIA AND THE GAZA DISTRICT, *JUDEA-SAMARIA AND THE GAZA DISTRICT: A SIXTEEN-YEAR SURVEY (1967-1983)* 60 (1983). For the International Covenant on Civil and Political Rights, Dec. 16, 1966, see 999 UNTS 171.

A particularly clear exposition of the Israeli view on the applicability of human rights accords is contained in a memorandum prepared by the Office of the Legal Adviser in the Israeli Foreign Ministry in 1984. Written in response to an inquiry about the applicability of seven human rights accords, the memorandum asserts that Israeli policy in the West Bank and Gaza was in accord with the provisions of the 1950 Agreement on the Importation of Educational, Scientific and Cultural Materials; the 1960 Convention against Discrimination in Education; and the 1966 International Convention on the Elimination of All Forms of Racial Discrimination. However, in respect of some other agreements (the 1948 Universal Declaration of Human Rights and the two 1966 International Covenants), the memorandum says:

The unique political circumstances, as well as the emotional realities present in the areas concerned, which came under Israeli administration during the armed conflict in 1967, render the situation *sui generis*, and as such, clearly not a classical situation in which the normal components of "human rights law" may be applied, as are applied in any standard, democratic system in the relationship between the "citizen" and his government. Hence the criteria applied in the areas administered by Israel, in view of the *sui generis* situation, are those of "humanitarian law", which balances the needs of humanity with the requirements of international law to administer the area whilst maintaining public order, safety and security.⁹⁸

This passage contains a serious argument, namely, that much human rights law is about the relations between the citizen and his own government and is therefore not necessarily appropriate to the rather different circumstance of occupation. Nevertheless, it is doubtful whether human rights law only applies in "a classical situation," and the memorandum itself does not view all human rights law in this rather limited way. Its insistence that the relevant criteria are those of "humanitarian law" (i.e., the Hague Regulations and the Geneva Conventions) seems evasive in view of the elements of ambiguity in Israel's attitude towards the applicability of the fourth Geneva Convention.

A very strong case can be made for asserting the general applicability of human rights standards to military occupations, but this does not solve many problems. The relevance of the international law of human rights to the prolonged Israeli occupation needs to be assessed in individual cases, taking the following points into account.

1. There are different views on the exact legal status of some international agreements relating to human rights, including the 1948 Universal Declaration, whose applicability in the occupied areas has been urged in numerous UN General Assembly resolutions.⁹⁹

⁹⁸ Office of the Legal Adviser, memorandum (Sept. 12, 1984), written for, and contained in, A. ROBERTS, B. JOERGENSEN & F. NEWMAN, *ACADEMIC FREEDOM UNDER ISRAELI MILITARY OCCUPATION* 80, 81 (World University Service, London/International Commission of Jurists, Geneva, 1984).

⁹⁹ See, e.g., GA Res. 2443 (XXIII) (Dec. 19, 1968); GA Res. 2546 (XXIV) (Dec. 11, 1969); GA Res. 2727 (Dec. 15, 1970); and the subsequent annual resolutions entitled "Report of the

2. Fewer states are parties to the international conventions on human rights than to the Geneva Conventions. For example, on December 31, 1988, the four Geneva Conventions had 165 states parties, including all the states in the area; whereas the two International Human Rights Covenants had 92 and 87 parties, respectively. Egypt, Jordan and Syria are parties to both Covenants. Israel has signed both but has not ratified them.¹⁰⁰

3. Many human rights conventions permit derogations from some of their provisions, for example, in time of public emergency. Israel is obviously inclined to view its military occupation, especially in the context of continuing armed conflict or internal revolt, as constituting such an emergency.

4. Over a wide range of issues, the laws of war rules regarding military occupations, as laid down in the Hague Regulations and the Geneva Conventions, may offer more extensive, detailed and relevant guidance than can the general human rights conventions,¹⁰¹ and their supervisory machinery may be more appropriate to the circumstances.

5. On a few specific issues, there may be an element of conflict between the law on occupations and human rights law. For example, Article 13(1) of the Universal Declaration says: "Everyone has the right to freedom of movement and residence within the borders of each state." Article 78, paragraph 1 of the fourth Geneva Convention says: "If the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment."¹⁰²

6. There are some issues (such as discrimination in employment, discrimination in education and the import of educational materials) that are addressed in considerable detail in certain human rights agreements, and are not so addressed in the law on occupations. In respect of such issues, the application of international human rights standards is highly desirable.

Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population in the Occupied Territories." For the Universal Declaration of Human Rights, see GA Res. 217A (III), UN Doc. A/810, at 71 (1948).

¹⁰⁰ See note 24 *supra* and accompanying text. For the Covenant on Civil and Political Rights, *supra* note 97, and the Covenant on Economic, Social and Cultural Rights, GA Res. 2200 (Dec. 16, 1966), see MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL: STATUS AS AT 31 DECEMBER 1988, at 120, 130, UN Doc. ST/LEG/SER.E/7 (1989).

Syria, at accession to the Covenants in April 1969, made a declaration to the same effect as that of its declaration on Protocol I, *supra* note 53. In a note to the depositary in July 1969, Israel objected to this declaration.

¹⁰¹ Possible overlap between human rights law and the laws of armed conflict was raised in *Cyprus v. Turkey* where, because of the applicability of the third Geneva Convention on prisoners of war, the European Commission of Human Rights did not find "it necessary to examine the question of a breach of Article 5 of the European Convention on Human Rights with regard to persons accorded the status of prisoners of war." See T. MERON, HUMAN RIGHTS LAW-MAKING IN THE UNITED NATIONS 212 n.229 (1986) (quoting Eur. Comm'n of Hum. Rts., Report on Applications Nos. 6780/74 and 6950/75 (*Cyprus v. Turk.*) 109 (1976, declassified in 1979)). See also *supra* note 94.

¹⁰² Fourth Geneva Convention, *supra* note 7, Art. 78, para. 1.

mination and, if so, how any such right may be recognized and exercised. While there cannot be absolute answers to these questions, the case of the West Bank and Gaza suggests some partial answers and points to the emergence of procedures for addressing them.

The international community has favored self-determination in respect of several recent and contemporary occupations—for example, in Kampuchea, Namibia and Western Sahara.¹⁰⁹ However, the case for self-determination has not been pressed where the occupied territory is widely accepted as being part of an existing state, from which it has been forcefully separated and to which it may be expected eventually to revert. A case in point is northern Cyprus: any act of self-determination there might well be seen as a threat to the sovereignty and territorial integrity of Cyprus, and as a victory for the Turkish invasion and occupation.

The idea of Palestinian self-determination, which has been extensively advanced since 1967, is not new. There are strong grounds for doubt whether the West Bank and Gaza were, before 1967, simply integral parts of Jordan and Egypt, respectively.¹¹⁰ There was also, even before 1967, some evidence of a tendency to view the inhabitants of Palestine as a people, and as candidates for self-determination—despite uncertainty and disagreement as to the geographical area in which it was to be exercised.¹¹¹

In the period since June 1967, Palestinian nationalism has grown within the occupied territories.¹¹² Moreover, in many different ways the international community has come to accept the propositions that there is a Palestinian people; that it has a right of self-determination; and that this right is to be exercised in the West Bank and Gaza, rather than in the whole of former mandatory Palestine. None of these propositions is self-evident, and in the nature of things their acceptance by the international community has been slow and uneven; for example, Palestinian self-determination was not mentioned in UN Security Council Resolutions 242 and 338.¹¹³ Significant

¹⁰⁹ See, e.g., GA Res. 36/5 (Oct. 21, 1981); and GA Res. 43/19 (Nov. 3, 1988) (both on Kampuchea); GA Res. 2403 (XXIII) (Dec. 16, 1968); and GA Res. 43/26 (Nov. 17, 1988) (both on Namibia); and GA Res. 38/40 (Dec. 7, 1983); and GA Res. 43/33 (Nov. 22, 1988) (both on Western Sahara).

¹¹⁰ See *supra* text at note 64.

¹¹¹ On the evolution within the international community of the idea of Palestinian self-determination, see especially S. & T. Mallison, *The Juridical Bases for Palestinian Self-Determination*, 1 PALESTINE Y.B. INT'L L. 36 (1984). On the emergence of nationalism among the Palestinian Arabs, see the important study by an Israeli scholar, Y. PORATH, *THE EMERGENCE OF THE PALESTINIAN-ARAB NATIONAL MOVEMENT 1918-1929* (1974).

¹¹² On political developments in the West Bank, see particularly two fine studies by an Israeli and a Palestinian academic, respectively: M. MA'OZ, *PALESTINIAN LEADERSHIP ON THE WEST BANK: THE CHANGING ROLE OF THE MAYORS UNDER JORDAN AND ISRAEL* (1984); and E. SAHLIYEH, *IN SEARCH OF LEADERSHIP: WEST BANK POLITICS SINCE 1967* (1988). In 1979-1980 Ma'oz was an adviser on Arab affairs to the Israeli Defense Minister, and to the Coordinator for Activities in the Territories.

¹¹³ SC Res. 242 (Nov. 22, 1967) provided for Israeli withdrawal from territories occupied in the 1967 war, coupled with a termination of all claims or states of belligerency. SC Res. 338 (Oct. 22, 1973) reaffirmed Res. 242 and called for negotiations "aimed at establishing a just and durable peace in the Middle East." These resolutions, accepting as they did Israel's right to

landmarks in the international acceptance of Palestinian aspirations have included General Assembly resolutions from 1969 onwards reaffirming "the inalienable rights of the people of Palestine";¹¹⁴ the September 1978 Camp David Agreements between President Sadat, Prime Minister Begin and President Carter, with their proposals for a self-governing authority for the West Bank and Gaza for a transitional period of 5 years;¹¹⁵ the June 1980 Venice declaration of the heads of government of the nine member states of the European Communities, calling for recognition of two principles—the right to existence of all the states in the region and the legitimate rights of the Palestinian people;¹¹⁶ the peace plan, adopted by the Arab summit at Fez in September 1982 and accepted by the PLO, calling for a settlement based on Israeli withdrawal from the territories occupied in 1967;¹¹⁷ the September 1983 Geneva declaration on Palestine;¹¹⁸ and the short-lived Jordan-PLO accord of February 1985.¹¹⁹

In 1988 and 1989, many important diplomatic developments took place. King Hussein of Jordan changed the framework of discussion significantly on July 31, 1988, by accepting "the wish of the PLO, the sole legitimate representative of the Palestinian people, to secede from us in an independent Palestinian state," and indicating that he would dismantle "the legal and administrative links" between Jordan and the West Bank.¹²⁰ On November 15, the Palestine National Council, in making a declaration of independence, proposed an international conference on the Middle East on the basis of Security Council Resolutions 242 (1967) and 338 (1973), and thus implic-

exist, and making no specific mention of Palestinian self-determination, were for many years viewed with deep suspicion by the PLO.

¹¹⁴ The first such resolution was GA Res. 2535B (XXIV) (Dec. 10, 1969). Another key resolution was GA Res. 2672C (XXV) (Dec. 8, 1970), which recognized that "the people of Palestine are entitled to equal rights and self-determination, in accordance with the Charter of the United Nations." These early resolutions attracted only modest support: votes for and against and abstentions were, respectively, 48-22-47, and 47-22-50.

¹¹⁵ Camp David Agreements, *supra* note 43. For a succinct account of the negotiation of these accords, referring to memoirs of participants, see S. SOFER, *BEGIN: AN ANATOMY OF LEADERSHIP* 189-200 (1988). According to Sofer, as late as March 1978, "Sadat was inclined to agree that a Palestinian state should not be established." *Id.* at 187.

¹¹⁶ KEESING'S CONTEMPORARY ARCHIVES 30,635 (1980).

¹¹⁷ The Arab Peace Plan, adopted by the Twelfth Arab Summit Conference, held at Fez, Sept. 6-9, 1982, went some way towards accepting the existence of Israel. For details, including extracts from the Fez summit declaration, see KEESING'S CONTEMPORARY ARCHIVES 32,037 (1983). It was subsequently supported in numerous General Assembly resolutions, e.g., GA Res. 43/54A (Dec. 6, 1988), and at the extraordinary summit meeting of the Arab League at Algiers on June 7-9, 1988.

¹¹⁸ This declaration was issued at the conclusion of the UN International Conference on the Question of Palestine, held at Geneva, Aug. 29-Sept. 7, 1983, *reprinted in* 1 PALESTINE Y.B. INT'L L. 66 (1984).

¹¹⁹ The text of the Jordanian-Palestinian Accord, Feb. 11, 1985, together with indications of the PLO Executive Committee's desired alternative wording, is *reprinted in* 2 PALESTINE Y.B. INT'L L. 224 (1985). On the demise of the accord, see Roberts, *Decline of Illusions: The Status of the Israeli-occupied Territories over 21 Years*, 64 INT'L AFF. 345, 353-54 (1988).

¹²⁰ N.Y. Times, Aug. 1, 1988, at A1, col. 6.

itly accepted the existence of Israel and a two-state solution to the problem of Palestine.¹²¹ The proclamation of the State of Palestine was widely, though not of course universally, acknowledged in the international community.¹²² Subsequent clarifications by PLO Chairman Yasir Arafat in Geneva on December 13 and 14, including reiterations in a new form of earlier statements renouncing terrorism, led to the first official direct talks between U.S. and PLO officials, which began in Tunis on December 16.¹²³

All these developments were followed by a period of continued infiltration and incidents on the ground, and diplomatic stalemate. On May 14, 1989, the Israeli cabinet approved Prime Minister Shamir's plan for elections among Palestinians in the occupied territories, leading to a strictly limited autonomy. The PLO rejected it, while indicating that certain elements could be incorporated into a framework for an overall settlement. Shamir remained hostile to any Palestinian state, telling the Knesset on May 17 that he ruled out trading land for peace. The Egyptian Government announced a ten-point plan aimed at overcoming these differences in September 1989, following extensive consultations with key parties: it contained detailed proposals for internationally supervised elections in the West Bank (including East Jerusalem) and Gaza, and envisaged negotiations on a final settlement in 3 to 5 years' time.¹²⁴

These diplomatic moves came on top of some other demographic and political developments that have weakened, if not undermined, extreme positions on both sides: by the late 1980s, neither the complete abolition of Israel nor complete Israeli settlement and domination of the occupied territories could be presented with the same conviction as in earlier periods.¹²⁵

The effect of all these developments should not be exaggerated. They could not in themselves dissolve the encrusted bitterness of a long-standing and violent dispute, they could not alleviate deep fears on both sides about security and they could not prevent the growth of religious fundamentalism among Arabs and Israelis. They have had, at best, a limited effect in persuading Israelis and Palestinians to work towards pragmatic compromise. The Israeli Government remains obdurate; while on the Palestinian side, the belief that self-determination is an internationally recognized right still

¹²¹ For a succinct summary of the 19th session of the PNC, held in Algiers, Nov. 12-15, 1988, see KEESING'S RECORD OF WORLD EVENTS 36,438 (1989). On the evolution of Palestinian thinking that led to the events at the end of 1988, see Sayigh, *Struggle Within, Struggle Without: The Transformation of PLO Politics since 1982*, 65 INT'L AFF. 247 (1989).

¹²² Evidence of a degree of international acceptance of the PLO's move was GA Res. 43/177 (Dec. 15, 1988), which acknowledged the proclamation of the State of Palestine by the Palestine National Council and decided that the designation "Palestine" should be used in place of "Palestine Liberation Organization" in the UN system, without prejudice to the observer status and function of the PLO within the system. The vote was 104-2-36, the two votes against being those of Israel and the United States. UN Press Release GA/7814, at 112 (Jan. 16, 1989).

¹²³ Int'l Herald Trib. (Paris), Dec. 17-18, 1988, at 1.

¹²⁴ KEESING'S RECORD OF WORLD EVENTS 36,599 and 36,670 (1989); and report from Cairo, The Times (London), Sept. 13, 1989, at 12, col. 7.

¹²⁵ See, e.g., Y. HARKABI, ISRAEL'S FATEFUL DECISIONS (1988); and Roberts, *supra* note 119.

sometimes involves a corollary reluctance to think in terms of a transitional period before full independence, or to accept that there might be any obligation on Palestinians to demonstrate (to Arab states as much as to Israel) that a future Palestinian state would be a stable and responsible member of international society, accepting frontiers, regimes and rules of coexistence.

Despite the many problems associated with them, the diplomatic and political moves since the occupation began together have reinforced the view of the West Bank and Gaza as territories that jointly are a candidate for self-determination, and have weakened alternative views. The idea that either of these territories might revert eventually to the state that previously controlled it is effectively dead. Thus, the acts of the international community indicate that the implicit assumption of the law on occupations—that occupied territory is “territory of a High Contracting Party”—need not be a straitjacket when it comes to consideration of the future status of a land and its people.

Professor Richard Falk, in proposing a formal international convention on prolonged occupation, has suggested that if an occupation is not terminated after, say, 10 years, some political procedure needs to be established whereby the inhabitants can secure and exercise a right of self-determination.¹²⁶ Although the Falk proposal would accord with the expressed views of the international community on the West Bank and Gaza, it may be doubted whether an international convention would actually add clarity or force to what is already a strong demand. Moreover, it is not self-evident that in all cases of occupations, a formal requirement for some mechanism of self-determination after a specified period would be superior to the normal processes of bargaining for a political settlement. In some cases, the international community is unlikely to favor self-determination by the people in the territory deemed to be occupied, e.g., northern Cyprus.

The emphasis placed by the international community on Palestinian self-determination has not meant a complete abandonment of Jordanian and Egyptian responsibility for the West Bank and Gaza, respectively. With Israeli consent, the ousted administering powers have maintained a modest degree of involvement in various spheres, including some educational matters. Until the Palestinians actually exercise self-determination, and decide on the form of a future Palestinian entity, the Governments of Jordan and Egypt are likely to continue to have an important role in the territories—or at least in negotiations on their future.

The Legitimacy and Treatment of Resistance

In most cases of prolonged occupation, resistance emerges in some form, whether violent or nonviolent. However, the main international conven-

¹²⁶ Prof. Falk's article, *supra* note 29, was originally a paper presented on July 8, 1988, at an international symposium at Oxford. In this paper he also suggested that the proposed convention should specify that international human rights law, as well as the law of war, applies in a prolonged occupation.

tions on occupations say little about its legitimacy or otherwise, and only slightly more about the treatment of those involved in it. The most detailed rules governing the treatment of resisters are in Articles 5, 49 and 68 of the fourth Geneva Convention. There is also a much larger, but widely dispersed, body of case law, especially from the time of the Second World War.

The legitimacy of resistance in occupied areas, and of support from abroad for such resistance, has always been a difficult question for diplomatic conferences, courts, writers on the laws of war and governments. It has been raised in sharp form by events in the 1980s in Afghanistan, Nicaragua, Namibia and elsewhere. What is the status of combatants other than the members of the regular armed forces of a country? Is popular resistance (whether violent or nonviolent) a breach of a notional contract between occupier and occupied?¹²⁷ Is active outside support of resistance in occupied areas justified? Is the recovery of lost territories, including those under prolonged occupation, a justification for war?¹²⁸ These questions, which are by no means new, do not admit of absolute answers: it is placing too heavy a burden on international law to expect answers from it, but it can offer some criteria and guidelines.

In the post-1945 period, following Allied support for resistance in Axis-occupied countries, and the ending of the European colonial empires, the international community has tended not only to support self-determination in principle, but also—and increasingly—to view resistance against outside domination as justifiable. The 1974 UN Definition of Aggression contained the statement:

Nothing in this Definition . . . could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right . . . , particularly peoples under colonial and racist régimes or other forms of alien domination; nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter¹²⁹

As a corollary of this approach, a degree of recognition has been granted to certain liberation movements. Thus, on November 13, 1974, PLO Chairman Arafat addressed the UN General Assembly. On November 22 of that year, the Palestine Liberation Organization was one of several national liberation movements accorded observer status in the General Assembly and UN-sponsored conferences.¹³⁰

¹²⁷ A famous exploration of resistance is Baxter, *The Duty of Obedience to the Belligerent Occupant*, 27 BRIT. Y.B. INT'L L. 235 (1950).

¹²⁸ For a brief, skeptical discussion of this issue in relation to the 1973 war, which Egypt and Syria justified partly as a war for the recovery of territory under prolonged Israeli occupation, see W. O'BRIEN, *THE CONDUCT OF JUST AND LIMITED WAR* 286 (1981).

¹²⁹ Definition of Aggression, Art. 7, Annex to GA Res. 3314 (XXIX) (Dec. 14, 1974). See also the similar formula in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, Annex to GA Res. 2625 (XXV) (Oct. 24, 1970).

¹³⁰ GA Res. 3237 (XXIX) (Nov. 22, 1974). On recognition, see also *supra* note 122.

In countless statements, UN bodies have criticized the actions taken by Israel in response to resistance of one kind or another. For example, a telegram dispatched by the UN Commission on Human Rights on March 8, 1968, called on Israel "to desist forthwith from acts of destroying homes of the Arab civilian population in areas occupied by Israel."¹³¹ Eighteen years later, in 1986, a General Assembly resolution called on Israel "to release all Arabs arbitrarily detained or imprisoned as a result of their struggle for self-determination and for the liberation of their territories."¹³² In 1988, almost a year after the outbreak of the *intifada*, a General Assembly resolution stated that it

[c]ondemns Israel's persistent policies and practices violating the human rights of the Palestinian people in the occupied Palestinian territories, including Jerusalem, and, in particular, such acts as the opening of fire by the Israeli army and settlers that result in the killing and wounding of defenceless Palestinian civilians, the beating and breaking of bones, the deportation of Palestinian civilians.¹³³

Much Israeli policy and practice in dealing with resistance has deserved criticism. The above-quoted resolution was properly critical of the policy of "force, power and beatings" enunciated by Minister of Defense Rabin on January 20, 1988. This approach—though subsequently clarified by the Attorney General in a ruling that beatings could only be administered to subdue rioters while resisting arrest—led to the issuing of certain orders that were criticized by an Israeli military court in 1989 as "manifestly illegal."¹³⁴

Yet the General Assembly's tendency to criticize almost all Israeli actions against resistance has resulted in failure to take note of those that have recognized legal standards in the treatment of resisters; and an equal failure

¹³¹ Mentioned in GA Res. 2443 (XXIII) (Dec. 19, 1968). House demolitions have been widely criticized as an extrajudicial measure of collective punishment.

¹³² GA Res. 41/63A (Dec. 3, 1986). In logic, one could question the claim that the Arabs have been detained "arbitrarily," when the reason for their detention occupies the rest of the same sentence in the resolution. In reality, however, it does appear that many cases of detention and imprisonment have been arbitrary.

¹³³ GA Res. 43/21 (Nov. 3, 1988). In April 1989, the ICRC stated

that it had been extremely concerned for some time by the increasingly frequent use of firearms against civilians in the occupied territories, and by acts of physical violence against defenceless people. Over the past 16 months, more than 400 Palestinians and around 17 Israelis have been killed, while thousands of people have been injured. In addition, the institution stated that the evacuation of the wounded, the work of medical staff and the smooth running of hospitals in the occupied territories were hampered by Israeli forces.

ICRC BULL., No. 160, May 1989, at 1.

¹³⁴ Judgment of an Israeli military court, May 25, 1989, hearing the case of four soldiers accused of manslaughter of a Palestinian beaten to death after trying to protect his son from arrest. The four were convicted on the lesser charge of brutality. The court said that, under Israeli law, obeying orders is no defense if, as in this case, they were manifestly illegal. Charles Richards, reporting from Jerusalem, concluded: "Prosecutions and disciplinary actions have been rare; the army protects its own. . . . Since the Uprising began in December 1987, two soldiers have been convicted of manslaughter. Nearly 500 Palestinians have been shot dead or beaten to death in this period." The Independent (London), May 26, 1989, at 12, col. 1.

to note that the dilemmas Israel faces are difficult and its rights under the law on occupations real. Consequently, General Assembly resolutions bearing on the treatment of Palestinian resistance have had diminished impact, having been easy for Israelis to dismiss.

In general, United Nations involvement in the subject of resistance has been highly controversial, and has contributed to criticism of the Organization. It has sought simultaneously to maintain the Charter prohibitions on the use of force and to offer an "innovatory adumbration of the principles of the Just War."¹³⁵ UN support for struggles of national liberation has often been expressed rhetorically, without addressing important issues. One finds little awareness of the Burkean distinction between the possible existence of a right (e.g., of resistance, or of recovery of territory through war) and the wisdom of actually exercising that right in a given situation. Further, one finds little serious discussion of choice of means of pursuing a given right; for example, UN resolutions have given no clue as to whether liberation struggles ought to be fought within limits derived from, or akin to, the laws of war. This omission has been especially serious since terrorist attacks against wholly innocent civilian targets were already alarmingly widespread in the early 1970s. The record of the United Nations in this respect has not been wholly negative: it has, of course, been involved in drawing up conventions and resolutions dealing with various aspects of terrorism, and it has been increasingly critical of this phenomenon.¹³⁶ The real criticism is that UN resolutions have lacked intellectual coherence, and (for a time at least) they lost sight of laws of war principles as a possible restraint not just on occupying powers, but also on liberation movements.

The issue of making legal restraints clearly applicable to liberation struggles is addressed in Geneva Protocol I, which includes within its scope of application "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination."¹³⁷ This formula, which is echoed in countless UN documents, clearly includes the peoples of southern Africa and Palestine.¹³⁸ If implemented, Protocol I would require any liberation movement to observe extensive restrictions as regards methods of operation, weaponry and targets. The provisions in respect of such movements, and, indeed, whether the Protocol encompasses such movements at all, have inspired considerable debate, especially in the United States.¹³⁹ Nevertheless, the Protocol does establish that there are rules that would apply to

¹³⁵ Howard, *The UN and International Security*, in UNITED NATIONS, DIVIDED WORLD 31, 37 (A. Roberts & B. Kingsbury eds. 1988).

¹³⁶ For results of the UN consideration of terrorism, including the texts of conventions on the subject, see especially GA Res. 3166 (XXVIII) (Dec. 14, 1973); GA Res. 34/146 (Dec. 17, 1979); and GA Res. 40/61 (Dec. 9, 1985).

¹³⁷ Protocol I, *supra* note 27, Art. 1(4).

¹³⁸ M. BOTHE, K. PARTSCH & W. SOLF, *supra* note 36, at 51-52. Since neither South Africa nor Israel has become party to the Protocol, its formal applicability to these territories is of course doubtful.

¹³⁹ The main positions are outlined in *Agora: The U.S. Decision Not to Ratify Protocol I to the Geneva Conventions on the Protection of War Victims*, 81 AJIL 910 (1987); and its continuation, 82 AJIL 784 (1988); see also Gasser's further letter, 83 AJIL 345 (1989).

participants in liberation struggles as well as to other types of combatant—which is more than can be said of some UN resolutions.

Palestinian Deportations, Israeli Settlements

Over 20 years, no aspect of life can remain static. The changes in the demography of the occupied territories have been particularly significant. In September 1967, the Palestinian population of the West Bank and Gaza was just under one million. By the end of 1987, it reached an estimated 1,424,100 (860,000 in the West Bank and 564,100 in the Gaza Strip).¹⁴⁰ This growth is remarkable, considering that it has taken place against a background of substantial labor emigration, especially in the oil boom of the 1970s. Among Israelis, these figures have caused much concern because they suggest that within decades there might be an Arab majority in the overall area comprising Israel and the occupied territories.¹⁴¹ For Palestinians, too, there are major causes of concern on demographic matters: deportations of Palestinians and Israeli settlements.

In accord with the view that occupation is a provisional state of affairs, the imposition of demographic changes within occupied territory has long been seen as undesirable. The fourth Geneva Convention appears to be precise on the question, stating as it does in the first and sixth paragraphs of Article 49:

Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive.

The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.¹⁴²

The individuals deported from the occupied territories fall into two broad categories: political leaders and those alleged to be involved directly in hostile activities. The deportations began in 1967 in the first months of the occupation, have particularly affected the leadership and have involved well over a thousand persons.¹⁴³ Some of the deportations have been de-

¹⁴⁰ CENTRAL BUREAU OF STATISTICS, STATISTICAL ABSTRACT OF ISRAEL 1988, at 705.

¹⁴¹ Unofficial Israeli projections for mandatory Palestine as a whole (i.e., Israel, the West Bank and Gaza) suggest that by the year 2010 there will be parity between the Jewish and Arab populations. See M. BENVENISTI, THE WEST BANK DATA BASE PROJECT 1987 REPORT 5 (1987). An accelerated influx of Soviet Jews in the 1990s could upset these forecasts.

¹⁴² Fourth Geneva Convention, *supra* note 7, Art. 49, paras. 1 and 6.

¹⁴³ E. COHEN, *supra* note 32, at 106–07, reports figures indicating that over 1,100 people were deported from the West Bank and Gaza between 1967 and 1977. She quotes a senior military official as saying that only 68 of these were genuine deportations—i.e., cases in which the individuals concerned were (1) recognized officially to be residents of the occupied territories, and (2) not transferred as part of an exchange with an Arab state. The deportations aroused opposition both internally and internationally; in 1980 they were discontinued, recommencing following a cabinet decision of Aug. 4, 1985.

A figure of 2,000 deportations for the whole period 1967–1986, apparently from the West Bank alone, is given in M. BENVENISTI, THE WEST BANK HANDBOOK: A POLITICAL LEXICON 87 (1986).

fended, e.g., in Supreme Court decisions, on a variety of grounds, such as that these deportations were quite different in character and intent from those which took place in the Second World War; that the individuals concerned were not "protected persons"; and/or that they were being deported, not to "any other country," but to a country (e.g., Jordan) whose nationals they were.¹⁴⁴ Such arguments could not allay the deep fears among the Palestinian population that the deportations actually carried out by Israel were the thin end of the wedge, to be followed by larger expulsions. One disturbing aspect of the Israeli swing to the right as a result of the Palestinian uprising has been an apparent increase in the numbers of Israelis favoring deportations. According to a survey conducted for Tel Aviv University, four Israelis in every ten support the idea of "transferring" the Arab populations out of the West Bank and the Gaza Strip.¹⁴⁵

The growth of Israeli settlements in the occupied territories, which has been most marked since 1977, has similarly fueled fears of mass expulsions. At the end of 1976, after almost a decade of occupation, there were an estimated 3,176 Jewish settlers in the West Bank. By April 1987, there were approximately 65,000 Jews living in the West Bank, and 2,700 in the Gaza Strip.¹⁴⁶ As with deportations, so with settlements: there have been some claims that Israeli practices are compatible with international norms, including those of the fourth Geneva Convention. A distinction has been drawn between the transfer of people—which is forbidden under Article 49—and the voluntary settlement of nationals on an individual basis; and it has been asserted that there is nothing wrong with settlements in the sense of army bases where soldiers are engaged in agriculture for part of the time.¹⁴⁷ Civilian settlements have also been called necessary for the occupying power's security, and therefore essential if the occupying power is to preserve public order and safety.¹⁴⁸

¹⁴⁴ For discussions of the legality of the deportations, see Dinstein, *Refugees and the Law of Armed Conflict*, 12 ISR. Y.B. HUM. RTS. 94 (1982); Shefi, *supra* note 104, at 304–06; E. COHEN, *supra* note 32, at 104–11. For a well-argued critique of the legality of deportations (mainly those of 1985–1986), see J. HILTERMANN, *ISRAEL'S DEPORTATION POLICY IN THE OCCUPIED WEST BANK AND GAZA* (Al-Haq/Law in the Service of Man, 1986). For a 1988 Supreme Court case involving deportations, see *infra* text at note 181. For a recent affirmation of the illegality of deportations, under both the Geneva Convention and customary law, see T. MERON, *supra* note 23, at 48 n.131.

¹⁴⁵ OBSERVER (London), June 12, 1988, at 22, col. 5. In the November 1988 election, one party, Moledet, ran on this issue; it secured under 2% of the total vote and won only two seats in the Knesset.

¹⁴⁶ M. BENVENISTI, *supra* note 141, at 51–55; and M. BENVENISTI, *supra* note 143, at 66. The figures for settlers in the West Bank do not include the large number (80,000 in 1985, and still growing) in the extended municipal boundaries of Jerusalem.

¹⁴⁷ For an analysis suggesting that some Israeli settlements are compatible with the fourth Geneva Convention, see Dinstein, *supra* note 67, at 124. See also text at notes 169, 173 and 174 *infra*, for statements in the Supreme Court on the status and meaning of Article 49, paragraph 6.

¹⁴⁸ See, e.g., the material on various Supreme Court cases involving settlements in *MILITARY GOVERNMENT*, *supra* note 30, at 152–53, 158, 313–19, 371–97, 404–41. See also *infra* text at notes 166–74 (referring to the *Beth-El* and *Elon Moreh* cases).

Such arguments are far from convincing. In particular, even if voluntary settlement of nationals on an individual basis were permissible under Article 49, the ambitious settlements program of the 1980s, which was planned, encouraged and financed at the governmental level, does not meet that description.¹⁴⁹ Moreover, it is doubtful whether the settlements program was primarily intended to contribute to the occupying power's security and whether, in the event, it has contributed to that end; by causing friction with the Palestinian inhabitants of the territories, the program may even have added to the work of the Israel Defense Forces (IDF).¹⁵⁰ The settlements program is quite simply contrary to international law. However, it is now so far advanced, and so plainly in violation of the Geneva Convention, that it actually creates a powerful reason for Israel's continuing refusal to accept that the Convention is applicable in the occupied territories on a *de jure* basis.

The international community has taken a critical view of both deportations and settlements as being contrary to international law. General Assembly resolutions have condemned the deportations since 1969, and have done so by overwhelming majorities in recent years.¹⁵¹ Likewise, they have consistently deplored the establishment of settlements, and have done so by overwhelming majorities throughout the period (since the end of 1976) of the rapid expansion in their numbers.¹⁵² The Security Council has also been

¹⁴⁹ See, e.g., M. BENVENISTI, *supra* note 141, at 51-65.

¹⁵⁰ On unauthorized violence by settlers, see the Ministry of Justice report J. KARP ET AL., REPORT OF THE INQUIRY TEAM RE INVESTIGATION OF SUSPICIONS AGAINST ISRAELIS IN JUDEA AND SAMARIA (1984).

¹⁵¹ The first was GA Res. 2546 (XXIV) (Dec. 11, 1969). The following resolutions condemning deportations received overwhelming majorities: GA Res. 41/63E (Dec. 3, 1986) (131-1-21); and GA Res. 43/58E (Dec. 6, 1988) (152-1-1). The United States abstained on these resolutions. However, the "United States has stated that deportation is inconsistent with the Fourth Geneva Convention." DEPARTMENT OF STATE, *supra* note 87, at 1193.

¹⁵² See, e.g., the following examples, at 4-year intervals:

GA Res. 31/106A	(Dec. 16, 1976)	(129-3-4)
GA Res. 35/122B	(Dec. 11, 1980)	(140-1-3)
GA Res. 39/95C	(Dec. 14, 1984)	(143-1-1)
GA Res. 43/58C	(Dec. 6, 1988)	(149-1-2)

The United States voted against the 1976 resolution above, and abstained on the others. When it abstained on GA Res. 32/5 (Oct. 28, 1977) (131-1-7), the U.S. representative said that the United States opposed the Israeli settlements, but that it had accepted a special responsibility as cochairman of the Geneva Peace Conference on the Middle East, requiring it to remain impartial when the complex issues to be considered there were involved. 1977 UN Y.B. 317-18.

For a clear statement of the U.S. view that Israel's establishment of civilian settlements in the occupied territories is inconsistent with international law, see the letter of Herbert J. Hansell, Legal Adviser, Department of State, to House Comm. on International Relations (Apr. 21, 1978), 17 ILM 777 (1978). On U.S. policy towards settlements in 1989, see text at note 184 *infra*.

The General Assembly has shown some consistency in criticizing other cases of demographic changes imposed by foreign occupation forces. See, e.g., its expressions of concern "about reported demographic changes being imposed in Kampuchea by foreign occupation forces" in GA Res. 40/7 (Nov. 5, 1985), and GA Res. 43/19 (Nov. 3, 1988).

critical of deportations and settlements,¹⁵³ and other bodies have viewed them as an obstacle to peace, and illegal under international law.¹⁵⁴

Long-Term Economic Change

The idea that occupation is temporary, and that an occupying power has a role in some respects akin to that of a trustee, finds reflection in a number of rules on economic matters, particularly the 1907 Hague Regulations (Articles 48–56). Some of the foundations of the Hague rules now seem dated, especially the insistence (objectionable to Communist countries) that private property merits a higher degree of protection than state property. However, few in number and antique as they are, these rules do establish some important principles, such as on taxation.¹⁵⁵

In the West Bank and Gaza since 1967, extensive economic changes have been brought about in such key areas as agriculture, land ownership, use of water resources, the road system, building construction and taxation. Labor has become more mobile: large numbers work daily in Israel, and many have left on a longer-term basis to work abroad.¹⁵⁶ Not all these changes have been for the worse. For example, living standards rose, at least up to the mid-1970s. Nevertheless, some actual and planned economic measures have caused concern, on several grounds: discrimination against Palestinian economic activity, creation of an economy dependent on that of Israel and use of certain resources in the territories for the benefit of Israelis rather than Palestinians.

The international community has made many pronouncements on economic aspects of the Israeli occupation. The numerous references in the annual reports of the UN Special Committee on Israeli Practices have been reflected in the annual General Assembly resolutions on the reports.¹⁵⁷

¹⁵³ See, e.g., SC Res. 469 (May 20, 1980) (on deportations; quoting the fourth Geneva Convention, Art. 49, and calling on Israel to rescind the expulsion of the mayors of Hebron and Halhoul, and the Sharia Judge of Hebron); and SC Res. 465 (Mar. 1, 1980) (calling settlements a "flagrant violation of the Geneva Convention"). The latter resolution, which also criticized Israel's purported annexation of Jerusalem, was adopted unanimously, but the U.S. Government subsequently stated that it was retracting its vote. For an account of "the highly publicized snafu" over this vote, see Z. BRZEZINSKI, *POWER AND PRINCIPLE: MEMOIRS OF THE NATIONAL SECURITY ADVISER, 1977–1981*, at 441 (rev. ed. 1985). Brzezinski presents much interesting material on the Carter administration's thinking on the settlements; see, e.g., *id.* at 110, 258, 263 and 440–42. See also SC Res. 607 (Jan. 5, 1988), adopted unanimously, calling on Israel to refrain from deporting any Palestinian civilians from occupied territory.

¹⁵⁴ See, e.g., the June 1980 Venice declaration of the nine EEC countries, *supra* note 116 and accompanying text, which was blunt on the settlements issue.

¹⁵⁵ See, e.g., text at note 177 *infra*.

¹⁵⁶ On economic developments in the West Bank and Gaza, see Graham-Brown, *The Economic Consequences of the Occupation, in OCCUPATION: ISRAEL OVER PALESTINE* 167 (N. Aruri ed. 1984); and M. BENVENISTI, publications cited in notes 70, 141 and 143 *supra*.

¹⁵⁷ See, e.g., GA Res. 41/63D (Dec. 3, 1986), which includes in its litany of complaints of Israeli policies and practices the following economic items:

(c) Illegal imposition and levy of heavy and disproportionate taxes and dues;

Other General Assembly resolutions have also addressed the legality of certain Israeli economic activities and plans. From 1973 to 1983, a series of resolutions on "Permanent Sovereignty over National Resources in the Occupied Arab Territories" asserted that Israel, as an occupying power, has very limited economic rights, and condemned Israel for alleged exploitation of resources.¹⁵⁸ Resolutions in the period 1981–1984 demanded "that Israel cease forthwith the implementation of its project of a canal linking the Mediterranean Sea to the Dead Sea."¹⁵⁹ All these resolutions reflect the underlying principle that an occupying power, even in a prolonged occupation, has particularly to avoid making drastic changes in the economy of the occupied territory—especially those which are of an exploitative character, or which would result in binding the occupied territory permanently to the occupying power. However, the international community has not been inflexible in its interpretation of this principle.¹⁶⁰

Oil was a subject of some contention in Israel's relations with Egypt, and with the United States. The oil fields in the Sinai Peninsula, which were operated during the Israeli occupation and returned to Egypt in November 1975, were not the main problem. Difficulties principally arose over prospecting for additional oil in Sinai and the Gulf of Suez, raising questions about an occupant's right to make so significant a change in the economy of

(f) Confiscation and expropriation of private and public Arab property in the occupied territories and all other transactions for the acquisition of land involving the Israeli authorities, institutions or nationals on the one hand and the inhabitants or institutions of the occupied territories on the other;

(m) Interference with the system of education and with the social and economic and health development of the population in the Palestinian and other occupied Arab territories;

(o) Illegal exploitation of the natural wealth, resources and population of the occupied territories.

¹⁵⁸ The first was GA Res. 3175 (XXVIII) (Dec. 17, 1973). It referred to the fourth Geneva Convention. It was not until the fifth resolution on this subject, GA Res. 32/161 (Dec. 19, 1977), that specific reference was made to the Hague Convention, which is more germane to the exploitation of natural resources. These resolutions received substantial, but not overwhelming, support. The voting on the last in this series, GA Res. 38/144 (Dec. 19, 1983), was fairly typical: 120 for, 2 against and 18 abstentions.

¹⁵⁹ If constructed, part of the canal would allegedly have gone through the Gaza Strip. The first General Assembly resolution criticizing it was GA Res. 36/150 (Dec. 16, 1981). The 1984 version, GA Res. 39/101 (Dec. 14, 1984), stated that the canal, "if constructed, is a violation of the rules and principles of international law, especially those relating to the fundamental rights and duties of States and to belligerent occupation of land." This received 143 votes for, 2 against and 1 abstention.

¹⁶⁰ One piece of evidence of discrimination by the international community is that there has been little, if any, international comment or censure regarding one apparent infringement by Israel of the law on occupations—the building of the main road from Jerusalem to Tel Aviv on a natural line that passes through what before 1967 was a demilitarized zone between the West Bank and Israel. Although this road in effect annexes a small portion of territory, Jordan and other states acquiesced in it.

an area, and about its position regarding maritime matters. A Memorandum of Law by the U.S. Department of State of October 1, 1976, concluded firmly: "International law does not support the assertion of a right in the occupant to grant an oil development concession."¹⁶¹ An Israeli response dated August 1, 1977, included this statement bearing on prolonged occupation: "if over a long period, such as in the case of the present occupation of Sinai, oil exploitation had been prevented, the development of the territory would have been delayed by that number of years."¹⁶² Although in the eyes of the international community there was considerable doubt about the legitimacy of Israel's oil exploitation policy, it does not appear in the end to have been an obstacle to peace with Egypt.¹⁶³

VIII. ISRAELI SUPREME COURT JUDGMENTS ON PROLONGED OCCUPATION

In a large number of cases, especially before the Supreme Court of Israel, questions of an inherently long-term character, or involving specific consideration of the prolonged nature of the occupation, have arisen. What follows is not in any sense a comprehensive survey of these cases, or even an account of the main issues raised in them, but rather a distillation intended to convey some of the main lines of the Supreme Court's thinking on a few such questions.

An innovation was made in the territories occupied by Israel after the June 1967 war, namely, the establishment of a right to petition the Israeli Supreme Court against arbitrary or illegal acts by the occupant. The Court asserted its competence to review the legislation and acts of the military commander and other authorities in the West Bank and Gaza. The effectiveness of the Court in bringing rules of law, including those of international law, to bear on Israeli occupation policy has been much discussed.¹⁶⁴

¹⁶¹ U.S. Dep't of State, Memorandum of Law (Oct. 1, 1976), 16 ILM 733, 752 (1977). This memo stated that concessions granted to Amoco by Egypt were valid, "whether granted prior to or post June 1967." *Id.*

¹⁶² Memorandum of Law, *supra* note 59, 17 ILM at 434 (submitted to the U.S. Department of State on Oct. 27, 1977). On Mar. 26, 1978, two wells in the Alma field in the Gulf of Suez began operation under a concession granted by Israel to the Neptune Oil Co. *Id.* at 432. All Sinai was returned to Egypt by Apr. 25, 1982.

¹⁶³ See further Gerson, *Off-Shore Oil Exploration by a Belligerent Occupant: The Gulf of Suez Dispute*, 71 AJIL 725 (1977); and Claggett & Johnson, *May Israel as a Belligerent Occupant Lawfully Exploit Previously Unexploited Oil Resources of the Gulf of Suez?*, 72 AJIL 553 (1978).

¹⁶⁴ Nathan, *The Power of Supervision of the High Court of Justice over Military Government*, in *MILITARY GOVERNMENT*, *supra* note 30, at 109, 133. For other Israeli assessments, see Domb, *Judgments of the Supreme Court of Israel Relating to the Administered Territories*, 11 ISR. Y.B. HUM. RTS. 344 (1981); Negbi, *The Israeli Supreme Court and the Occupied Territories*, JERUSALEM Q., No. 27, Spring 1983, at 33; and E. COHEN, *supra* note 32, at 80-92.

Many inhabitants of the occupied territories with whom I discussed the matter in November-December 1983 and January 1988, welcomed this right of petition, and noted that it had fostered a few out-of-court settlements of certain issues, but argued that, overall, very few practical results had been achieved. These sources were critical of the tendency of the Court (1) to accept "security" as a justification for the acts of the occupant, and (2) to accept certain limits on the formal applicability or justiciability of the fourth Geneva Convention. For a critical Palestinian view, see R. SHEHADEH, *supra* note 80, at 95-100.

In reviewing acts by the occupant, the Supreme Court has had regard, *inter alia*, to the relevant rules of international law. However, it was not self-evident which rules of international law were to be applied by the Court or exactly how it was to apply them. The Court has had to take into account not only the Israeli Government's position on the *de jure* applicability of the 1907 Hague and 1949 Geneva Conventions, but also complex questions of justiciability: do these agreements impose obligations and create rights directly enforceable under Israeli municipal law before an Israeli court? In addressing this issue, the Court has suggested that customary international law, including the Hague Convention, is justiciable; whereas conventional international law (in which category it has tended to include the Geneva Convention) is more problematical in this regard.¹⁶⁵

Cases about Israeli Settlements

The matter of Israeli settlements, so central to any consideration of the long-term impact of the occupation, highlights the significance of relying more on the Hague Convention than on the Geneva Convention.

In the *Beth-El* case, the Court reached its key decision on settlements. The petitioners were inhabitants of the West Bank who owned land there that was being requisitioned by the Israeli authorities for Jewish settlement. In his judgment, given on March 15, 1979, Justice Witkon addressed the question

whether the petitioners as protected persons may themselves claim their rights under these Conventions in a municipal court of the occupying power or whether only states, parties to the Conventions, are competent to claim the rights of the protected persons, and this clearly on the international level alone. The answer to this question depends [on] whether a provision of an international convention which it is desired to enforce has become part of the municipal law of the state whose court is asked to deal with the issue or whether that provision remains the term of an agreement merely between states and has not been incorporated into municipal law. In the first case, we speak of customary international law, recognized by the municipal court so long as the term is not in conflict with some provision of the municipal law itself, and in the second case we speak of conventional international law, binding . . . only on states *inter se*.¹⁶⁶

Justice Witkon then referred to certain judgments of the Supreme Court indicating that "both Conventions are in the nature of conventional international law and were therefore not to be invoked in an Israeli municipal court." However, he went on to state that he had changed his mind following publication of an article by Dinstein: "I am now persuaded that the Hague Convention is accepted as customary law under which actions may be

¹⁶⁵ See, e.g., Nathan, *supra* note 164, at 125-49; and Hadar, *The Military Courts*, in MILITARY GOVERNMENT, *supra* note 30, at 171, 172-75. Also the judgments in the *Beth-El* and *Elon Moreh* cases, *infra* text at notes 166-74. For a critique of the view that the fourth Geneva Convention does not embody customary law, see T. MERON, *supra* note 23, at 45-50.

¹⁶⁶ *Beth-El* case, *supra* note 68, at 378. For a short report of this case, see 9 ISR. Y.B. HUM. RTS. 337 (1979).

brought in a municipal court . . . It is otherwise with the Geneva Convention."¹⁶⁷

On settlements, Justice Witkon said that "as regards the pure security aspect, it cannot be doubted that the presence in occupied territory of settlements—even 'civilian' settlements—of citizens of the occupying power contributes appreciably to security in that territory and makes it easier for the army to carry out its task."¹⁶⁸

In the same case, Justice Landau, concurring, raised some specific objections to the idea that Article 49, paragraph 6 of the fourth Geneva Convention had become customary law.¹⁶⁹ He also supported the Israeli settlements against the obvious objection that there was an inconsistency between the temporary character of an occupation and the construction of permanent settlements. Referring to the advocates for the petitioners and the respondents, he said:

Mr. Khoury asks how a permanent settlement can be established on land requisitioned only for temporary use. This is a good question. But Mr. Bach's answer, that the civilian settlement can only exist in that place as long as the IDF occupy the area by virtue of the Requisition Order, commends itself to me. This occupation can itself come to an end some day as a result of international negotiations . . .¹⁷⁰

All the opinions in the *Beth-El* case emphasized Israel's unique security problems as a basis for justifying the settlements.¹⁷¹ The petition objecting to the requisition of land was dismissed.

It was on the basis of Article 52 of the Hague Regulations (which deals with requisitions) that the Supreme Court, in its famous judgment of October 22, 1979, in the *Elon Moreh* case, declared an Israeli civilian settlement near Nablus in the West Bank to be illegal.¹⁷² Because the decision was based on this provision, it had little bearing on settlements that did not involve requisitions or were officially declared essential to Israeli security. In his judgment, Justice Landau said that he "excluded Article 49(6) of the Geneva Convention altogether from consideration because it belongs to conventional international law which does not legally bind an Israeli court."¹⁷³ In concurring, Justice Witkon said: "The question whether voluntary settlement falls under the prohibition of 'transferring sections of the

¹⁶⁷ *Beth-El* case, *supra* note 68, at 379. The article in question was Dinstein, *The Judgment in the Rafiah Approach Case*, 3 TEL AVIV U.L. REV. 934 (Hebrew 1974).

For critiques of the Supreme Court's view that the fourth Geneva Convention does not have the status of customary law, see T. MERON, *supra* note 23, at 5–6 n.5, and 48 n.131; and Rubinstein, *supra* note 42, at 65–67.

¹⁶⁸ *Beth-El* case, *supra* note 68, at 377.

¹⁶⁹ *Id.* at 387–90. See also Justice Witkon's statement that "the provisions of the Geneva Convention regarding the transfer of population from or to occupied territory do not come under already existing law. They are intended to enlarge, and not merely clarify or elaborate the duties of the occupying power." *Id.* at 380.

¹⁷⁰ *Id.* at 392.

¹⁷¹ *Id.* at 374–77, 392–93, 395–97.

¹⁷² *Elon Moreh* case, No. H.C. 390/79, reprinted in MILITARY GOVERNMENT, *supra* note 30, at 404, 419–26 and 437–38. For a short report, see 9 ISR. Y.B. HUM. RTS. 345 (1979).

¹⁷³ *Elon Moreh* case, *supra* note 172, at 419.

population' within the meaning of Article 49(6) of the Geneva Convention is not an easy one and, as far as we know, no answer has yet been found in international jurisprudence."¹⁷⁴ The only practical effect of the decision in this case was that Elon Moreh was built a short distance away from its original site.

Cases about Other Matters

Numerous other Supreme Court judgments have tackled issues, including economic ones, directly related to the prolonged character of the occupation.

In *Christian Society for the Holy Places v. Minister of Defence*, the Court considered whether an order by the Regional Commander of Judea and Samaria was *ultra vires* Article 43 of the Hague Regulations, which requires the occupant to respect, "unless absolutely prevented, the laws in force in the country." The case arose from an employment dispute, and the order in question was an amendment of a Jordanian law so as to make it possible to appoint members of an arbitration council. The petitioner's position was dismissed by a majority decision. Justice Sussman, in upholding the legality of the order, observed that the occupant has a duty in respect of the population's welfare:

A prolonged military occupation brings in its wake social, economic and commercial changes which oblige him to adapt the law to the changing needs of the population. The words "absolutely prevented" in Article 43 should, therefore, be interpreted with reference to the duty imposed upon him *vis-à-vis* the civilian population, including the duty to regulate economic and social affairs. In this context, it is of special importance whether the motive for the change was the furtherance of the occupant's interests or concern for the welfare of the civilian population. In Sussman's opinion, the appointment of persons to the arbitration council was done for the purpose of enabling an institution established by the Jordanian Law to function. The Order only completed the machinery set up under Jordanian Law, which would not otherwise have been able to operate. Therefore the Order did not constitute an excess of jurisdiction.¹⁷⁵

¹⁷⁴ *Id.* at 438.

¹⁷⁵ *Christian Soc'y for the Holy Places v. Minister of Defense*, No. H.C. 337/71, 26(1) Piskei Din 574 (1972), as summarized in 2 ISR. Y.B. HUM. RTS. 354, 355 (1972). Justice Cohn's dissenting opinion is at p. 355. On the application of particular treaties, the summary states that the Court

refrained from considering two issues: first, whether the Hague Convention applied to the administered areas, and second, whether the two aforementioned Conventions [i.e., the fourth Hague Convention and the fourth Geneva Convention] constitute law which could be invoked in an "internal" dispute between a State and its citizens. The Court explained that it avoided these questions because Counsel for the State chose not to raise them, as he based the defense of the respondents on the argument that they observed the Conventions properly.

Id. at 356. See also the interesting discussion of this case, and the implications of prolonged occupation, in Dinstein, *supra* note 67, at 112-14.

In *Jerusalem Electricity Co. Ltd. v. Minister of Energy*, the legality of the occupant's purchase of the undertaking that supplied electricity to the West Bank was considered. The Supreme Court declared that the notice on the purchase of the petitioner's undertaking was null and void. Justice Cahan said:

[G]enerally, in the absence of special circumstances, the Commander of the region should not introduce in an occupied area modifications which, even if they do not alter the existing law, would have a far-reaching and prolonged impact on it, far beyond the period when the military administration will be terminated one way or another, save for actions undertaken for the benefit of the inhabitants of the area.¹⁷⁶

The *Abu Aita* case centered on whether the imposition of a new tax (value added tax) was contrary to Articles 48 and 49 of the Hague Regulations. In his carefully argued judgment of over a hundred pages, given on April 5, 1983, Justice Shamgar referred to the significance, so far as a prolonged belligerent occupation is concerned, of the above-mentioned judgment in *Christian Society for the Holy Places*. He stated that international law prescribes no limits to the duration of a belligerent occupation. He went on to endorse the criterion, advanced by Dinstein, that in most instances legislative steps taken by the occupant should be regarded as legitimate if the occupant takes equal legislative steps towards its own population; but he noted that this criterion is not exhaustive, and that situations may occur in an occupied territory that demand legislative steps not required in the home country. He also accepted that the new tax was genuinely necessary.¹⁷⁷

In *Cooperative Society v. Commander of the IDF Forces in the Judea and Samaria Region*, the Court considered the occupant's authority to construct new roads in the region and to expropriate private lands for the purpose. The petitioners' application was dismissed. A central issue was whether the occupant had authority to initiate "a civil project of long-range permanent implications lasting beyond the duration of the belligerent occupation." Justice Barak said that, in defining the scope of the authority of a military administration, one must bear in mind the distinction between one of short duration and one that is prolonged. He cited Dinstein in noting that "the needs of the civilian population become more valid and tangible when the

¹⁷⁶ *Jerusalem Elec. Co. v. Minister of Energy*, No. H.C. 351/80, 35(2) Piskei Din 673 (1981), summarized in 11 ISR. Y.B. HUM. RTS. 354, 357 (1981).

¹⁷⁷ *Abu Aita* case, Nos. H.C. 69/81 and 493/81, 37(2) Piskei Din 197 (1983), translated in 7 SELECTED JUDGMENTS OF THE SUPREME COURT OF ISRAEL 6, 98-99 (1988). For a summary, see 13 ISR. Y.B. HUM. RTS. 348 (1983). The article by Dinstein to which Shamgar referred was *The Legislative Power in Occupied Territories*, 2 TEL AVIV U.L. REV. 505 (1972 Hebrew). See also Dinstein, *supra* note 67, at 112-13; and his analysis of this case, Dinstein, *Taxation under Belligerent Occupation*, in DES MENSCHEN RECHT ZWISCHEN FREIHEIT UND VERANTWORTUNG 115 (J. Jekewitz et al. eds. 1989).

In a subsequent case, *'Atiah v. IDF Commander in Gaza Strip*, No. H.C. 118/84, 38(3) Piskei Din 107 (1984), summarized in 15 ISR. Y.B. HUM. RTS. 276 (1985), which concerned the treatment of mentally ill accused persons, the Supreme Court ruled that there was no obligation to make legislation in the occupied territories conform to Israeli legislation on similar matters; discretion for such conformity was vested in the commander of the region.

occupation is drawn out.” Therefore, though the Hague Regulations had been codified against the background of a short occupation, “nothing prevents the development—within their framework—of rules defining the scope of a military government’s authority in cases of prolonged occupation.”¹⁷⁸ Barak concluded:

The authority of a military administration applies to taking all measures necessary to ensure growth, change and development. Consequently, a military administration is entitled to develop industry, commerce, agriculture, education, health, welfare, and like matters which usually concern a regular government, and which are required to ensure the changing needs of a population in a territory under belligerent occupation.¹⁷⁹

In *Mustafa Yusef v. Manager of the Judea and Samaria Central Prison*, the six petitioners, convicted of homicide by a court in Israel and sentenced to long prison terms, objected to their transfer from a prison in Israel to the newly opened Judea and Samaria Central Prison. Their petition was not successful. Justice Barak said in his judgment:

The right to a “civilized human life in prison” is granted to every “criminal” or “security” prisoner, both in Israel and in the Region. It is the duty of a military administration—in particular one of prolonged duration—to be concerned with the welfare of the inhabitants of the occupied territory, and this concern includes maintaining a minimal standard of prison conditions.¹⁸⁰

The legality of deportations has been examined in several Supreme Court decisions. In the *Afu* case, the Court asserted by a majority decision on April 10, 1988, that Article 49 of the fourth Geneva Convention prohibits “only such, especially collective, deportations as are carried out for purposes similar to those underlying the deportations by the Nazi authorities during the Second World War.”¹⁸¹ Individual, security-motivated deportations are not prohibited. This holding is hard to reconcile with the clear language of Article 49, paragraph 1, and has been criticized.¹⁸²

Supreme Court Judgments: Some General Considerations

The judgments of the Israeli Supreme Court in cases arising from the occupation have been numerous, lengthy, erudite and carefully argued. Many have reflected key aspects of international law, and have related them to the multitude of problems thrown up in this prolonged occupation. Even

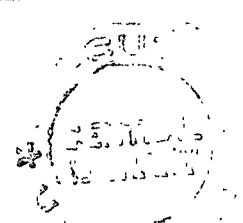
¹⁷⁸ *Cooperative Soc’y v. Commander of IDF Forces in Judea and Samaria Region*, No. H.C. 393/82, 37(4) Piskei Din 785 (1983), summarized in 14 ISR. Y.B. HUM. RTS. 301, 307–08 (1984) (referring to Y. DINSTEIN, *THE LAWS OF WAR* 216 (1983 Hebrew)).

¹⁷⁹ 14 ISR. Y.B. HUM. RTS. at 309.

¹⁸⁰ *Mustafa Yusef v. Manager of the Judea and Samaria Central Prison*, No. H.C. 540-6/84, 40(1) Piskei Din 567 (1986), summarized in 17 ISR. Y.B. HUM. RTS. 309, 312 (1987).

¹⁸¹ T. MERON, *supra* note 23, at 48 n.131 (referring to *Afu* case, Nos. H.C. 785/87, 845/87 and 27/88 (1988)).

¹⁸² *Id.* (referring also to Dinstein, *Deportation from Administered Territories*, 13 TEL AVIV U.L. REV. 403 (1988)). For the text of Article 49, paragraph 1, see *supra* text at note 142.



though the *de jure* applicability and justiciability of the fourth Geneva Convention have been questioned, the Court has increasingly taken for granted the *de facto* applicability of its provisions. Nevertheless, problems remain.

1. Applicability *de jure* of the fourth Geneva Convention to the occupied territories. Has the Court accepted too easily, without full scrutiny of all relevant issues, the position of the Israeli Government?

2. Justiciability of the fourth Geneva Convention. The Court has relied heavily on the assumption that the incorporation of provisions of international conventions into municipal law is a principal form of evidence that such provisions have the status of customary international law. Has it placed excessive reliance on this one form of evidence of customary law?

3. Interpretation of the fourth Geneva Convention. The Court has often interpreted the Convention's provisions in a relative way that is not easily squared with their language or with the interpretations placed on them by other states.

4. Views of governments and international organizations. The Court's judgments contain very little reference to the opinions of governments and the resolutions of international organizations (e.g., the United Nations, UNESCO, the ICRC) on matters relating to the occupation. There is an argument for taking some account of such statements—at least in cases where they reveal a high degree of agreement among states or address issues on which there is a need to interpret existing legal provisions, for example, in the light of new circumstances.

5. Israeli settlements. The Court has sometimes appeared not just reluctantly to accept, but positively to espouse, the debatable argument that settlements contribute to Israel's security. Further, its view that their apparently permanent character is not inconsistent with the provisional character of the occupation, though justified by the example of the now-abandoned settlements in Sinai, invites skepticism.

6. The principle of equal legislative treatment. The judgment in the *Abu Aita* case relied on an interesting, but potentially problematical, criterion for judging new legislation: whether the occupying power takes equal legislative steps towards its own population. As the judgment itself implied, legislation that is suitable for one society (with its own laws and customs, ethnic and religious composition, and state of development) may not be at all suitable for another, very different society. Such an approach could also have the effect of integrating the occupied territory into that of the occupant, and separating it from other states with which the inhabitants may want association.

7. The changing needs of the population. The argument made in several judgments—that in a prolonged occupation, new (and sometimes long-term) measures have to be taken in response to new problems—is powerful. However, it raises the question of exactly what individual or institution is able to assess and respond to the changing needs of the population, and by what means those needs or wishes should be determined.

Overall, the question arises whether the approach adopted by the Supreme Court—on the applicability, justiciability and interpretation of inter-

national conventions—has not had the effect of reducing the Court's possibilities of intervention. Is there an extent to which the Court has served as a buffer to soften the apparent conflict between international legal provisions, on the one hand, and Israeli policy and practices, on the other?

IX. ISSUES AND CONCLUSIONS

Prolonged Occupations Generally

1. Prolonged occupations, lasting more than 5 years, have not been uncommon in the post-1945 world. Although attaching the opprobrious label "occupation" to a given situation is always controversial, many situations have been so identified by the international community, and some have not ended quickly. Condemnation of occupations, especially prolonged ones, is natural; but there is a need also to understand why they occur, and how the interests of the occupants and the inhabitants can be balanced.

2. Some or all of the underlying purposes of the law on occupations remain relevant in prolonged occupations. However, there may sometimes be tension among the various purposes; and difficult matters of political judgment are often involved in determining what particular policies flow from them.

3. The one diplomatic attempt to establish which rules apply to an occupation on the basis of its duration—namely, Article 6, paragraph 3 of the fourth 1949 Geneva Convention—indicated that fewer rules would apply in a prolonged occupation. It was based on the assumption, confounded in the Israeli-occupied territories, that as time went by indigenous institutions would take over more and more responsibilities. The provision has never been formally implemented, was in effect rescinded by Protocol I and must be regarded as a failure.

4. Any effort to get formal international agreement on a body of rules to apply specifically to all prolonged occupations is likely to fail, partly because prolonged occupations differ in their character and purpose, as recent and contemporary cases (including Kampuchea, Namibia and northern Cyprus) demonstrate. Further, it has been hard enough to get states to agree on the existing rules on occupations; to try to revise these rules, subdivide them or create special permutations of them would create acrimony and invite legalistic chaos. If prolonged occupations deserve a special body of rules, then why not occupations in which the indigenous government remains in post? Or occupations of territory whose status is in dispute? The most that could reasonably be expected is some broad guidelines as to the principles that might inform any departure from or addition to the existing law—but even that would be difficult.

5. If a formal international agreement on the problems raised by prolonged occupations is unlikely, it may be more profitable to consider other means by which such problems might be tackled—especially the emergence of procedures, both national and international, for interpreting and implementing law in the light of changing conditions.

6. In an occupation, including a prolonged one, international organizations can have a number of important roles. They can remind all concerned of their obligations under international law; indicate which policies, or international legal provisions, remain not merely applicable but in urgent need of being applied; interpret legal provisions in the light of new circumstances; suggest appropriate action where there is a conflict between legal principles or provisions; engage in fact-finding or arbitration in respect of particular issues; and provide peacekeeping or observer forces to facilitate total or partial withdrawals by the occupant.

Whatever view is taken about the quantity, the quality and the precise status in international law of the many UN resolutions on particular occupations (those relating to Israel are considered further below), their existence does suggest that the international community already has machinery for addressing certain questions that arise in such cases. Granted the reluctance of sovereign states to accept international scrutiny of how they use their armed force, this machinery will always need to be used with care.

7. Specific causes for concern about the relevance of the existing law on occupations to prolonged occupations include, but are not limited to:

(a) The law on occupations, especially as interpreted in some writings and military manuals, seems to allow, or suffer, the occupant to have a very large measure of authority, especially regarding the occupant's own security, the maintenance of public order, the keeping in force of already existing public order legislation, control of the media and prohibitions on political activity. This degree of authority may be acceptable in a war, but can it be acceptable indefinitely? Statements by international bodies suggest that there is a widely held view that in a prolonged occupation, especially if it extends into something approximating peacetime, an occupant cannot exercise the draconian powers that may be permissible in a shorter occupation; the interests and wishes of the inhabitants must be accorded greater weight.

(b) The conventions sometimes seem to be based on assumptions about a territory—that its previous status as part of a sovereign state was clear, and its previous legal and political order was satisfactory—that are open to question in many recent and contemporary prolonged occupations.

(c) The conventions governing military occupations say little about certain issues that inevitably crop up in a prolonged occupation, including the safeguarding and promotion of the economic life of occupied territories.

(d) The conventions say little about the treatment of those involved in resistance activities of whatever kind (whether violent or nonviolent), apart from a few key references in the fourth Geneva Convention (Articles 5, 49 and 68).

8. Causes for concern such as those listed above may be perfectly genuine, but they do not suggest that the relevant international agreements (especially the Hague Regulations and the fourth Geneva Convention) should cease to be viewed as formally applicable. These agreements are not

a rigid straitjacket, but a flexible framework. They leave room for special agreements between the parties if they are willing to conclude them; for interpretation by policy makers in accord with their basic purposes and principles; for elucidation by various bodies; and for supplementation from other sources: from case law, writings and other international agreements.

9. There are grounds for viewing international human rights law as applicable to occupations, including prolonged ones. Certain provisions of this body of law—for example, prohibitions of discrimination in education and of racial discrimination generally—usefully supplement the Hague and Geneva rules on occupations. In addition, some human rights conventions offer procedures of a kind lacking in laws of war conventions. However, the application of some provisions is not free from difficulties, especially in time of armed conflict or internal uprising.

10. The questions whether there is a right of resistance in territories under occupation (especially when prolonged), whether foreign states are justified in assisting such resistance, and whether states are justified in going to war to recover occupied territories have cropped up in many recent conflicts. It is doubtful whether general answers in international law can be particularly helpful when the circumstances of each case, including the purpose and character of the occupation, vary so greatly. Some statements on these matters made in UN General Assembly resolutions have been vulnerable to other criticisms as well. They have drawn attention neither to the key importance of the choice of means involved in pursuing any such rights, nor to the related issue of the application of laws of war limitations to the armed actions of liberation movements.

Israeli-Occupied Territories

11. Israel deserves credit for accepting the relevance in these territories of international legal norms, including those outlined in the fourth Geneva Convention. However, its position that the latter is not necessarily applicable on a *de jure* basis is unconvincing.

12. During the long occupation, a continuous and, in the 1980s, increasingly strong litany of complaints has emerged about numerous aspects of Israel's rule: the annexation of East Jerusalem and the Golan Heights, the establishment of Israeli settlements, deportations of inhabitants, the treatment of institutions of higher education, the acquisition of land, the conduct of the judicial system, conditions of detention, and so on. Such complaints have often been expressed in legal form, as violations of particular international legal provisions or, indeed, of fundamental principles of humanitarian law. They are thus testimony to the continued salience, if not always to the efficacy, of international law in a prolonged occupation.

13. Both Israelis and Palestinians can point to ways that, in their view, the whole framework of the law on occupations has in some sense been abused by the adversary in this prolonged occupation:

- (a) Israelis could argue that the law on occupations has provided a safety net, enabling the Palestinians to escape the consequences of their

leaders' folly, or that of some Arab governments, in not negotiating seriously about the future of the territories—a safety net that it is not necessarily reasonable to maintain indefinitely. A related Israeli argument has been that the law is being used in a one-sided way if Palestinians claim legal rights at the same time as their leaders support "terrorism" (itself a violation of the laws of war) or deny Israel's right to exist—a violation of even more fundamental norms.

(b) A concern widely shared by Palestinians is that the law on occupations has afforded Israel a cloak of legitimacy: while apparently respecting international law, Israel has actually interpreted it to suit its purposes. The Israelis are seen as claiming all the rights of belligerent occupants but shirking some of their legal obligations, and as introducing a system of permanent control under the legal cover that it is temporary. A further concern is that the law on occupations provides a basis for putting the inhabitants in a separate legal category and denying them normal political activity, keeping them in effect permanently under Israeli control, but as second-class citizens or worse. From this perspective, the longer the occupation lasts, the more akin to colonialism it seems.

Both these positions are serious. They point to the hazards of using the law on occupations selectively: the Palestinian tendency to take little account of the corrosive effects of terrorism is one example; so is the Israeli tendency to see in the law on occupations a justification for preventing or strictly controlling political activity indefinitely.

14. Consideration of the practical relevance of the two main instruments on occupations (the Hague Regulations and the fourth Geneva Convention) to the situation in the territories is likely to yield the conclusions that both are of key importance in the various fields they address; that neither has lost its relevance because of passage of time; and that the Convention is germane to a wider range of currently critical problems, including treatment of detainees and the legality of deportations and settlements. The Convention has also been cited far more frequently in resolutions of international bodies.

15. The question whether, and if so to what extent, the fourth Geneva Convention embodies customary law has become important in respect of the Israeli occupation and needs to be further considered. Some relevant facts to be taken into account include the large number of states parties, the time that has elapsed since 1949, resolutions of international bodies, incorporation into domestic legislation, state practice and the opinions of writers. To the extent that its provisions are accepted as embodying customary law, the terms of the Convention might be taken into greater account by at least some Israeli decision makers and courts.

16. Any consideration of how to get the law on occupations properly implemented has to start with the fact that the Government of Israel has responsibility for these territories. (Indeed, there has always been some doubt whether other states would rush to pick up that responsibility if given the chance.) Israel does have a certain discretion in interpreting and applying the law on occupations—especially as that law, like much law, involves

balancing different considerations. In these circumstances, criticisms of Israeli policy that are seen as ill-considered, intemperate or unfair are obviously not likely to be heeded. Israel will pursue policies based on its view of its own interests, and up to a point it is right that it should do so. International law and the national interest of states—even occupying powers—should not be seen as necessarily incompatible.

17. Some Israeli legal practices in this occupation have been notably innovative. One example is the abolition of capital punishment for murder, which shows that the duty in Article 43 of the Hague Regulations to respect, “unless absolutely prevented, the laws in force in the country” need not be a bar to progressive legislation.

18. Another significant innovation is the right to petition the Israeli Supreme Court in respect of arbitrary or illegal acts by the occupant. Whatever the arguments about the effectiveness of this right in practice, and about the actual decisions reached by the Court, this innovation has potential as one additional means of bringing international law and occupation policy into some kind of relation with each other. (The other such means to have emerged in this occupation has been the United Nations, especially the General Assembly, discussed below. A difficulty is that the Supreme Court and the General Assembly have reached different conclusions on key matters and have largely ignored each other’s positions.)

International Interest in the Israeli Occupation

19. The interest of the outside world in events in the Israeli-occupied territories is legitimate not only because an interest in human rights anywhere is legitimate, but also because the territories and those inhabitants who are refugees have a special status. There is no reason for this interest to decline, or to be viewed as less legitimate, on account of the great length of the occupation; rather the reverse.

20. The interest of the outside world has been manifested through mechanisms somewhat different from the formal system enunciated in the fourth Geneva Convention. Some of the bodies that have exerted significant influence in the occupied territories are indeed mentioned in the Convention: the International Committee of the Red Cross, as well as individual governments, which have a responsibility under Article 1 to “ensure respect for the Convention in all circumstances.” On the other hand, the formal system of protecting powers, mentioned extensively in the Convention, has not operated. Numerous UN bodies, not mentioned in the Convention, have had an important role.

21. The outside power with the greatest capacity to influence Israel on adhering to the law on occupations is the United States. Indeed, the United States played a central role in negotiations leading to Israeli withdrawals from Sinai and part of the Golan Heights. It may have been partly because of positions adopted by the United States that Israel has not annexed the West Bank and Gaza: against the objections of so important an ally, Israel could not throw the restraints of international law out the window, even if it

wished to do so.¹⁸³ In the past, the United States has sometimes been diffident about restraining extreme Israeli policies, such as the extension of Israeli law to the Golan Heights in 1981, the invasion of Lebanon in 1982, and the building of settlements in the Golan Heights, the West Bank and Gaza. The reasons for past U.S. diffidence have included not just the much-vaunted Jewish lobby, but also a legitimate opposition to terrorism and to some of the PLO's aims; a genuine commitment to Israel's survival; a concern that extreme pressure could be counterproductive; a stated desire to maintain a degree of independence so as to sustain credibility in pursuit of a negotiated settlement; and perhaps a lack of confidence in the Government's own judgment (especially in view of Vietnam), combined with exaggerated respect for Israeli judgment. Further, in the early Reagan years, which were so fateful in the Middle East, the U.S. administration went through a phase of, at best, lukewarm support for multilateral legal agreements and procedures. In 1988 and 1989, U.S. policy on a range of issues connected with the occupation began to change, as indicated by Secretary of State James Baker's statement on May 23, 1989, that Israel should "for-swear annexation" of the West Bank and Gaza Strip, and "stop settlement activity there. For Israel now is the time to lay aside once and for all the unrealistic vision of a greater Israel."¹⁸⁴

22. The United Nations, and in particular the General Assembly, is sometimes seen as having done little but pass resolutions indiscriminately condemnatory of all aspects of Israeli policy. Although this is more a criticism of the member states than of the Organization as such, the United Nations is vulnerable to the charge of rebuking Israel endlessly, while maintaining a diplomatic silence in respect of certain brutalities committed by other governments, including some Arab governments. The Special Committee to Investigate Israeli Practices has been widely criticized. The potential of UN resolutions has been undermined by political partiality and intellectual inconsistency. The General Assembly's espousal in 1975 of the resolution equating Zionism with racism was the most spectacular, but not the only, example of a denunciatory and self-defeating approach. Too often, UN member states have seemed content to cast votes on the subject and leave it at that; painstaking fact-finding, authoritative argument and diplomatic dialogue have sometimes been lacking. All this has conveyed the unfortunate impression that the law on occupations is a stick with which to beat occupants and a mechanism of political warfare, rather than a serious means of seeking to reconcile the conflicting interests of the parties. Elements in the approaches taken at the United Nations have made careful and sober consideration of some issues more difficult and may have reduced the Organization's chances of exercising a useful role in mediation or negotiation. For the future, there is a case for reconsideration of the UN mechanisms both for the investigation of facts concerning prolonged occupations and for the articulation of opinion about them.

¹⁸³ A point argued impressively by Arthur Hertzberg, *Israel and the West Bank: The Implications of Permanent Control*, 61 FOREIGN AFF. 1064, 1072-75 (1983).

¹⁸⁴ The Independent (London), May 24, 1989, at 11, col. 1.

23. UN resolutions, though open to criticism, have had some consistency and utility. They have criticized other occupying powers and not just Israel. Many General Assembly and Security Council resolutions on the Israeli-occupied territories have usefully reaffirmed the value of key legal provisions and related these to changing factual situations. On basic matters, such as whether the West Bank and Gaza should eventually revert to the states that formerly controlled them or form a new state based on self-determination for the inhabitants, UN resolutions have been the principal means of expressing the changing views of the international community. On some issues, the United Nations has shown discrimination in its response to developments in the occupied territories: many extreme and one-sided resolutions have attracted fewer votes than more dispassionate ones.

24. During the Israeli occupation, international organizations not only have passed resolutions but have assumed other important roles. They have acted in mediatory, humanitarian and peacekeeping capacities. From the beginning, the International Committee of the Red Cross has engaged in a wide range of activities, including observing prison conditions, arranging prisoner transfers, making private representations to the Israeli Government and issuing public statements about the international legal provisions applicable in the territories. The UN Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) has continuously assisted those inhabitants of the West Bank and Gaza classified as refugees, and it has served as an important point of contact between the territories and the UN system. In schools in the occupied territories, the extremely sensitive problem of eliminating objectionable material in textbooks from Jordan and Egypt was eventually resolved through the good offices of UNESCO.¹⁸⁵ The United Nations has provided peacekeeping and observer forces in Sinai and the Golan Heights to facilitate Israeli withdrawals from occupied territory. As to the future, there have been several suggestions that UN peacekeeping or observer forces could have a role in monitoring elections in the West Bank and Gaza.

25. The International Court of Justice has not been asked to consider issues arising from the Israeli-occupied territories. Its important advisory opinion on Namibia of 1971 stands as a reminder that it can play a role in clarifying certain legal questions in a prolonged occupation. It has sometimes been suggested that the General Assembly or the Security Council might refer certain legal matters to the Court, in accord with Article 96 of the UN Charter and Article 65 of the ICJ Statute. Theoretically, many questions might be put to the Court: for example, whether the fourth Geneva Convention is applicable in the occupied territories on a *de jure* basis and in its entirety; whether the Convention embodies customary law, and if so to what extent; whether, in a prolonged occupation, there might in principle be some room for variations within, or even departures from, the law on occupations, and if so on what grounds; whether international

¹⁸⁵ See A. GERSON, *supra* note 83, at 181–83; and the 1983 Report of the Commissioner General of UNRWA, 38 UN GAOR Supp. (No. 13) at 12, UN Doc. A/38/13 (1983).

human rights instruments are applicable in occupied territories; and whether settlements by nationals of the occupying power, or deportations of inhabitants, or major plans for new roads tying the territories to Israel proper accord with international law. Not all such questions are necessarily amenable to resolution by a legal body of this kind; and any such resolution would not of itself necessarily change political and military realities. The principal ground for considering the proposal at all is that, more than two decades after this occupation began, there is still basic disagreement about what parts of international law are formally applicable to the situation in the territories.

The Ending of Prolonged Occupations

26. Consideration of prolonged occupations, against the background of more than 20 years of Israeli occupation, should encourage some reflection about how occupations end. One idea, widely accepted by lawyers and politicians, is of international negotiation leading to a formal treaty that terminates the occupation at a single point in time. However, the end of many occupations (and also colonial regimes) has included the gradual emergence (or re-emergence) of autonomous political institutions within the territory, which assume increasing responsibilities culminating in sovereignty and independence. Past events there suggest that such a process would not be easy to initiate today in the West Bank and Gaza. However, some such process is envisaged in several current diplomatic proposals and should not be ruled out entirely on the all-too-familiar grounds of "all or nothing." Such a process could be especially important in view of the continuing need for Palestinians to show the rest of the world (including their Arab neighbors as well as Israel) that they can conduct their affairs in a responsible and effective way. Since many occupations have only ended when the occupying power has made its own decision, in its own interest, that the time for termination has come, the value of steps that might provide a basis for an occupant to reach that decision is clear. The PLO still has a long way to go to get over encrusted suspicions, and to demonstrate clearly its acceptance of Israel, its opposition to terrorism and its commitment to democracy.

27. Prolonged occupation may be a feature of the contemporary world, but it does not necessarily mean permanent occupation. Some long-standing and contentious cases of foreign military involvements—the Soviet Union in Afghanistan, Vietnam in Kampuchea, and South Africa in Namibia—have been drawing to a close. As for the Middle East, the Soviet Union now looks more willing to treat Israel in a less ideological manner than hitherto, and to assist more constructively in diplomatic negotiations. However, the problem of the Israeli occupation remains outstandingly difficult to resolve: Israel has greater grounds than some other recent occupying powers to be concerned about threats to its security; the presence of settlers in the occupied territories makes withdrawal more difficult; the political strength in

Israel of territorial claims is considerable; and drawing the borders of any future Palestinian state raises tangled problems, especially regarding Jerusalem.

28. The Israeli occupation, unlike some others, is therefore likely to be yet further prolonged. In these circumstances, the law on occupations cannot conceivably eliminate the fundamental conflict between the Israeli occupants and the Palestinian inhabitants. At most, it can mitigate some of the worst effects of that conflict. In particular, it can remind all concerned of the provisional status of the occupation and deter further drastic steps that would militate against an eventual settlement. If such modest functions are not to be wasted, the parties involved will need, not just to use law, but to demonstrate statesmanship.

THE NATURE OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL AND THE EVOLVING STRUCTURE OF INTERNATIONAL DISPUTE RESOLUTION

By David D. Caron*

The Iran-United States Claims Tribunal¹ has been called "the most significant arbitral body in history";² its awards, "a gold mine of information for perceptive lawyers."³ In a recent international commercial arbitration, however, an arbitrator reportedly stated that decisions of the Tribunal, although on point, were not persuasive because the Tribunal, after all, involves a special type of arbitration. This arbitrator is not alone. A lecturer at the Hague Academy of International Law, speaking on international commercial arbitration, reportedly did not refer to the Tribunal's jurisprudence because he did not find it relevant to his work for the same reason. Viewed as a gigantic experiment in international dispute resolution rather than merely a claims settlement device for this particular group of disputes, the Tribunal thus appears (at least to some) to yield decisions of unclear precedential value. Millions of dollars have been spent on its operation and hundreds of awards rendered, yet an apparently not uncommon perception is that the work of this, in some respects unique, institution is not applicable elsewhere.

* Acting Professor of Law, University of California at Berkeley. Formerly Legal Assistant to Charles N. Brower and Richard M. Mosk, Members, Iran-United States Claims Tribunal. The author wishes to thank George H. Aldrich, Charles N. Brower, Richard M. Buxbaum, John R. Crook, David Feller, Richard M. Mosk, Stefan A. Riesenfeld, Stephen M. Schwebel, Peter D. Trooboff, Albert Jan van den Berg, Jan Vetter and Joachim Zekoll for their comments. He also thanks Joseph Giansiracusa, J.D. Boalt Hall, '89, for his able research assistance.

¹ The Iran-United States Claims Tribunal was established in 1981 pursuant to the Declaration of the Government of the Democratic and Popular Republic of Algeria (hereinafter General Declaration) and the Declaration of the Government of the Democratic and Popular Republic of Algeria concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran (hereinafter Claims Settlement Declaration), collectively referred to as the Algiers Accords. For the text of the Accords, see 1 IRAN-UNITED STATES CLAIMS TRIBUNAL REPORTS [hereinafter IRAN-U.S. C.T.R.] 3 (1981-2), 75 AJIL 418 (1981). As to citation of awards by the Tribunal, see note 123 *infra*.

As to the Tribunal, see generally Brower & Davis, *The Iran-United States Claims Tribunal After Seven Years: A Retrospective View from the Inside*, 43 ARB. J. 16 (1988); THE IRAN-UNITED STATES CLAIMS TRIBUNAL 1981-1983 (R. Lillich ed. 1984) [hereinafter IRAN-UNITED STATES TRIBUNAL]; Stewart, *The Iran-United States Claims Tribunal: A Review of Developments 1983-84*, 16 L. & POL'Y INT'L BUS. 677 (1984); and Selby & Stewart, *Practical Aspects of Arbitrating Claims Before the Iran-United States Claims Tribunal*, 18 INT'L LAW. 211 (1984).

² Lillich, *Preface to THE IRAN-UNITED STATES CLAIMS TRIBUNAL*, *supra* note 1, at vii.

³ Holtzmann, *Some Lessons of the Iran-United States Claims Tribunal*, in 1988 PRIVATE INVESTORS ABROAD—PROBLEMS AND SOLUTIONS IN INTERNATIONAL BUSINESS 16-5 (J. Moss ed.). Indeed, decisions of the Tribunal are cited in a number of Reporters' Notes to the *Restatement (Third) of the Foreign Relations Law of the United States* (1987).

In one sense, the doubt about the relevance of the Tribunal's work reflects a more fundamental uncertainty about the proper place of the Tribunal and its work within traditional categories of international dispute resolution.⁴ Like any truly nagging question, that fundamental uncertainty comes to be phrased in various ways. A phrasing frequently used by scholars inquires into the "nature" of the Tribunal.⁵ The assumption apparently underlying this question is that there are basically two distinct types of international arbitration:⁶ interstate arbitration such as the *Beagle Channel*

⁴ A complete discussion of the precedential value that should be given the work of the Tribunal would have several dimensions. The Tribunal's work is potentially significant for various reasons: it is the first major claims tribunal since the interwar period; its orders, awards and much of its workings are open to public (hence scholarly) examination; its docket of approximately 3,850 cases involves issues such as exchange-control regulation, expropriation and expulsion; and it is conducting its work in general in accordance with the UNCITRAL Arbitration Rules (*see infra* notes 26 and 110). This potential significance has been challenged on the ground that combative arbitrators have politicized both the procedural and the substantive decisions of the Tribunal. *See also* M. SORNARAJAH, *THE PURSUIT OF NATIONALIZED PROPERTY* 202 (1986) ("the jurisprudential value of the awards . . . [is] open to doubt on the ground that they were based on an agreement settling a political dispute and that there was an effort made by the Tribunal to approach issues in a manner favouring compromise"). The significance has also been challenged on the ground that the third-country chairmen have all been drawn from Western countries and thus bring with them the jurisprudential predispositions of their cultures. Both of these challenges are beyond the scope of this article and deserve a separate, extended response. To state my views briefly, however, I do not believe either objection stands up to scrutiny or is substantial. As to the former, I believe the combativeness of the Iranian arbitrators did not politicize substantive decisions, although it is true that, procedurally, extensions of time were more frequently granted to the Iranian parties than many U.S. claimants would have desired. The ingenuity of the Iranians, if anything, only tested and pushed at every aspect of the UNCITRAL Rules. The Tribunal met such tests and, in my opinion, has shown the workability and value of the Rules. On the Tribunal's work in one area of arbitral procedure, *see* Caron, *Interim Measures of Protection: Theory and Practice in Light of the Iran-United States Claims Tribunal*, 46 *ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT* 465 (1986).

As to the latter objection, the third-country arbitrators have come from Western countries (two Swedes, two Frenchmen, one Swiss, one Dutchman, one German, one Italian and one Finn), but Iran (or arbitrators appointed by Iran) agreed to the selection of seven of the nine. More importantly, the charge of Western bias is directed really at only one, albeit emotional, issue—expropriation. Even then, the issue in controversy is not what constitutes a taking or whether compensation is due for a taking, but the appropriate standard for determining the amount of compensation.

As the precedential value of an international decision should turn upon its persuasiveness to the next panel, the challenge posed by the uncertainty about the nature of the Tribunal is subtle and indirect. I would speculate that the reluctance of some private international arbitrators to rely on the Tribunal's decisions reflects their intuitive conclusion that the Tribunal involves the classic interstate arbitral process *and* the further intuitive conclusion that the process is therefore particularly politicized. In this sense, a complete discussion of the precedential value of Tribunal awards will require further examination of the challenges to the integrity of the process described above.

⁵ *See, e.g., Decisions of the Iran-United States Claims Tribunal*, Remarks of David Lloyd Jones, 78 *ASIL PROC.* 225, 226 (1984).

⁶ During the preparation of this study, I generally found the distinction between public and private international arbitration to be held quite strongly, particularly among civil law scholars accustomed to a more systematic approach to law. Many scholars who stood by it were not altogether sure precisely what factors made an arbitration interstate rather than private, or

arbitration between Chile and Argentina⁷ (sometimes referred to here as public international arbitration); and international commercial arbitration such as proceedings between private companies before the International Chamber of Commerce (ICC) (sometimes more broadly referred to here as private international arbitration).⁸ Practitioners often regard the inquiry into the nature of the process as irrelevant to lawyering until it is pointed out that many practical questions, such as the enforceability of an award and the ability to challenge an award, turn upon the answer.

As discussed more fully below, a simple inquiry into the legal "nature" of an international arbitral process is too undefined because any one of several aspects could be emphasized. This article in particular examines the relationship of the international legal system and the various municipal legal systems to the arbitrations before the Tribunal, and, in doing so, discusses more broadly the evolving structure of international dispute resolution. I am not concerned here with what *law* the arbitrators might apply *within* the Tribunal, but rather with the positions that will be taken under various *legal systems* on the validity and enforceability of the Tribunal's arbitral awards.

Since practical consequences such as enforceability and recognition can turn upon the nature of an arbitration, it may not be surprising that the Islamic Republic of Iran and the United States have disagreed over which legal system governs the validity of arbitrations before the Tribunal. Indeed, they have disagreed even as to who the parties are for many of the arbitrations.⁹ But it is not only the two state parties that have expressed differing views. Advocates as well as scholars have taken a variety of positions on the characterization issue. The Dutch Government proposed legislation in 1984 that would provide clearly for the Dutch legal system to review the validity of the arbitral process.¹⁰ Yet a British judge has stated that "the Dutch Courts would probably . . . wholly decline to recognize the validity in Dutch law of [such] arbitration proceedings" and would therefore declare such proceedings a "nullity."¹¹ Meanwhile, the United States Court of Appeals for the Ninth Circuit recently affirmed a district court ruling that the New York Convention on the Recognition and Enforcement

what insights were gained by the distinction. For many, their intuitive judgment was that arbitrations before the Tribunal have an interstate nature. Another response, reflecting the difficulty of the question more than an answer, was to say that the arbitrations are of a "mixed" or "hybrid" nature.

⁷ Argentine-Chile Frontier Case, 16 R. Int'l Arb. Awards 109 (1966) (McNair, Kirwan & Papworth arbs.).

⁸ The term "private international arbitration" is used in this article to encompass international commercial arbitration, maritime arbitration and other similar manifestations of private arbitration. On the ICC, see W. CRAIG, W. PARK & J. PAULSSON, *INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION* (1983). See generally Stein & Wotman, *International Commercial Arbitration in the 1980s: A Comparison of the Major Arbitral Systems and Rules*, 38 BUS. LAW. 1685 (1983).

⁹ See *infra* text at notes 122-52.

¹⁰ See *infra* text at notes 178-86.

¹¹ Mark Dallal v. Bank Mellat, [1986] 1 Q.B. 441, 2 W.L.R. 745, 1 All E.R. 239, noted in Fin. Times (London), Aug. 21, 1985, at 25, col. 1. See also Kunzlik, *Public International Law—Cannot Govern a Contract, Can Authorise An Arbitration*, 45 CAMBRIDGE L.J. 377 (1986).

of Foreign Arbitral Awards "certainly is applicable" to awards rendered by the Tribunal.¹² One Dutch commentator has concluded that its proceedings are not "arbitration" as understood under Dutch law,¹³ while another Dutchman has reached the opposite conclusion.¹⁴ Two American lawyers have together argued that the arbitrations are "a-national,"¹⁵ while another, the late Professor Ted Stein, stated that "[t]he *lex fori* of the Tribunal is public international law."¹⁶ Finally, Lady Hazel Fox recently wrote that the Tribunal is the latest example of how "a private party may . . . have its private claims taken up by the State and presented through an interstate arbitration."¹⁷ In short, virtually every possible position on the "nature" of the Tribunal's arbitrations has been put forward.

The analysis of the Tribunal's nature remains incomplete, not from a lack of attention or concern, but because the positions taken tend to rest on intuition supported only by analogies. For example, one position is that the Tribunal, like the International Court of Justice, was established by treaty and that the work of the Tribunal, like that of the Court, therefore has an interstate character. Moreover, the use of undefined terms such as "a-national," "denationalized" and "de-localized," and unclear distinctions such as that between interstate and international commercial arbitration, further confuse the discussion. Consequently, determining the significance of the Tribunal's work requires not only that we examine the Tribunal itself, but also that we understand the larger context and clarify what it means to distinguish between interstate and international commercial arbitration.

Part I introduces the international arbitral process and probes the weakness of the categorical distinction made between interstate and international commercial arbitration. I conclude that the issue is not whether an arbitration has this or that character, as if there existed distinct pigeonholes dictating such an approach. Rather, the proper inquiry should focus on what the parties intended the arbitration to be and what principles of construction should be applied in order to ascertain this intent.

¹² *Ministry of Defense of Islamic Republic of Iran v. Gould, Inc.*, 887 F.2d 1357 (9th Cir. 1989). On the district court order of Judge R. A. Gadbois, Jr., No. 87-03673 (C.D. Cal. Jan. 14, 1988), see Lewis, *What Goes Around Comes Around: Can Iran Enforce Awards of the Iran-U.S. Claims Tribunal in the United States?*, 26 COLUM. J. TRANSNAT'L L. 515, 517 n.14 (1988).

¹³ Hardenberg, *The Awards of the Iran-US Claims Tribunal Seen in Connection with the Law of the Netherlands*, 1984 INT'L BUS. LAW. 337, translated from *De Uitspraken van het Iran-United States Claims Tribunal naar Nederlands recht bezien*, NEDERLANDS JURISTENBLAD, Feb. 11, 1984, at 167.

¹⁴ Van den Berg, *Proposed Dutch Law on the Iran-United States Claims Settlement Declaration, A Reaction to Mr. Hardenberg's Article*, 1984 INT'L BUS. LAW. 341, translated from *Wetsontwerp Iran-United States Claims Tribunal, Een reactie*, NEDERLANDS JURISTENBLAD, Feb. 11, 1984, at 170.

¹⁵ Lake & Dana, *Judicial Review of Awards of the Iran-United States Claims Tribunal: Are the Tribunal's Awards Dutch?*, 16 L. & POL'Y INT'L BUS. 755 (1984).

¹⁶ Stein, *Jurisprudence and Jurists' Prudence: The Iranian-Forum Clause Decisions of the Iran-United States Claims Tribunal*, 78 AJIL 1, 18 (1984). The thrust of the section that contains this quote, however, is that interpretation of the Algiers Accords is a question of public international law.

¹⁷ Fox, *States and the Undertaking to Arbitrate*, 37 INT'L & COMP. L.Q. 1, 3 (1988).

Part II applies the conclusions of part I to the Iran–United States Claims Tribunal and concludes that Iran and the United States intended that the Dutch legal system govern the validity of the arbitral process and that the awards of the Tribunal be enforceable as Dutch awards. Moreover, so far as the Netherlands is concerned, the process likely is so governed. The significance of this conclusion also is examined. In particular, I do not believe that the decision to create the Iran-U.S. Claims Tribunal foreshadows a wave of such tribunals. The trend in this century has been to replace claims tribunals with lump sum settlements. Although the Iran-U.S. Claims Tribunal demonstrates that circumstances still may yield a tribunal, the trend likely will continue.¹⁸ The significance lies rather in the choice of Iran and the United States to have the Dutch legal system review the validity of the arbitrations. That choice reflects the inadequacy of merely distinguishing between interstate and international commercial arbitration to describe the complexities emerging in practice.

In part III, I speculate on what the nature of the Tribunal's work suggests about the way the structure of international dispute resolution evolves and the significance one means of dispute resolution may have for another. A growing body of literature points to the importance for international law and theories of world legal order of understanding the interrelationships between public and private international law.¹⁹ Examination of the legal character of the Tribunal's work necessarily touches on some aspects of these relationships and illuminates the richness and variety in the international resolution of disputes. Part III posits that the various private, state and interstate mechanisms for the resolution of international disputes have developed in response to the needs of the parties and of the community controlling the mechanisms; that these mechanisms do not operate in isolation but, rather, compete with, and evolve in response to, one another; and that the choices of parties as to the most appropriate mechanism for settling their disputes have led the entire system of dispute resolution to evolve toward greater efficiency and effectiveness.

I. MOVING BEYOND THE DISTINCTION BETWEEN INTERSTATE AND INTERNATIONAL COMMERCIAL ARBITRATION

There are various dimensions within which one might analyze, and hence explore the nature of, a dispute resolution process. Consequently, the focus

¹⁸ In the case of the Tribunal, the circumstances were disagreement as to a lump sum settlement amount, coupled with the urgent need to conclude the Accords.

On the general trend toward lump sum settlement, see R. LILlich & B. WESTON, *INTERNATIONAL CLAIMS: THEIR SETTLEMENT BY LUMP SUM AGREEMENTS* (1975); and Lillich & Weston, *Lump Sum Agreements: Their Continuing Contribution to the Law of International Claims*, 82 *AJIL* 69 (1988).

¹⁹ See, e.g., Buxbaum, *The Role of Public International Law in International Business Transactions*, in *PUBLIC INTERNATIONAL LAW AND THE FUTURE WORLD ORDER*, LIBER AMICORUM IN HONOR OF A. J. THOMAS, JR. 16-1 (J. J. Norton ed. 1987); *Academic Workshop: Should We Continue to Distinguish Between Public and Private International Law?*, 79 *ASIL PROC.* 352 (1985); and Paul, *The Isolation of Private International Law*, 7 *WIS. INT'L L.J.* 149 (1988).

of this article should be clear. For example, although all international arbitration rests upon the *consent* of the parties, the point in time relative to the dispute when consent is given, and the scope of that consent, may vary considerably. If consent is the focus, an international court and an ad hoc interstate arbitration can be said to involve the same process. These forums differ, however, as to *party control* over the process, whether that control involves the selection of decision makers or agreement on rules of procedure. This article focuses on two other aspects of the international arbitral process. First, how is the legitimacy or, more relatively, the validity of the arbitral process to be determined? Second, how is the result of the arbitral process to be enforced?²⁰ Party control is an *internal* aspect of the arbitral process. Validity and enforcement can be viewed as involving the evaluation of different legal systems of the *external* effects to be given the process.

The world internal to an arbitral process is created by the parties. Indeed, municipal arbitration in most countries can be seen simply as an aspect of contract law: the parties to a contract, in this instance an agreement to arbitrate, agree jointly to establish their own means for resolving disputes between them.²¹ Similarly, interstate arbitration and private international arbitration are created and defined by the joint will of the parties. In many cases the parties will cooperate in the arbitral proceedings and voluntarily comply with the award. When the parties cooperate in this way, the private arrangement is autonomous in that no legal system need be involved.²² Such an arbitration is a world unto itself. In any arbitration that is not so ideally cooperative, however, many legal systems may become involved. Generally, they will be those that one or both of the parties or the tribunal invokes. Regardless of whether a legal system becomes involved, however, there will remain a contractual world internal to the arbitration defined by the will of the parties, as that intent is interpreted by the arbitrators.²³

²⁰ Although one's conclusions regarding the validity of a given arbitral process will often correlate with those regarding enforcement, they need not do so. See discussion on ICSID in text at notes 34-38 *infra*.

²¹ Parties are motivated to enter into such arrangements municipally because they perceive the process as more likely to be subject to their control and, perhaps, as faster, less expensive and more confidential than that available in the courts. The key legal issue concerns what external limits the relevant municipal legal system places on the freedom of the parties to contract in this way.

²² Although such autonomy obtains in most municipal legal systems, it is characteristic of municipal arbitration statutes in many Latin American states that even if the parties include a compromissory clause in a contract, the initiation of arbitration must be reviewed and approved by a municipal court. See Garro, *Enforcement of Arbitration Agreements and Jurisdiction of Arbitral Tribunals in Latin America*, 1 J. INT'L ARB. 293, 310-15 (1984).

²³ The parties, in defining the internal world, may make three significant choices regarding "law." First, the parties may designate the law under which the dispute will be decided. Second, the parties may designate the legal system that supervises the arbitral process. Note that it is *essential* to distinguish between the *legal system* governing the arbitration as a process and the *law* applied by the arbitrators to the substance of the dispute to be resolved. Confusion over this distinction is often engendered by the common reference to the legal system governing the arbitration as "the law applicable to the arbitration." Third, the parties may also stipulate the rules of procedure to be used by the tribunal by choosing the procedural law of a state, or, as is

The relationship of the arbitration to the world external to it is governed by a particular legal system, the identity of which depends on the particular relationship in question.²⁴ The most important relationships between an arbitration and the world external to it arise when a party attempts to have the arbitration agreement enforced, and any resulting award recognized, set aside or enforced. Knowledgeable parties will draft their arbitration agreement and later structure the proceedings so as to ensure that both the agreement and the award will be valid and enforceable.²⁵ Consequently, the internal and external worlds of an arbitration become intertwined because the designers of the former must anticipate the dictates of the latter.²⁶

Although interstate arbitration and international commercial arbitration are thus conceptually similar, there are obvious distinctions between them. They typically involve different sorts of parties, disputes and arbitral institutions. A typical interstate arbitration involves a dispute between two sovereign states, for example, over a boundary, and is conducted before either an ad hoc or an institutional panel.²⁷ In contrast, the paradigm of interna-

more commonly done, the rules of an arbitral institution such as the ICC. All three choices of law are separate and not necessarily the same.

²⁴ This internal/external model is expressed as a part of the doctrinal view of others. Clive Schmitthoff, for example, writes, "From the viewpoint of doctrine, arbitration contains two elements, a contractual and a judicial element." Schmitthoff, *The Supervisory Jurisdiction of the English Courts*, in *INTERNATIONAL ARBITRATION: LIBER AMICORUM FOR MARTIN DOMKE* 289, 289 (P. Sanders ed. 1967). The contractual element springs from the will of the parties and is manifested in the internal world of the arbitration. The judicial element arises in every legal system that is touched by the interaction of the arbitration and the world external to it. Hazel Fox recently wrote, "The institution of arbitration, on the one view, derives its force from the agreement of the parties; on another view, from the State as supervisor and enforcer of the legal process." Fox, *supra* note 17, at 1. The internal/external paradigm, at least for the purposes of this study, accurately models the arbitral process.

²⁵ Professor Park has stated that "an arbitrator must bow to mandatory norms of the country in which he sits." Park, *The Lex Loci Arbitri and International Commercial Arbitration*, 32 INT'L & COMP. L.Q. 21, 23 (1983). It may be more accurate to state that it is to the intent of the parties that the arbitrator must bow. Local law very rarely coerces the arbitrator. Instead, by indicating that a motion to set aside would likely be granted, local law encourages the parties to draft an arbitration agreement that will result in compliance of their arbitration with the mandatory provisions of local law. Indeed, Article V(1)(d) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *opened for signature* June 10, 1958, 21 UST 2517, TIAS No. 6997, 330 UNTS 3 [hereinafter New York Convention], states that enforcement of an award can be refused if the "composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties."

²⁶ For example, recognizing that the parties would want the award to be enforceable in the external world, the UNCITRAL Arbitration Rules, *reprinted in* 15 ILM 701 (1976) [hereinafter UNCITRAL Rules], an internal set of arbitral rules that parties may adopt, in Article 1(2) provides that those contractual rules are to be superseded by any provision of municipal law that the governing legal system regards as "mandatory."

²⁷ Because the focus of this article is upon the external view of the process rather than party control, interstate arbitration for the purposes of this article could be ad hoc or within the embrace of an institution such as the International Court of Justice. Although the extent of party control over those processes differs greatly, both types of proceedings are interstate arbitration in the sense that jurisdiction remains consensual.

tional commercial arbitration involves, for example, a contract dispute between two private entities and takes place under the auspices of a private arbitral institution such as the International Chamber of Commerce. The distinction between interstate arbitration and international commercial arbitration is strengthened by the generally separate identity of the groups of practitioners and scholars dealing with them and these specialists' lack of experience with each other's forums.²⁸

Distinctions are useful to the extent that they provide a precise, yet simple, model as a foundation for more complex analysis. The distinction between interstate and international commercial arbitration is no exception. Nevertheless, its limits must be appreciated lest any analysis rest on inaccurate assumptions. To move beyond this distinction requires not only a fuller examination of the two types of international arbitration, but also an understanding of why certain institutions, such as the Iran-United States Claims Tribunal, appear to fit neither ideal type.

Interstate Arbitration

The internal world of interstate arbitration typically is created and defined by treaty.²⁹ The agreement to arbitrate and (where applicable) the treaty establishing the responsible institution are the most relevant treaties. The external world may be of little significance for two reasons.

First, so far as the relationship of the customary international legal system to the arbitration is concerned, the international lawmaking capability of the parties may lead to a merging of the internal/external models. The models can collapse into one because states by their agreements both define the internal world of the arbitration *and* modify the applicable international law. In this sense, international law leaves the structuring and conduct of the arbitration entirely in the control of the parties. Consequently, the prime question is whether by their agreement to arbitrate the state parties intend to adopt, supplement or, instead, replace entirely the customary interna-

²⁸ See, e.g., 1 J. G. WETTER, *THE INTERNATIONAL ARBITRAL PROCESS—PUBLIC AND PRIVATE*, at xxiv (1979) ("Commercial lawyers regard arbitrations between States as wholly irrelevant; and public international law teachers, advocates and officials view commercial arbitration as an essentially alien process . . ."). However, there is a small group of lawyers and arbitrators who serve in both types of proceedings.

²⁹ The interstate arbitral process is governed by international law by definition. State parties could agree to remove the dispute entirely from the public international level. For example, state parties in their arbitration agreement could waive their sovereignty and specify that the legal system of a third country will govern the arbitration, just as the latter municipal system might govern private arbitration occurring in that third country. As will be seen, this is precisely what this article contends that Iran and the United States did in the case of the Tribunal. Such an action should be distinguished from those instances in the past when heads of state served as arbitrators of disputes. The arbitration in these cases remained governed by the international legal system. For example, the King of Spain was arbiter in 1906 of a boundary dispute between Honduras and Nicaragua. Nicaragua claimed the award to be a nullity under public international law, an allegation ultimately reviewed and rejected by the International Court of Justice. See *Arbitral Award Made by the King of Spain (Hond. v. Nicar.)*, 1960 ICJ REP. 192 (Judgment of Nov. 18).

tional law that governs such processes. Many agreements to ad hoc arbitration are quite brief and are intended to rest upon the pertinent customary international practice.³⁰ Even a brief agreement, however, may raise the question whether aspects of customary practice have been displaced. For example, state parties often agree that the arbitral award shall be final and binding upon them. Nonetheless, customary international law recognizes that either party may declare the award a nullity when the arbitral process does not satisfy certain fundamental norms of fairness.³¹ That a tribunal may not exceed its jurisdiction or be corrupt are examples of such norms.³² Although states could agree to remove this customary right, the common phrase "the award shall be final and binding upon the parties" does not necessarily constitute such agreement inasmuch as it is "the award" that is challenged by a declaration of nullity.³³ An express example of the removal of the customary right can be found in the, in many ways, innovative Convention establishing the International Centre for Settlement of Investment Disputes (ICSID).³⁴ That Convention provides a limited mechanism for nullification by a second tribunal³⁵ and states that the award "shall not be subject to any appeal or to any other remedy except those provided in this Convention."³⁶

³⁰ Indeed, this customary practice was so involved in arbitrations in the first half of this century that international legal scholarship devoted a great deal of energy to its codification. See, e.g., Carlston, *Codification of International Arbitral Procedure*, 47 AJIL 203 (1953).

³¹ See generally W. M. REISMAN, NULLITY AND REVISION: THE REVIEW AND ENFORCEMENT OF INTERNATIONAL JUDGMENTS AND AWARDS (1971). Of course, the problem with this right is that often no international court has jurisdiction to review the merits of a state's declaration of nullity; thus, the declaration in effect becomes a justification for that state's refusal to comply with the award.

³² For an example of corruption in modern times, see the discussion of the U.S.-Venezuelan Claims Commission (1866-1888), 2 J. B. MOORE, INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY 1659-92 (1898).

³³ See W. M. REISMAN, *supra* note 31, at 421.

³⁴ Convention on the Settlement of Investment Disputes between States and Nationals of Other States, opened for signature Aug. 27, 1965, 17 UST 1270, TIAS No. 6090, 575 UNTS 159 [hereinafter ICSID Convention]. ICSID is unlike classical interstate arbitration in that one of the parties is likely private. In this sense (and see further text at note 216 *infra*), ICSID, like the Tribunal, is an institution that reflects developments not modeled by the traditional distinction. The ICSID Convention, however, nonetheless stands as a valid example of the proposition in the text because the means of reviewing the validity of awards is decided by the mechanisms provided for in the treaty, and not by reliance on or reference to customary international law doctrines such as declarations of nullity.

³⁵ ICSID Convention, *supra* note 34, Art. 52. For the most recent example of such a nullification proceeding, see *Amco Asia Corp. v. Republic of Indonesia*, No. ARB/81/1: On the Application for Annulment Submitted by the Republic of Indonesia Against the Arbitral Award Rendered on November 20, 1984 (Ad Hoc Committee decision of May 16, 1986, nullifying in part the award on the merits), reprinted in 25 ILM 1441 (1986). For further proceedings in the case, see 83 AJIL 106 (1989).

³⁶ ICSID Convention, *supra* note 34, Art. 53(1).

This issue was raised vividly in the recent Judgment of the ICJ on jurisdiction in Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Jurisdiction and Admissibility, 1984 ICJ REP. 392 (Judgment of Nov. 26). The United States has refused to recognize the proceedings of the Court on the ground that the Court exceeded its jurisdiction. See Reisman,

The second reason for the general irrelevance of the external world to interstate arbitration is that the immunities normally afforded to states will preclude the involvement of municipal legal systems. Of course, the treaty defining an interstate arbitration could involve municipal courts. For example, although the validity of an ICSID award is resolved within the ICSID process, ICSID awards are enforceable in the national courts of any state party.³⁷ In practice, however, resort to municipal courts has been possible only infrequently. Moreover, the agreement of state parties to the use of municipal courts to enforce an arbitral decision is conceptually different from their agreeing that the arbitral process shall be fully subject to a municipal legal system. In the latter case, the municipal system would govern not only enforceability, but also validity.³⁸ Involvement of municipal courts in either validity or enforcement rests upon a waiver by states of the immunities such courts normally extend to them.

International Commercial Arbitration between Private Entities

The extension of traditional municipal arbitration. As to modern forms of international arbitration, Dr. Mann writes:

Although, where international aspects of some kind arise, it is not uncommon and, on the whole, harmless to speak somewhat colloquially, of international arbitration, the phrase is a misnomer. In the legal sense no international commercial arbitration exists. Just as . . . every system of private international law is a system of national law, every arbitration is a national arbitration, that is to say, subject to a specific system of national law.³⁹

Under this view, international commercial arbitrations are merely private municipal arbitrations that have an international aspect. For such arbitrations, the municipal legal system of the *place of arbitration* governs whether the arbitral award is valid.⁴⁰ This governing legal system is often termed the

Has the International Court Exceeded its Jurisdiction?, 80 AJIL 128 (1986). The legal issue is whether or not the United States displaced its customary right to nullify an award for this reason by its agreement in Article 94(2) of the UN Charter "to comply with the decision of the International Court of Justice in any case to which it is a party." See also W. M. REISMAN, *supra* note 31, at 420-23.

³⁷ ICSID Convention, *supra* note 34, Art. 54(1). See, e.g., *Liberian E. Timber Corp. v. Government of Republic of Liberia*, 650 F.Supp. 73 (S.D.N.Y. 1986).

³⁸ See, e.g., *Maritime Int'l Nominees Establishment v. Republic of Guinea*, 693 F.2d 1094, 1100 (D.C. Cir. 1982), *cert. denied*, 464 U.S. 815 (1983) (distinguishing between U.S. federal court jurisdiction to enforce and jurisdiction generally over ICSID proceedings). See generally Delaume, *ICSID Arbitration and the Courts*, 77 AJIL 784 (1983).

³⁹ Mann, *Lex Facit Arbitrum*, in INTERNATIONAL ARBITRATION, *supra* note 24, at 157, 159. The de-localized view of arbitration, which challenges Dr. Mann's statement, is considered in the text at notes 50-65 *infra*.

⁴⁰ The parties may confuse this general rule by, for example, expressly providing for a *lex arbitri* different from that of the designated place of the arbitration, or by holding all proceedings in, or rendering the award in, a country other than the country of the designated place of arbitration. See Mann, *Where Is an Award 'Made'?*, 1 ARB. INT'L 107 (1985).

lex arbitri.⁴¹ "The *lex arbitri* is not necessarily the law governing the substance of the dispute, nor the procedural rules applied by the arbitrators."⁴² Rather, it is the legal system that determines whether the award was arrived at properly.⁴³ An award is said to have the *nationality* of the country where it is rendered; presumably, the place of arbitration is chosen by the parties, or by some other person or institution they have empowered to make that choice. The source of this concept of nationality is territorial; that is, the contract (the agreement to arbitrate) is to be performed within the jurisdiction of a country.⁴⁴

States can take, and have taken, a variety of approaches to their supervision of municipal arbitration. For example, a state may forbid arbitration and refer all disputes to the courts.⁴⁵ States may allow arbitration but dictate the precise procedure to be employed, specify which questions are arbitrable and subject all aspects of the arbitration to judicial review.⁴⁶ Finally, states may allow the parties to choose how the arbitration is to proceed and

⁴¹ See Mann, *supra* note 39.

⁴² Park, *supra* note 25, at 23.

⁴³ Hirsch, *The Place of Arbitration and the "Lex Arbitri,"* 34 ARB. J. 43, 44 (1979).

⁴⁴ Other dimensions to governance of the arbitral process exist and the courts of the place of arbitration may be requested to intervene in arbitral proceedings in such other ways. These other relationships generally involve securing judicial assistance in furtherance of the arbitral proceedings, including, *inter alia*, the appointment of arbitrators and the production of evidence. Generally such matters (in particular, matters relating to the composition of the tribunal) are only within the competence of the courts of the place of arbitration. However, assistance in areas such as interim measures might be available to the parties before courts other than those of the place of arbitration. Finally, it is normally reserved to the courts of the place of arbitration to decide questions about liability of the arbitrators to the parties and, not as exclusively, liability of the parties to the arbitrators. The approaches of the various municipal systems on these more detailed questions vary considerably. See generally Delaume, *Court Intervention in Arbitral Proceedings*, in *RESOLVING TRANSNATIONAL DISPUTES THROUGH INTERNATIONAL ARBITRATION* 195 (T. Carbonneau ed. 1984) [hereinafter *RESOLVING DISPUTES*].

⁴⁵ Courts in the United States, for example, were hostile at one time to arbitration. See, e.g., *United States Asphalt Ref. Co. v. Trinidad Lake Petroleum Co.*, 222 F. 1006 (S.D.N.Y. 1915). As caseloads have increased in the United States, however, hostility has given way to encouragement. See Burger, *Isn't There a Better Way?*, 68 A.B.A.J. 274, 277 (1982).

⁴⁶ For example, until quite recently, this second municipal law approach was exemplified by the law of England and Commonwealth countries that followed English practice. This second approach, known as the "special case" or "case stated" procedure, involves much more extensive judicial supervision and control of the arbitration to ensure not only fundamental fairness but also legally correct results. Under the case-stated procedure, either party may demand that the arbitral panel submit a question of law or fact to the courts. The courts may then hold a hearing with full argument from which appeal may be made. The grounds upon which the court addresses the validity of an award are thus considerably broader. However, the approach is no longer favored in the United Kingdom, having been replaced by the 1979 Arbitration Act, a law that moves toward the third approach—an arbitral process substantially more independent of judicial control.

See Mann, *Some Recent Developments of the English Law of Arbitration*, in *IUS INTER NATIONES: FESTSCHRIFT FÜR STEFAN RIESENFELD* 187, 190 (1983). See also Park, *The Influence of National Legal Systems on International Commercial Arbitration: Recent Developments in English Arbitration Law*, in *RESOLVING DISPUTES*, *supra* note 44, at 80; Lord Hacking, *Where We Are Now: Trends and Developments Since the Arbitration Act [1979]*, 2 J. INT'L ARB. 7 (1985); Jaffe, *The Judicial Trend Toward Finality of Commercial Arbitral Awards in England*, 24 TEX. INT'L L.J. 67 (1989); and Thomas, *The Antaios: The Nema Guidelines Reconsidered*, 1985 J. BUS. L. 200.

limit review to the parties' fundamental interests in a fair process.⁴⁷ Although the details vary considerably and differences may be significant, the approach with limited judicial review has come to be the most common.

Under this approach, a statute typically sets forth rules of arbitral procedure. Simultaneously, the statute gives parties the right to displace the statutory procedural scheme by rules of their own choice. Thus, the internal statutory construct is to be applied only if the parties fail to provide otherwise. A frequent caveat in this regard, however, is that *certain* aspects of the national arbitration law will be mandatory. These mandatory provisions are usually those that ensure fundamental fairness; ordinarily, failure to observe these rules will lead to the setting aside of the award.⁴⁸ The dominance of the notions of nationality of awards based on the place of the arbitration and judicial review limited to concerns of fundamental fairness has been confirmed and bolstered by their adoption in the 1985 UNCITRAL Model Law on International Commercial Arbitration.⁴⁹

Thus, private parties in international commercial arbitration in effect can control the procedure within statutorily defined limits of fundamental fairness. Effective control devolves upon the parties because it is permitted by the sovereign of the place of arbitration. States in interstate arbitration have such control because of their inherent ability to displace by treaty the regime otherwise provided by customary international law.

⁴⁷ See generally Carboneau, *American and Other National Variations on the Theme of International Commercial Arbitration*, 18 GA. J. INT'L & COMP. L. 143 (1988) (discussing the evolution of the French, British, Canadian and American approaches).

⁴⁸ For example, an arbitral award rendered in the United States may be vacated under §10 of the U.S. Arbitration Act:

- (a) Where the award was procured by corruption, fraud, or undue means.
- (b) Where there was evident partiality or corruption in the arbitrators
- (c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing . . . or in refusing to hear evidence
- (d) Where the arbitrators exceeded their powers

9 U.S.C. §10 (1988).

⁴⁹ UNCITRAL Model Law on International Commercial Arbitration, Art. 34, adopted June 21, 1985, reprinted in 24 ILM 1302, 1311 (1985) [hereinafter UNCITRAL Model Law]. See Report of the U.N. Commission on International Trade Law on the Work of its Eighteenth Session, 40 UN GAOR Supp. (No. 17), UN Doc A/40/17, Ann. 1 (1985). See generally H. HOLTZMANN & J. NEUHAUS, A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION (1988); McNerney & Esplugues, *International Commercial Arbitration: The UNCITRAL Model Law*, 14 B.C. INT'L & COMP. L. REV. 47 (1986); Herrmann, *UNCITRAL Adopts Model Law on International Commercial Arbitration*, 2 ARB. INT'L 2 (1986); and Broches, *The 1985 UNCITRAL Model Law on International Commercial Arbitration: An Exercise in International Legislation*, 18 NETH. Y.B. INT'L L. 3 (1987).

On previous regional efforts in Latin America and Europe at a uniform municipal model arbitration law, see Domke, *International Arbitration of Commercial Disputes*, in 2 INSTITUTE ON PRIVATE INVESTMENTS ABROAD 131, 136-39 (1960).

That the "fundamental fairness" approach is dominant should not be taken to mean that other approaches to municipal governance of the arbitral process do not exist at present. In particular, arbitration in the socialist countries tends to remain very closely supervised by the courts.

The movement for an anational process. Private parties often are motivated to arbitrate an international dispute for a reason fundamentally different from the reasons that motivate parties to most municipal disputes. On the municipal level, arbitration is attractive because it is perceived to be a desirable alternative to the courts.⁵⁰ But on the international level, there often is no alternative to arbitration.⁵¹ In many international situations, neither party will agree to submit all possible disputes to the courts of the other.⁵² Arbitration is preferred over litigation in some third state in part because to ascertain whether procedurally and substantively the courts and legal system would be acceptable would take a tremendous effort,⁵³ and also because foreign court proceedings ultimately require extensive, and possibly costly, use of foreign counsel.⁵⁴ Thus, the parties are led to choose arbitration.⁵⁵

Nevertheless, the arbitration alternative does not free the parties entirely from the unknown pitfalls of a foreign legal system; as described above, the system of the place of arbitration will serve as the *lex arbitri*. The desire to free the parties completely from such pitfalls gives rise to one aspect of the anational movement.⁵⁶

⁵⁰ The arbitration alternative is particularly attractive for smaller cases where the often time-consuming procedural guarantees and appeal structure of a court system are not of particular importance to the parties.

⁵¹ Similarly, domestic labor arbitration, particularly labor grievance arbitration, arguably "is not a substitute for litigation . . . [but] rather, a device by which the parties agree to accept the judgment of a third party instead of fighting the issues out on the picket lines." Brief for Petitioner 32, *Textile Workers Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 448 (1957).

⁵² Smit, *The Future of International Commercial Arbitration: A Single Transnational Institution?*, 25 COLUM. J. TRANSNAT'L L. 9, 10 (1986) ("Rather than permit international disputes to be settled in national courts, many parties often prefer to submit them to a tribunal that is not part of the governmental structure of a particular state"; *id.* at 9); de Vries, *International Commercial Arbitration: A Contractual Substitute for National Courts*, 57 TUL. L. REV. 42 (1982); and Kerr, *Commercial Dispute Resolution: The Changing Scene*, in *LIBER AMICORUM FOR LORD WILBERFORCE* 111, 128 (M. Bos & I. Brownlie eds. 1987).

⁵³ The generally recognized expertise of English courts in maritime matters is an exception.

⁵⁴ In international commercial arbitration, the necessary reliance on foreign counsel can be greatly reduced. Even if a foreign law is applicable to the substance of the dispute, the normal counsel to the parties usually can operate within the arbitral procedure adopted, generally are better suited to deal with the factual basis of the case and, thus, often need to involve foreign counsel only to advise on selected points of the applicable law or supervising legal system.

⁵⁵ Moreover, because the motivations for entering into international and wholly municipal commercial arbitration differ, there can be important differences in the two processes and in the directions in which the processes are evolving. For example, because international commercial arbitration can be the only alternative and large amounts may be in dispute, the parties—rather than desiring a streamlined process to ensure speed and reduce costs, as is often the case stated in the municipal context—may seek to design an arbitral process that quite resembles court proceedings, e.g., by providing for discovery or even appeal.

⁵⁶ The movement toward an anational system for private international arbitrations has been the subject of a great deal of commentary in recent years. See, e.g., Paulsson, *Arbitration Unbound: Award Detached from the Law of its Country of Origin*, 30 INT'L & COMP. L.Q. 358 (1981); Park, *supra* note 25. The movement has a number of aims. One is that the legal system of the place of arbitration should no longer govern the arbitral process. Rather, it is argued that the system where enforcement is sought should govern. Another aim is development of a substantive law that is non-national, the "*lex mercatoria*." See Lando, *The "Lex Mercatoria" in International Commercial Arbitration*, 34 INT'L & COMP. L.Q. 747 (1985); and Cremades &

Specifically, although a large number of states allow arbitrating parties to stipulate the procedure to be employed (such as the ICC Rules of Arbitration), this choice does not necessarily assure them a predictable, neutral and effective process. Paulsson offers the following example:

A majority award is rendered. The losing party moves to set it aside on the grounds that the dissenting arbitrator—who one might suppose was nominated by the said party—had not signed the award. The winning party retorts that the contractually stipulated ICC Rules of Arbitration accept majority awards, and do not require a signature by the dissenting arbitrator. The argument would appear to fail, however, since the law of [the place of arbitration] not only requires that all arbitrators sign the award, but provides that any contractual stipulation to the contrary is invalid.⁵⁷

Paulsson points out that whereas the law of the place of arbitration may be totally appropriate for purely domestic arbitrations,

the international businessman who had chosen arbitration under a simple set of rules he thought he understood, having ended up at a seat of arbitration selected only for convenience and not out of admiration for any local legal principles, would be deeply shocked to find that the end result of an expensive process in which he had justly prevailed is the utter nullity of his effort.⁵⁸

Furthermore, to the degree that an arbitral award is only enforceable if it has a nationality, the action of the place of arbitration may render the award a nullity throughout the world.⁵⁹

Plehn, *The New "Lex Mercatoria" and the Harmonization of the Laws of International Commercial Transactions*, 2 B.U. INT'L L.J. 317 (1984). For recent critical discussions, see Mustill, *The New "Lex Mercatoria": The First Twenty-Five Years*, in LIBER AMICORUM FOR LORD WILBERFORCE, *supra* note 52, at 149; Highet, *The Enigma of the Lex Mercatoria*, 63 TUL. L. REV. 613 (1989).

The anational arbitration system is similar to the so-called autonomous theory of the nature of private international arbitration. See J. RUBELLIN-DEVICHI, *L'ARBITRAGE; NATURE JURIDIQUE, DROIT INTERNE ET DROIT INTERNATIONAL PRIVÉ* (1965). In essence, the autonomous theory asserts that private parties may take the place of a state in establishing regimes for the resolution of certain disputes. Yet arbitration often depends on states for support during the arbitral process and for enforcement of resulting awards. See Wetter, *The Conduct of the Arbitration*, 2 J. INT'L ARB. 7, 27-34 (1985).

⁵⁷ Paulsson, *Delocalisation of International Commercial Arbitration: When and Why It Matters*, 32 INT'L & COMP. L.Q. 53, 58 (1983). Paulsson noted that such a provision, albeit "poised for reform," exists in Austria. *Id.* at 59 n.10. See Melis, *Arbitration and the Courts in Austria—international aspects*, in THE ART OF ARBITRATION, LIBER AMICORUM FOR PIETER SANDERS 253, 257 (J. C. Schultz & A. J. van den Berg eds. 1982).

⁵⁸ Paulsson, *supra* note 57, at 59.

⁵⁹ New York Convention, *supra* note 25. On the Convention, see generally A. J. VAN DEN BERG, *THE NEW YORK CONVENTION OF 1958: TOWARD A UNIFORM JUDICIAL INTERPRETATION* (1981); Contini, *International Commercial Arbitration: The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 8 AM. J. COMP. L. 283 (1959); Mirabito, *The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards: The First Four Years*, 5 GA. J. INT'L & COMP. L. 471 (1975); Sanders, *A Twenty Years' Review of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 13 INT'L LAW. 269 (1979); and Springer, *The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 3 INT'L LAW. 320 (1969).

The anational movement challenges the burden placed on international commercial arbitration by such vagaries of municipal arbitration. Municipal arbitration statutes were originally drafted, quite understandably, with municipal disputes in mind. Their standards of judicial review followed municipal norms of fairness. The anational movement opposes the tendency of the enforcing state to require that the award have a nationality. Under its approach, an annulment at the place of arbitration would no longer be a global annulment and, in effect, the significance of an award would be determined by the state where enforcement is sought.⁶⁰ A common metaphor is that the award "floats" until enforcement seeks to anchor it within a given legal system. Anational arbitration is referred to also as "delocalized arbitration."

Critics of the anational approach argue that arbitral awards must have a nationality; otherwise, "[t]he paradox of a legal obligation independent of a legal order suggests Athena springing full-blown from the head of Zeus"⁶¹ Proponents counter that no one questions that the validity of an international contract should not turn upon the approval of the state where the contract was formed, particularly when the contract has no other connection with that state. Similarly, the *lex arbitri* should not be permitted to dictate the determinative view of an award because there are often few connections between the place of arbitration and the parties, the dispute or the assets that may satisfy the award.

In support of the enforceability of anational awards under the Convention, see Lake & Dana, *supra* note 15, at 790. Opposed, see A. J. VAN DEN BERG, *supra*, at 28-40. A subcommittee of the American Arbitration Association concluded that "the convention should apply to delocalized arbitration [another term for anational arbitration], but it is to be expected that delocalized awards will be given special scrutiny in the courts of the United States." Sub-Committee on Delocalized Arbitration of the Law Committee of the American Arbitration Association, Report 12 (Feb. 14, 1984) [hereinafter AAA Report]. If, instead of an appropriate law applied fairly, the award were set aside in a country "without a tradition of judicial independence . . . merely to please the bureaucracy . . . [e]nforcement of such an award [elsewhere] would seem neither improper nor inappropriate." Park, *supra* note 25, at 27-28.

⁶⁰ A related objective of the approach is to encourage courts to abstain from applying their law to an international commercial arbitration simply because the award was rendered in that state. An often-argued example is the decision on the appeal of an ICC award, *Götaverken Arendal v. Libyan General National Maritime Transport*, Feb. 21, 1980; for an English translation of extracts, see Paulsson, *supra* note 56, at 385. The Paris Court of Appeal noted that even though the place of arbitration was Paris and the award had been rendered in Paris, Article 11 of the ICC Rules (unaltered by the parties) provided for not even a subsidiary reference to French law: "the place of the arbitral proceedings, chosen only in order to assure their neutrality, is not significant; it may not be considered an implicit expression of the parties' intent to subject themselves, even subsidiarily, to the *loi procédurale française*." The court concluded that since the award had been "rendered in accordance with proceedings which are not those of French law and which have no attachment whatsoever to the French legal order since the two parties are foreigners, and since the contract was signed and was to be performed abroad, [it] may not be considered French." *Id.* at 386. In this sense, the rhetoric of the anational movement echoes the motivations expressed in the shift in U.S. choice of law from localizing factors to interest analysis.

⁶¹ Park, *supra* note 25, at 27. See also Redfern, *The Arbitration Between the Government of Kuwait and Aminoil*, 55 BRIT. Y.B. INT'L L. 78 (1984).

Although nationality of awards may not be a logical necessity, as some critics seem to suggest, there are practical reasons that support the present connection between the rendering of an award and the legal system of the place of arbitration. Most importantly, this connection provides a means for timely judicial review of arbitral awards. Unlike the formation of a contract, the rendering of the award is the final act in arbitral proceedings. Consequently, most municipal arbitration statutes require that a motion to set aside the award must be filed with local courts within a short period—quite often within 3 months of the rendering of the award.⁶² This procedure accomplishes two practical goals. First, the losing party need challenge the award only once and therefore is not “forced to litigate issues such as arbitrator corruption in all States where it has assets.”⁶³ Second, and more important, the judicial review of at least certain issues takes place at the most appropriate place and time: where the arbitrators and records are likely to be present and while the recollections and evidence are fresh.

Moreover, this aspect of the anational movement's concerns, although interesting, has been, and will increasingly be, of little practical significance. First of all, prudent parties will desire, and thus intend, that their arbitration be governed by a legal system so that court assistance *during* the proceedings, even though often limited, will be available, and so that the enforceability of the award will be strengthened by the support of the appellation of a nationality. Second, and more important, the problem behind the main impetus to the anational movement, “peculiar and unexpected local norms,” is being resolved in ways other than that suggested by the movement's adherents: in part, by the general harmonization of municipal arbitration statutes, and especially, by the trend toward the adoption by states of special statutes that cover international commercial arbitration alone and exclude peculiar local norms.⁶⁴ The recently adopted UNCITRAL Model

⁶² See, e.g., UNCITRAL Model Law, *supra* note 49, Art. 34(3).

⁶³ Park, *supra* note 25, at 51. See also A. J. VAN DEN BERG, *supra* note 59, at 30.

⁶⁴ For example, Lord Elwyn Jones, in introducing the bill that eventually eliminated the British “case stated” procedure, *supra* note 46, explained: “The purpose [of the bill] is to remove certain legal obstacles which at present stand in the way of London being used to its full potential as an international centre for arbitration.” See Kerr, *supra* note 52, at 124. See also Bentil, *Making England a More Attractive Venue for International Commercial Arbitration by Less Judicial Oversight*, 5 J. INT'L ARB. 49 (1988). Indeed, the commercial value of being a center of arbitration is generally believed to have spurred this global transformation of municipal arbitration laws.

France, whose courts are argued to have employed anational reasoning in regard to an arbitration (see *supra* note 60), shortly thereafter adopted such a statute. See Audit, *A National Codification of International Commercial Arbitration: The French Decree of May 12, 1981*, in RESOLVING DISPUTES, *supra* note 44, at 117. See also Carbonneau, *supra* note 47, at 167–73; Carbonneau, *The Elaboration of a French Court Doctrine on International Commercial Arbitration: A Study in Liberal Civilian Judicial Creativity*, 55 TUL. L. REV. 1 (1980); Bellet, *The Evolution of French Judicial Views on International Commercial Arbitration*, 34 ARB. J. 28 (1979).

On the other hand, Belgium has passed a law freeing international arbitrations entirely, i.e., making them anational. See van Houtte, *La Loi belge du 27 mars 1985 sur l'arbitrage international*, 1986 REVUE DE L'ARBITRAGE [REV. ARB.] 29 (1986); Vanderelst, *Increasing the Appeal of Belgium as an International Arbitration Forum?—The Belgian Law of March 27, 1985 concerning the Annulment of Arbitral Awards*, 3 J. INT'L ARB. 77 (1986).

Law on International Commercial Arbitration should encourage this approach, as it applies only to international commercial arbitration and affords limited, and only generally accepted, grounds for the setting aside of, or refusal to enforce, an award.⁶⁵

International Arbitration between a State and a Private Entity

Arbitrations that typically are neither interstate nor private illuminate the inadequacy of distinguishing between these processes on the basis of the parties or issues involved, or the public or private nature of the surrounding institutional arrangement. Most such arbitrations involve proceedings between a state and a private entity, an increasingly common configuration of parties and the one faced for the most part by the Iran–United States Claims Tribunal.⁶⁶ In these cases, is the arbitration governed by the international legal system as for interstate arbitration, or by a municipal legal system as for international commercial arbitration? Awards reaching one or the other conclusion have been rendered.⁶⁷

⁶⁵ See UNCITRAL Model Law, *supra* note 49, Art. 34. "To the extent that the UNCITRAL draft Model Law . . . with its very limited grounds for review is adopted, [the] reasons for seeking to delocalize arbitration would be reduced in persuasiveness." AAA Report, *supra* note 59, at 6. "Article 34 takes into account the 'mobility' of international commercial arbitration and reduces the legal relevance of the chosen place of arbitration. . . . [I]t contributes to what one may call 'soft delocalization'." Herrmann, *The British Columbia Enactment of the UNCITRAL Model Law*, in UNCITRAL ARBITRATION MODEL IN CANADA 65, 70 (R. Paterson & B. Thompson eds. 1987). As to the grounds for refusing to enforce an award under the UNCITRAL Model Law, see Ungar, *The Enforcement of Arbitral Awards Under UNCITRAL's Model Law on International Commercial Arbitration*, 25 COLUM. J. TRANSNAT'L L. 717 (1987).

⁶⁶ See Böckstiegel, *States in the International Arbitral Process*, 2 ARB. INT'L 22 (1986).

⁶⁷ A caveat to the significance of these arbitral awards can be found in Judge Lagergren's comment in *British Petroleum*, *infra* note 76, that the "Tribunal is not competent to establish conclusively the nationality of its Award, for this can only be decided by the courts of [the place of arbitration] and of other jurisdictions in which the enforcement of the Award may be sought." 53 ILR at 309. Notably, in this regard the somewhat ambiguous *LIAMCO* award, *infra* note 85, was later the subject of extensive municipal litigation. Implicit in that subsequent litigation, despite the ambiguity of the award itself, is the seemingly unquestioned assumption that the arbitration was governed by Switzerland's legal system. The Swiss Federal Supreme Court, in an action relating to enforcement, noted that "the appeal for annulment permissible under the laws of Geneva was not filed." *Libya v. Libyan American Oil Co.* (Swiss Federal Supreme Ct., June 19, 1980), reprinted in 20 ILM 151, 154 (1981). (As to Swiss laws on the execution issue presented, see generally Lalive, *Swiss Law and Practice in Relation to Measures of Execution against the Property of a Foreign State*, 10 NETH. Y.B. INT'L L. 153 (1979).) Moreover, in a later enforcement action in U.S. courts, Libya itself characterized the award as Swiss, contending that "the Swiss judgment has, in effect, set aside or suspended LIAMCO's arbitral award"; while the United States, as *amicus curiae*, argued that the award was a foreign arbitral award enforceable under the New York Convention. Brief (June 16, 1980) and Supplemental Memorandum (Nov. 7, 1980) of the United States as *amicus curiae* in *Libyan American Oil Co. v. Socialist People's Libyan Jamahirya*, reprinted in 20 ILM 161 and 164, 165 (1981). The court of appeals, apparently in reliance on the *amicus* brief, 684 F.2d 1032 (D.C. Cir. 1982), vacated the judgment of the U.S. district court, 482 F.Supp. 1175 (D.D.C. 1980), which also had assumed that the award was the result of foreign rather than international arbitration, but had nonetheless declined to recognize or enforce the award by reason of the act of state doctrine. The award was also recognized in France and Sweden. See *Procureur de la République v.*

The classic discussion of this question in a case is the 1958 arbitration, *Saudi Arabia v. Arabian American Oil Co. (ARAMCO)*.⁶⁸ The tribunal concluded that "[a]lthough the present arbitration was instituted, not between States, but between a State and a private American corporation, the Arbitration Tribunal is not of the opinion that the law of the country of its seat [Switzerland] should be applied to the arbitration."⁶⁹

The ARAMCO tribunal's conclusion rested in large part on great deference to the sovereign nature of states.

The jurisdictional immunity of States . . . excludes the possibility, for the judicial authorities of the country of the seat, of exercising their right of supervision and interference in the arbitral proceedings which they have in certain cases. . . .

Considering the jurisdictional immunity of foreign States, recognized by international law in a spirit of respect for the essential dignity of sovereign power, the Tribunal is unable to hold that arbitral proceedings to which a sovereign State is a Party could be subject to the law of another State.⁷⁰

This deference to sovereignty reflected the tribunal's estimation of the deference states afforded one another at that time:

It is true that the practice of the Swiss Courts has limited the jurisdictional immunity of States and does not protect that immunity, in disputes of a private nature, when the legal relations between the Parties have been created, or when their obligations have to be performed in Switzerland. The Arbitration Tribunal must, however, take that immunity into account when determining the law to be applied to an arbitration which will lead to a purely declaratory award. By agreeing to fix the seat of the Tribunal in Switzerland, the foreign State which is a Party to the arbitration is not presumed to have surrendered its jurisdictional immunity in case of disputes relating to the implementation of the "compromis" itself.⁷¹

Having decided that the Swiss legal system did not govern the arbitration, the panel structured the internal world of the arbitration along the lines of an interstate arbitration. "In such a case, the [internal procedural] rules set forth in the Draft Convention on Arbitral Procedure, adopted by the International Law Commission of the United Nations . . ., should be applied by analogy."⁷²

On the other hand, in 1963 the arbitrator in *Sapphire International Petroleum v. National Iranian Oil Co.* decided that the legal system of the place of

Société LIAMCO (Trib. gr. inst. Paris 1979), reprinted in 106 JOURNAL DU DROIT INTERNATIONAL [JDI] 857 (1979); *Libyan American Oil Co. v. Libya* (Ct. App. Svea, June 19, 1980), reprinted in English in 20 ILM 893 (1981).

⁶⁸ *Saudi Arabia v. Arabian American Oil Co. (ARAMCO)*, reprinted in 27 ILR 117 (1958) (Sausser-Hall, Badawi/Hassan, Habachy, arbs.).

⁶⁹ *Id.* at 155.

⁷¹ *Id.* at 156.

⁷⁰ *Id.* at 155-56.

⁷² *Id.*

arbitration would govern the arbitration.⁷³ The parties had agreed to a precise and detailed arbitration clause to be used after an optional conciliation procedure. Cavin, the sole arbitrator, concluded that the parties had "unequivocally shown their mutual desire to use arbitration in order to obtain a decision which will settle once and for all their possible differences."⁷⁴ In Cavin's opinion, this desire indicated that the decision "should be subject to the supervision of a State authority, such as the judicial sovereignty of a State."⁷⁵

*British Petroleum Exploration Co. v. Libyan Arab Republic*⁷⁶ was one of three arbitrations between Libya and the nationals of a foreign state that arose out of the Libyan oil nationalizations of the early 1970s.⁷⁷ In *British Petroleum*, Judge Lagergren quoted the *ARAMCO* opinion at length but then stated that the tribunal "cannot share the view that the application of municipal procedural law to an international arbitration like the present one would infringe upon such prerogatives as a State party to the proceedings may have by virtue of its sovereign status."⁷⁸ Indeed, Judge Lagergren contended, "By providing for arbitration as an exclusive mechanism for resolving contractual disputes, the parties to an agreement, even if one of them is a State, must . . . be presumed to have intended to create an effective remedy"; and the effectiveness of a remedy is certainly greater when the "award [is] founded on the procedural law of a specific [municipal] legal system."⁷⁹

*Texaco Overseas Petroleum & California Asiatic Oil Co. v. Libya (TOPCO)*⁸⁰ involved an arbitration clause identical to the one in *British Petroleum*, yet reached the opposite result of *British Petroleum* and *Sapphire*. Professor Dupuy, the sole arbitrator, cited the result in *Sapphire* with approval but

⁷³ *Sapphire International Petroleum v. National Iranian Oil Co.*, reprinted in 35 ILR 136 (1963) (Cavin, sole arb.). See also Suratgar, *The Sapphire Arbitration Award, the Procedural Aspects: A Report and a Critique*, 3 COLUM. J. TRANSNAT'L L. 152 (1964).

⁷⁴ *Sapphire*, 35 ILR at 168.

⁷⁵ *Id.* at 169.

⁷⁶ *British Petroleum Exploration Co. v. Libyan Arab Republic* (Award on the Merits), reprinted in 53 ILR 297 (1973) (Lagergren, sole arb.). A further award was rendered by Lagergren on Aug. 1, 1974, addressing plaintiff's motion to reopen the proceedings; reprinted in *id.* at 375.

⁷⁷ See von Mehren & Kourides, *International Arbitrations between States and Foreign Private Parties: The Libyan Nationalization Cases*, 75 AJIL 476 (1981). The three arbitrations are significant generally and to this discussion specifically because "[i]t is rare in international arbitration for three arbitrations, with virtually identical factual and legal contexts, to arise and be heard by distinguished international jurists, and to result in awards that thereafter become part of the public domain." *Id.* at 490.

⁷⁸ *British Petroleum*, 53 ILR at 309.

⁷⁹ *Id.* In support of his holding, Judge Lagergren cited *Sapphire* and *Alsing Trading Co. & Svenska Tändsticks Aktiebolaget v. The Greek State*, reprinted in 23 ILR 633 (1954) (Python, sole arb.). On *Alsing*, see generally Schwebel, *The Alsing Case*, 8 INT'L & COMP. L.Q. 320 (1959).

⁸⁰ *Texaco Overseas Petroleum Co. & California Asiatic Oil Co. v. Libyan Arab Republic* (Award on the Merits) (1977), reprinted in 17 ILM 1 (1978) (Dupuy, sole arb.). French original of part II of the Award on the Merits, reprinted in 104 JDI 350 (1977). Professor Dupuy at an earlier stage rendered an award on his jurisdiction. TOPCO (Preliminary Award), reprinted in 53 ILR 393 (1975) (Dupuy, sole arb.). See further Lalive, *Un Grand Arbitrage Pétrolier entre un Gouvernement et deux sociétés privées étrangères*, 104 JDI 319 (1977).

distinguished the case on two bases: (1) *Sapphire* had involved a state enterprise rather than, as was the case in *TOPCO*, the state itself; and (2) the plaintiff in *Sapphire* had sought an enforceable judgment, while the plaintiffs in *TOPCO* "have indicated that they intend that the present arbitration should be an arbitration on matters of principle."⁸¹ Even if a final judgment had been sought, Dupuy suggested that he would have discounted this fact because it was "a consideration relating to enforcement, which is not within the jurisdiction of the Arbitrator."⁸² Dupuy then cited the reasoning in *ARAMCO* with approval, adding that its conclusion was further supported in *TOPCO* because the President of the International Court of Justice had appointed the sole arbitrator⁸³ and the parties had not objected to Dupuy's formulation of the tribunal's rules of procedure, which, *inter alia*, provided that "the arbitration shall be governed by these Rules of Procedure to the exclusion of the local law."⁸⁴

The third and last Libyan oil nationalization case was *Libyan American Oil Co. v. Libyan Arab Republic (LIAMCO)*.⁸⁵ Of the three, *LIAMCO* was the most unclear about whether the arbitration was governed by the international legal system or by that of the place of arbitration. Mahmassani, the sole arbitrator, wrote only that, given the failure of the parties to agree otherwise, "the City of Geneva shall be the official seat of arbitration" and that "the arbitrator will employ the 1958 United Nations Draft Convention on Arbitral Procedure."⁸⁶ The first statement could be read to suggest that the Swiss legal system governed the arbitral process, while the second statement could be read to suggest equally that the international legal system governed.⁸⁷

⁸¹ *TOPCO*, 17 ILM at 8.

⁸² *Id.*

⁸³ Dupuy distinguishes *Sapphire*, whose sole arbitrator was to be appointed by the President of the Swiss Federal Tribunal. He implies mistakenly, however, that this designation was an expressly stated basis for the conclusion reached in *Sapphire*. *Id.*

⁸⁴ *Id.* at 9.

⁸⁵ *Libyan American Oil Co. v. Libyan Arab Republic* (1977), reprinted in 20 ILM 1 (1981) (Mahmassani, sole arb.).

⁸⁶ *Id.* at 43.

⁸⁷ Von Mehren & Kourides, assuming that Swiss law governed the arbitration, found it interesting that Libya did not challenge the award "because the arbitral procedure was not the law of the situs." Von Mehren & Kourides, *supra* note 77, at 509. However, under the vast majority of municipal arbitration statutes, parties may choose their own internal rules of procedure as long as those rules are not inconsistent with the mandatory provisions of the arbitration statute involved. Thus, there is nothing inherently challengeable about the choice by Mahmassani of the United Nations Draft Convention on Arbitral Procedure. The only reason for challenge on the basis stated would be failure to comply with mandatory provisions, such as registration of the award.

Lake and Dana conclude that the arbitration "must be regarded as a-national" because the choice to use the Draft Convention on Arbitral Procedure was made, according to Mahmassani, "independently of the local law of the seat of arbitration." Lake & Dana, *supra* note 15, at 804. Again, however, Mahmassani's statement is ambiguous in that it does not say that the procedural rules *chosen* would be *applied* even if they were—in some particularities—contrary to local law. Rather, Mahmassani cites *Sapphire* only to support the principle that the rules of procedure are chosen independently of local law.

Arbitrators and commentators have cited one or the other of these cases to justify a variety of inconsistent propositions about the legal system that should govern such arbitrations. Significantly, however, in all of the cases the arbitrators approached the facts before them in the same basic manner: they sought to ascertain the intent of the parties, which not once was set forth clearly in an express provision. Thus, the arbitrators examined subsidiary factors for evidence of intent. It is the facts, or perhaps the starting presumptions of the arbitrators, but not the test of which legal system governs, that led the cases to different results.

As to the difference in starting presumptions of the arbitrators, the 15 years between the *ARAMCO* and *British Petroleum* awards are crucial. That period saw dramatic changes in legal doctrine, which necessarily influenced what the arbitrators thought to be the basic intent of the parties. The 1958 *ARAMCO* award found that even though Saudi Arabia had agreed to making Switzerland the seat of the tribunal, it could not thus be presumed to have surrendered its immunity from Swiss oversight of the arbitration.⁸⁸ The 1973 *British Petroleum* award, on the other hand, emphasized that even though one of the parties was a state, it must have intended to create an effective remedy.⁸⁹

This change in attitude from *ARAMCO* to *British Petroleum* can be explained in two ways. First, the panel in *ARAMCO* noted repeatedly that the parties sought only a declaratory judgment. In this sense, they possibly attached less importance to the enforceability of the award.⁹⁰ The second and more significant explanation is the emergence of the doctrine of restrictive sovereign immunity in many municipal legal systems during this same period.

The resolution of international legal disputes finds expression in many mechanisms: the International Court of Justice, claims commissions, private

At the other end of the spectrum, Redfern suggests that Mahmassani followed the approach of Dupuy in *TOPCO* and regarded *LIAMCO* only as subject to public international law. Redfern, *supra* note 61, at 82.

⁸⁸ *ARAMCO*, 27 ILR at 156.

⁸⁹ *British Petroleum*, 53 ILR at 309.

Dupuy, the sole arbitrator in *TOPCO*, did not state his view on this point but, rather, confused his jurisdiction to consider enforceability generally with consideration of enforceability as a circumstance evidencing the parties' choice of the legal system to govern the arbitration. In addition, it seems inconsistent that Dupuy cited the number of parties to the ICSID Convention to support his conclusion that UN General Assembly Resolution 1803 continued to reflect the proper standard of compensation in expropriation, 17 ILM at 30, but did not cite the same circumstances to support the apparent willingness of states to enter into enforceable arbitral arrangements.

⁹⁰ Dupuy in *TOPCO* also noted that the enforceability of the award in that arbitration was not of practical significance, as the "present arbitration should be an arbitration on matters of principle." 17 ILM at 8. What Dupuy passed over, however, is that, as in *British Petroleum*, the award as to legal principles was only the first stage of an arbitration that ultimately was to decide upon the requested relief of restitution or damages. Thus, the *TOPCO* arbitration ultimately was of more than declaratory character. See von Mehren & Kourides, *supra* note 77, at 490-96.

arbitration and municipal courts. The development of these mechanisms is rarely coordinated, yet modifications in any one may, as a stone dropped into water, ripple throughout. The panel in *ARAMCO* noted in 1958 that "[i]t is true that the practice of the Swiss Courts has limited the jurisdictional immunity of States"⁹¹ It is also true, however, that 1958 marked only the beginning of widespread implementation of the restrictive theory of sovereign immunity. Prior to 1952, a U.S. national's primary mechanism for raising a claim against a foreign government was diplomatic protection.⁹² Indeed, the institution of an action in U.S. courts against a foreign state did not become free of executive comment until passage of the Foreign Sovereign Immunities Act in 1976.⁹³ Although acceptance of the restrictive theory, particularly as to enforcement, is by no means universal, transformations similar to that in the United States occurred in other countries during these decades.⁹⁴ Consequently, as the traditional distinctions between a state party and a private party have become less relevant to certain kinds of activity, the likelihood of an effective municipal remedy against state parties has increased dramatically for private parties engaged in international business.⁹⁵

At the same time, companies have often been reluctant to enter into schemes requiring investment in a foreign country unless that investment could be protected.⁹⁶ In negotiating arbitration clauses, companies and states are seeking an alternative to the local courts. This alternative can be truly acceptable to private parties only if it provides an effective remedy. Thus, one would expect the circumstances described to lead the parties to choose the legal system of the place of arbitration to govern the arbitral process.

Finally, it should be noted that Lake and Dana offer a third possible legal characterization of arbitrations between states and private entities. They

⁹¹ *ARAMCO*, 27 ILR at 156.

⁹² See *Z & F Assets Realization Corp. v. Hull*, 311 U.S. 470, 487 (1941).

⁹³ 28 U.S.C. §§1330, 1332, 1396, 1441, 1602-1611 (1982). During the period 1952-1976, suits could be instituted with the filing by the Department of State of its suggestions on immunity with the court. For a concise history of U.S. practice, see Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 698 (1976).

⁹⁴ See, e.g., United Kingdom State Immunity Act 1978, ch. 33, reprinted in 17 ILM 1123 (1978); Canadian Act to Provide for State Immunity, ch. 95 (1982), reprinted in 21 ILM 798 (1982); European Convention on State Immunity (1972), 1972 ETS 74, reprinted in 11 ILM 470 (1972); Australian Foreign States Immunities Act 1985, reprinted in 25 ILM 715 (1986).

On the current state of sovereign immunity doctrine, see Trooboff, *Foreign State Immunity: Emerging Consensus on Principles*, 200 RECUEIL DES COURS 235 (1986 V). On an agreement to arbitrate as a waiver of sovereign immunity from execution, see *id.* at 388; Fox, *supra* note 17, at 10; and Blessing & Burckhardt, *Sovereign Immunity—A Pitfall in State Arbitration?*, in *SWISS ESSAYS ON INTERNATIONAL ARBITRATION* 107 (C. Reymond & E. Bucher eds. 1984).

⁹⁵ Böckstiegel, *supra* note 66, at 27.

⁹⁶ Although I believe this proposition, as qualified, is true, I also note that I am not aware of empirical support for the assertion that business acts cautiously in regard to foreign investment. The qualification "often" recognizes that corporate behavior likely turns also upon the competition within the industry in question and the institutional memory of the specific corporation.

regard arbitrations such as *TOPCO* and *ARAMCO* as anational,⁹⁷ a conclusion that apparently rests on the assumption that all "denationalized" arbitration is anational arbitration. This assumption, however, fails to distinguish between two forms of denationalized arbitration: anational arbitration and interstate arbitration. Anational arbitration is denationalized in the sense that it is freed at least somewhat from the supervisory jurisdiction of the legal system where the award was made. Yet the proponents of anational arbitration do not intend that such proceedings also be freed from the jurisdiction of legal systems of states where enforcement may be sought. Interstate arbitration, on the other hand, is totally denationalized.⁹⁸ It is governed by the applicable international legal regime and involves municipal courts only to the degree agreed to by the parties. The *ARAMCO* tribunal concluded that Saudi Arabia could not be presumed to have intended to "be subject to the law of another State"; but to regard the *ARAMCO* award as anational would surely subject Saudi Arabia to the legal system of another state—the enforcement state.

The Distinction Distilled: Sovereign Immunity and Intent

The latitude parties enjoy over their agreement to arbitrate allows for great variety in the interstate and international commercial arbitral processes. Private parties choose the place of arbitration and the applicable rules of arbitral procedure, including special rules such as provisions for the production of evidence. States may choose an ad hoc arbitration governed by an international regime (such as in *ARAMCO*) or they may waive at least a part of their immunity and join the private parties in choosing a *lex arbitri*. The consideration arguably most influencing these choices, particularly the agreement of a state to review of the arbitral process by a municipal legal system, is the enforceability of the resulting award.⁹⁹ The types of parties and disputes involved often suggest the process preferred by the parties, and thus our intuitive distinction between an interstate and a private commercial process may often be confirmed.

In any particular case, however, the choice suggested as most likely by the circumstances may not be the choice in fact adopted by the parties. Consequently, although it may be convenient or useful to describe a particular type of process as interstate or private, the distinction should be used with care. To determine the legal character of an arbitration, the relevant ques-

⁹⁷ Lake and Dana first state that *ARAMCO* and *TOPCO* were "denationalized" proceedings, *supra* note 15, at 774. They later conclude that the Iran-U.S. Claims Tribunal, like the International Court of Justice, is "a 'denationalized' adjudicating body, whose actions are governed by the treaty creating it and by its own rules, but not by any national arbitration law," *id.* at 779. They ultimately conclude that because the Tribunal (and implicitly *ARAMCO* and *TOPCO* also) is denationalized, its awards are anational, *id.* at 789.

⁹⁸ A similar mixing of these two forms of denationalized arbitrations occurs in Redfern, *supra* note 61, at 77 (text at note 25) and 79-83.

⁹⁹ Although it must be remembered that a given country may not be a party to the New York Convention, while a state may have frozen assets at its disposal to set off against a public international award.

tions are: what legal system did the parties intend to govern the validity of the arbitral process? and, if a state is involved, to what degree does the agreement of the parties embody a waiver of the state party's immunities? A legal system will govern the validity of the arbitral process. But inasmuch as the parties themselves choose that legal system, the key factor is their intent.

The awards discussed above suggest several factors that might indicate the intention of the parties about the governing legal system. The content and structure of the arbitration agreement as a whole may serve as such evidence. Thus, Cavin cited the provision for an optional conciliation procedure and the detailed procedural provisions of the arbitration agreement in *Sapphire* to support his conclusion that the parties desired a final solution and that the law of the place of arbitration applied.¹⁰⁰ Likewise, the national or international nature of the appointing authority could be evidence of intent. In the *TOPCO* case, Professor Dupuy found such evidence in the parties' failure to object to the Rules of Procedure he had formulated.¹⁰¹ In addition to these factors, Delaume suggests that the more the legal system of the place of arbitration reviews both the fairness and the legal correctness of the arbitration, the more likely it is that the state party did not intend to submit itself to that system.¹⁰²

Subsidiary factors evidencing intent need not be examined when the parties have stated it unequivocally in the arbitration clause, even if the subsidiary factors mentioned above indicate the opposite intent. In *Kuwait and the American Independent Oil Co. (AMINOIL)*,¹⁰³ the arbitrators noted that the arbitration agreement provided (1) that the proceedings were to be subject to "any mandatory provisions of the procedural law of the place where the arbitration is held";¹⁰⁴ (2) that the parties "expressly waive[d] all rights of recourse to any Court, except such rights as cannot be waived by the law of the place of arbitration";¹⁰⁵ and (3) that the "seat of the arbitration shall be Paris."¹⁰⁶ On the basis of these provisions, the panel concluded that "[w]ith regard to the law governing the arbitral procedure in the broadest sense, it is not open to doubt that the Parties have chosen the French legal system."¹⁰⁷ Without such clear provisions in the arbitral agreement, the subsidiary factors would have suggested the opposite result. In particular, a state rather than a state enterprise was involved, the dispute

¹⁰⁰ *Sapphire*, 35 ILR at 168-69.

¹⁰¹ See text at note 84 *supra* and *TOPCO*, 17 ILM at 9.

¹⁰² Delaume, *Arbitration with Governments: "Domestic" v. "International" Awards*, 17 INT'L LAW. 687, 689 (1983):

In this connection, it may be appropriate to recall that the English Arbitration Act of 1979, abolishing the special case procedure, was enacted for the purpose, among others, of assuring foreign states that . . . they would no longer have to fear that the submission implied acceptance of the judicial supervisory authority of the English Court.

See AAA Report, *supra* note 59, at 5-6.

¹⁰³ *Kuwait and American Independent Oil Co.* (1982), reprinted in 21 ILM 976 (1982) (Reuter, Fitzmaurice, Sultan, arbs.).

¹⁰⁴ Art. IV(1), *id.* at 980.

¹⁰⁵ Art. V, *id.*

¹⁰⁶ Art. IV(3), *id.*

¹⁰⁷ *Id.* at 999.

involved rights in natural resources, and the President of the International Court of Justice had been called upon to appoint the presiding arbitrator.¹⁰⁸

Similarly, their intent would be unmistakable if the parties chose rules such as those of the ICC, since they presuppose that the parties desire a private international arbitral process. Indeed, under the law of several countries, a state's agreement to arbitration within that country's municipal scheme constitutes a waiver of immunities.¹⁰⁹ Normally, the intent to place the arbitration *within* the municipal scheme is apparent because the parties have adopted nationally promulgated private arbitration rules, such as those of the American Arbitration Association, or transnationally promulgated private arbitration rules, such as those of the ICC.

The transition from basing analysis on categories rather than intent will not be as simple for arbitral panels as might initially be thought. Analysis based on intent will require the interpreter of a treaty to be suspicious of traditional pigeonholes for international structures because the parties by their treaty may have constructed a new type of structure. This is not an easy task because an interpreter's preconceived notions of what the parties should have intended can blind the interpreter to what the parties say they intended. In both law and science one can undertake to construct a taxonomy; but in law the categories that can be said to be *naturally* apparent flow from changing circumstances such as the organization of society and the ability of those within the society to interact. This organization is constantly challenged and this ability thus far has increased without major interruption. The challenges may require change in legal categories; often the increasing ability to interact itself provides the means. To squeeze innovative efforts into traditional categories is to constrain society's ability to adapt. The danger that the innovative intent of the parties will be frustrated is particularly acute at a time when the relatively rapid evolution of international law processes may make preheld notions also out-of-date. Treaties are a prime source of innovation in international law and international relations. Subtle doctrinal predispositions will only frustrate objective interpretation and the experimentation necessary to the growth of the international system.

It is this conservative interpretational tendency that has confused analysis concerning the Iran-United States Claims Tribunal. Thus far, this analysis has rested primarily on intuition and analogy. These means of analysis carry

¹⁰⁸ Interestingly, in *AMINOIL* it reportedly was the state party, Kuwait, that argued for the arbitration to be governed by French law; *AMINOIL* argued for an anational process. Redfern, *supra* note 61, at 77. In this sense, it is Kuwait arguably that pressed for a more effective award. *Id.* at 86.

¹⁰⁹ For example, the U.S. Foreign Sovereign Immunities Act recognizes that immunity may be waived, 28 U.S.C. §1605(a)(1) (1982), and the House Report explaining that provision noted that "[w]ith respect to implied waivers, the courts have found such waivers in cases where a foreign state has agreed to arbitration in another country." H.R. REP. NO. 1487, 94th Cong., 2d Sess. 6 (1976), 1976 U.S. CODE CONG. & ADMIN. NEWS 6604, 6617. See generally Fox, *supra* note 17; Oparil, *Waiver of Sovereign Immunity in the United States and Great Britain by an Arbitration Agreement*, 3 J. INT'L ARB. 61 (1986); Sullivan, *Implicit Waiver of Sovereign Immunity by Consent to Arbitration: Territorial Scope and Procedural Limits*, 18 TEX. INT'L L.J. 329 (1983).

with them many doctrinal predispositions. What is needed, instead, is careful study of what Iran and the United States intended to accomplish in the Algiers Accords. Thus, this article now shifts from the exposition of a general theory to the examination of a specific case.

II. THE LEGAL SYSTEM SUPERVISING THE IRAN-U.S. CLAIMS TRIBUNAL

One of the most innovative and intellectually satisfying aspects of the Algiers Accords is that they establish for the Iran-United States Claims Tribunal a rather complete internal world. There is little need for the parties to request assistance from powers external to the Tribunal. The UNCITRAL Arbitration Rules¹¹⁰ provide for an appointing authority to resolve disputes between the parties over the composition of the Tribunal.¹¹¹ More importantly, the Algiers Accords established a fund, the Security Account, with a portion of the Iranian assets that the United States had frozen. With the Algerian Government acting as escrow agent for the Security Account pursuant to the Tribunal's instructions, the Security Account assures the availability of funds to satisfy most awards of the Tribunal.¹¹²

Nevertheless, to say that there is little need to refer to the world outside the Tribunal is not to say that there is none. Already, a British court has had to consider whether it should recognize an award of the Tribunal as *res judicata*.¹¹³ Moreover, the Security Account may satisfy only the claims of United States nationals, not awards in favor of Iranian nationals or Iranian governmental counterclaimants.¹¹⁴ Indeed, a current action in U.S. court seeks to enforce such a counterclaim award.¹¹⁵ In addition, if the Security Account were to become depleted, the unsatisfied beneficiaries might be required to seek enforcement of their awards elsewhere.¹¹⁶ Finally, a party

¹¹⁰ After 3 years of development involving all interested nations, the UNCITRAL Rules, *supra* note 26, were adopted by the United Nations Commission on International Trade Law (UNCITRAL) on Apr. 28, 1976, and recommended for use without further debate by the General Assembly on Dec. 15, 1976. See K. RAUH, *DIE SCHIEDS- UND SCHLICHTUNGSORDNUNGEN DER UNCITRAL* (1983); Sanders, *Commentary on UNCITRAL Arbitration Rules*, 2 Y.B. COM. ARB. 172 (1977). Article III(2) of the Claims Settlement Declaration, *supra* note 1, provides that the Tribunal shall use the UNCITRAL Rules "except to the extent modified by the Parties or by the Tribunal." See Aksen, *The Iran-United States Claims Tribunal and the UNCITRAL Arbitration Rules—an early comment*, in *THE ART OF ARBITRATION*, *supra* note 57, at 1.

¹¹¹ See UNCITRAL Rules, *supra* note 26, Arts. 6–14.

¹¹² State claimants have achieved similar security in the past by holding on to frozen assets for possible satisfaction of judgments rendered in their favor. The United States, for example, held German assets in this way after World War I and ultimately used a portion of those assets to satisfy awards made by the U.S.-German Mixed Claims Commission in favor of U.S. nationals. See Borchard, *The Settlement of War Claims Act of 1928*, 22 AJIL 373 (1928); McHugh, *Settlement of War Claims Act of 1928*, 14 A.B.A.J. 193 (1928).

¹¹³ Mark Dallal v. Bank Mellat, *supra* note 11.

¹¹⁴ See General Declaration, *supra* note 1, para. 7 ("All funds in the Security Account are to be used for the sole purpose of the payments of . . . claims against Iran . . .").

¹¹⁵ Ministry of Defense v. Gould, Inc., *supra* note 12.

¹¹⁶ As stated in the brief for the United States as *amicus curiae* in Ministry of Defense v. Gould, Inc., 887 F.2d 1357 (9th Cir. 1989) [hereinafter *Amicus Curiae Brief*]:

dissatisfied with an award may wish to challenge it and have it set aside. Thus, although the Tribunal is substantially less dependent upon the external legal world than many other forms of arbitration, that dependency remains significant.

Another factor in analyzing the Tribunal's relationship to the external legal world is the Tribunal's three primary jurisdictional grants. It must be asked whether the legal system supervising the arbitral process before the Tribunal is a function of the particular basis of jurisdiction. First, the Tribunal may hear "claims of nationals of the United States against Iran and claims of nationals of Iran against the United States"¹¹⁷ (claims of nationals). Second, the Tribunal has jurisdiction over "official claims of the United States and Iran against each other arising out of [certain] contractual arrangements between them"¹¹⁸ (official claims). Third, the Tribunal may hear disputes between Iran and the United States concerning the interpretation or performance of any provision of the General Declaration¹¹⁹ or the interpretation or application of the Claims Settlement Declaration¹²⁰ (interpretive disputes). The vast bulk of the disputes falls into the first category, claims of nationals.¹²¹ Moreover, the main point of contention between Iran and the United States, in scholarly commentary and in judicial decisions, has been the legal system governing arbitrations involving claims of nationals. Iran at times has contended that these are interstate arbitrations. The United States, on the other hand, after some consideration, has taken the position that these are more akin to international commercial arbitrations, as they are governed by the legal system of the Netherlands and the resulting awards have Dutch nationality. Iran at other times has joined the United States in characterizing the awards as Dutch. Neither Iran nor the United States has expressed views on the legal system to be applied to the arbitrations involving official claims or interpretive disputes. Consequently, a substantial portion of the evidence regarding intent relates only to the first grant of jurisdiction. As will be seen, however, the analysis set forth below appears to be equally applicable to the official claims and interpretive disputes.

This analysis focuses on three issues: (1) the intention of the state parties to rest the arbitrations involving claims of nationals on the interstate process of diplomatic protection; (2) the intention of the state parties to have the

While to date these awards have been paid from the Security Account [and] [a]lthough the United States expects Iran to carry out its obligation to replenish the Security Account in the future, should Iran not do so, the vast majority of private claims before the Tribunal will be dependent on judicial enforcement of Tribunal Awards.

Id. at 7.

¹¹⁷ Claims Settlement Declaration, *supra* note 1, Art. II(1).

¹¹⁸ *Id.*, Art. II(2).

¹¹⁹ *Id.*, Art. II(3); General Declaration, *supra* note 1, para. 17.

¹²⁰ Claims Settlement Declaration, *supra* note 1, Art. VI(4).

¹²¹ The Tribunal's docket is composed of approximately 3,761 claims of nationals, 78 official claims and 22 interpretive disputes.

legal system of the Netherlands govern the validity of the arbitrations; and (3) the willingness and ability of the Netherlands to accommodate the desires of the United States and Iran.

Claims of Nationals and Diplomatic Protection

An important preliminary question is whether the arbitrations involving "claims of nationals" are based on claims raised by the nationals themselves or by their governments through the interstate mechanism of diplomatic protection.¹²² If these arbitrations are based on diplomatic protection, the long history of this practice would suggest that Iran and the United States intended that they be subject to review under the international legal system.

In the *Dual Nationality* case, decided in 1984, Iran asserted that U.S. nationals who also possessed Iranian nationality (hence the phrase "dual nationals") could not bring claims against Iran before the Tribunal. In support of this position, Iran argued that the arbitrations before the Tribunal were an instance of diplomatic protection. According to Iran, the extensive customary international practice on diplomatic protection, which in Iran's view weighed against the espousal of claims of dual nationals, informed the Algiers Accords.¹²³ In its Memorial, Iran¹²⁴ noted that Article

¹²² Diplomatic protection is, in the words of the Permanent Court of International Justice, a situation in public international law whereby, "in taking up the case of one of its nationals, by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own right, the right to ensure in the person of its nationals respect for the rules of international law." *Panevezys-Saldutiskis Railway Case (Estonia v. Lithuania)*, 1939 PCIJ (ser. A/B) No. 76, at 16 (Judgment of Feb. 28). See also G. Leigh, *Nationality and Diplomatic Protection*, 20 INT'L & COMP. L.Q. 453, 455 (1971).

¹²³ Islamic Republic of Iran and United States (Case A18) (Dual Nationality), Dec. 32-A18-FT (Lagergren, Holtzmann (CO), Kashani (DO), Riphagen (CO), Aldrich, Shafeiei (DO), Mangård, Ansari (DO), & Mosk (CO), arbs., Apr. 6, 1984), 5 IRAN-U.S. C.T.R. 251 (1984 I).

Citations to this award and those below include the names of the arbitrators who were members of the panel rendering the award. The Chairman is always listed first, with the other arbitrators following in alphabetical order. Parenthetically following each name is, as appropriate, a letter or letters reflecting the arbitrator's position *vis-à-vis* the Tribunal's award. These symbols are: C, concurring; D, dissenting; CS, concurring via statement by signature; DS, dissenting via statement by signature; CO, concurring opinion; DO, dissenting opinion; SO, separate opinion; and RS, refusal to sign. An indication of dissent or concurrence with a whole award does not necessarily indicate dissent or concurrence with the particular point being discussed in this study.

On dual nationals' claims before the Tribunal, see generally Mahoney, *The Standing of Dual Nationals Before the Iran-United States Claims Tribunal*, 24 VA. J. INT'L L. 695 (1984); Note, *Claims of Dual Nationals in the Modern Era: The Iran-United States Claims Tribunal*, 83 MICH. L. REV. 597 (1984); Leurent, *Problèmes soulevés par les demandes des double nationaux devant le Tribunal des différends irano-américains*, 74 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ [RCDIP] 273-99, 477-503 (1985); and Rigaux, *L'Admissibilité des demandes introduites devant un tribunal international par les binationaux et la décision de l'Iran-United States Claims Tribunal sur cette question* (paper presented in The Hague, May 29, 1984).

¹²⁴ Memorial of the Islamic Republic of Iran in Case A18 (Oct. 21, 1983) [hereinafter *Iranian A18 Memorial*], reprinted in *IRANIAN ASSETS LITIGATION REPORTER* [hereinafter *I.A.L.R.*], Nov. 18, 1983, at 7,503.

II(1) of the Claims Settlement Declaration provides that "an *international* arbitral tribunal (the Iran-United States Claims Tribunal) is hereby established."¹²⁵ Although Iran recognized that the "fact that the Tribunal was created by international agreement does not necessarily . . . exclude its having been created in order to settle disputes of national law," it argued that the overall purpose of the Tribunal was to end disputes between the two states, that other jurisdictional categories clearly involved intergovernmental disputes, and that the two states (and not the private parties) had designated the arbitrators and were bearing the expense of the arbitration.¹²⁶ The phrase "claims of nationals," in Iran's view, "serves solely to identify" a class of international claims and "does not prejudge the nature of the claims nor the law which should be applied to them."¹²⁷ Iran concluded that it is clear from

the structure, the spirit and the terms of the Declarations, that this tribunal is truly international since it is called upon to settle a dispute between States, arising from the treatment by one of them of the nationals of the other, the solution to which must be found in public international law and not disputes between one State and nationals of the other, which could be resolved by the application of private international law.¹²⁸

Given the international origin of the Tribunal and the prevailing view that individuals are not subjects of international law, "[a]ll this confirms that the provisions concerning the resolution of disputes reflect classical requirements of diplomatic protection."¹²⁹

The United States rebutted this position, arguing that it ignored the most important evidence—what the parties had agreed to in the Accords:

The Iranian position seems to depend on a combined historical and theoretical analysis of what international tribunals should be. The theory is not derived from the facts of how this Tribunal is constructed. The facts are formed to fit the theory. If the facts don't fit the theory, Iran says that they don't really contradict it, however important the facts are.¹³⁰

The Full Tribunal in its decision in the *Dual Nationality* case observed that "most disputes [before it] involve a private party on one side and a Government or Government-controlled entity on the other." The Tribunal went on to hold that "the object and purpose of the Algiers Declarations was to resolve a crisis in relations between Iran and the United States, not to extend diplomatic protection in the normal sense."¹³¹

¹²⁵ *Id.* at 16-17 (emphasis added).

¹²⁶ *Id.* At least in the United States, a portion of the costs of the Tribunal is borne by the successful private claimants via a user fee placed by the U.S. Government on the amounts awarded to such claimants. See *United States v. Sperry Corp.* 58 U.S.L.W. 4018 (U.S. Nov. 28, 1989). See also the summary of the earlier opinion of the court of appeals in 83 AJIL 86 (1989).

¹²⁷ Iranian A18 Memorial, *supra* note 124, at 25-26.

¹²⁸ *Id.* at 18.

¹²⁹ *Id.* at 31.

¹³⁰ 1 U.S. Transcript of the Case A18 Hearing 140 (Nov. 9, 1983).

¹³¹ Case A18 (*Dual Nationality*), *supra* note 123, at 18-19, 5 IRAN-U.S. C.T.R. at 261.

Despite this decision of the Full Tribunal, Iran has maintained its view that the claims of nationals are indeed the claims of the government of those nationals.¹³² In its 1987 decision in Case A21, the Full Tribunal reiterated that "Tribunal awards uniformly recognize that no espousal of claims by the United States is involved in the cases before it."¹³³ Nonetheless, the Iranian arbitrators continue to file lengthy opinions arguing that the claims of nationals are raised through espousal.¹³⁴

Examination of the Accords supports the Full Tribunal's view that the Tribunal is international in origin but has as its primary purpose the resolution of claims between a private party and a state. The notion of diplomatic protection has structural implications simply not present in the case of the Tribunal.

Classically, for a state to espouse a claim on the basis of diplomatic protection, its national must have exhausted the remedies provided locally by the allegedly offending state.¹³⁵ The exhaustion of remedies without redress constitutes a part of the complicity of the second state in the injury to the national of the first state. However, the customary international law requirement that a claimant exhaust local remedies is not without limits.¹³⁶ The situation within Iran and between the two countries, for example, affords good reason to conclude that the requirement would have been waived by the Tribunal even if the claims had been presented on the basis of diplomatic protection.¹³⁷ Yet the Tribunal has not waived the requirement

¹³² See, e.g., Memorial of the Islamic Republic of Iran, Case A21, at 15 (May 15, 1986) (interpretive dispute dealing with the duty of the state parties to execute judgments rendered against their nationals), reprinted in I.A.L.R., July 25, 1986, at 12,682, 12,693 ("All this confirms that the provisions concerning the resolution of disputes reflect classical requirements of diplomatic protection . . ."). See also *A Recent Review of the Cases at the Hague Tribunal*, Kayhan [Iranian newspaper], June 13, 1984 (U.S. Dep't of State trans.) (statement of an Iranian official after the decision in *Dual Nationality* that "[w]e believe . . . that The Hague arbitration is an international arbitration and the Netherlands' Government has no right to interfere with it").

¹³³ Islamic Republic of Iran and United States (State Party Responsibility for Awards Rendered Against its Nationals), Dec. 62-A21-FT, para. 12 (Böckstiegel, Holtzmann, Mostafavi (SO), Briner, Aldrich, Bahrami-Ahmadi (SO), Virally, Salans, Ansari (SO), arbs., May 4, 1987), 14 IRAN-U.S. C.T.R. 324, 330 (1987 I).

¹³⁴ See, e.g., Concurring/Dissenting Opinion of Assadollah Noori (June 3, 1988) to Leonard & Mavis Daley and Islamic Republic of Iran, AWD 360-10514-1 (Böckstiegel, Holtzmann & Noori (CO/DO), arbs., Apr. 20, 1988); Separate Opinion of Seyed Khalil Khalilian (Feb. 23, 1988) to Lord Corp. and Iran Helicopter Support & Renewal Co., AWD 346-10973-2 (Briner, Aldrich & Khalilian (SO), arbs., Jan. 29, 1988).

¹³⁵ See *Claim of Finnish Shipowners (Fin. v. Gt. Brit.)*, 3 R. Int'l Arb. Awards 1479 (1934) (Bagge, sole arb.).

¹³⁶ See *Interhandel Case (Preliminary Objections) (Switz. v. U.S.)*, 1959 ICJ REP. 6 (Judgment of Mar. 21); *American Int'l Group v. Islamic Republic of Iran*, 493 F.Supp. 522, 525 (D.D.C. 1980) ("It is well settled in international law that where local remedies would be ineffective or meaningless or would not meet the international standard of minimum justice, the alien need not subject himself, in the first instance, to the local courts or administrative tribunals").

¹³⁷ See *Rexnord and Islamic Republic of Iran*, AWD 21-132-3, at 8-9 (Mangård, Mosk & Sani (RS), arbs., Jan. 10, 1983), 2 IRAN-U.S. C.T.R. 6 (1983 I); *American Int'l Group and Islamic Republic of Iran*, AWD 93-2-3, at 9 (Mangård, Ansari (RS) & Mosk (CO), arbs., Dec.

but, instead, has simply held it not to be applicable to the claims of nationals before the Tribunal.¹³⁸

More important than exhaustion of local remedies are aspects of the Accords that indicate in various ways that these claims belong to the national and not to the state, as they would if they were based on diplomatic protection.¹³⁹ Article II(1) of the Claims Settlement Declaration does not provide, as might be expected for diplomatic protection, that the Tribunal may decide claims of the United States or Iran brought "on behalf of the interests of its nationals" or "on the basis of injury to its nationals." Rather, the provision provides jurisdiction over the "claims of nationals of the United States and of Iran."

That the claim belongs to the national is substantiated by the fact that the Claims Settlement Declaration provides that the nationals themselves shall present their claims to the Tribunal.¹⁴⁰ Not only have claims of U.S. na-

19, 1983), 4 IRAN-U.S. C.T.R. 96 (1983 III); and Time and Islamic Republic of Iran, AWD 139-166-2, at 4 (Riphagen, Aldrich & Shafeiei (DS), arbs., June 29, 1984), 7 IRAN-U.S. C.T.R. 8 (1984 III). *But see* Dissenting Opinion of M. Kashani (Sept. 13, 1984) to Starrett Housing and Islamic Republic of Iran, ITL 32-24-1, at 55 (Dec. 19, 1983), 7 IRAN-U.S. C.T.R., *supra*, at 119. *Cf.* Schwebel, *Some Aspects of International Law in Arbitration Between States and Aliens*, in 1986 PRIVATE INVESTORS ABROAD—PROBLEMS AND SOLUTIONS IN INTERNATIONAL BUSINESS 12-1, 12-8 (J. Moss ed.).

¹³⁸ *See, e.g.*, Amoco Int'l Finance Corp. and Islamic Republic of Iran, AWD 310-53-5, para. 21 (Virally, Brower (CO) & Ansari (C/D), arbs., July 14, 1987), 15 IRAN-U.S. C.T.R. 189, 197 (1987 II).

¹³⁹ *See* Leigh, *supra* note 122, at 455.

¹⁴⁰ A supplemental clause provides that when the claim is less than \$250,000, the claim *may* also be presented by the government of that national. Claims Settlement Declaration, *supra* note 1, Art. III(3). In the event, the claims of U.S. nationals for less than \$250,000 were filed by the United States; the typical caption for the claimant read, "The United States of America, on behalf and for the benefit of the [name of private claimant]." The Tribunal, in the spring of 1986 on its own initiative, changed the caption of the claims for less than \$250,000 to read, "[name of private claimant], a claim of less than U.S. \$250,000 presented by the United States of America." *See, e.g.*, Picker Int'l Corp. and Islamic Republic of Iran, AWD 229-10173-3 (Virally, Brower & Ansari, arbs., May 1, 1986). The Agent for Iran filed Requests for Correction of Award asking that the original caption be reinstated. The Tribunal denied these requests, stating that Article III(3) of the Claims Settlement Declaration indicates that the claim "remains the claim of the national and not of the Government of such national . . . the Government of the national owning such claim merely presents the claim . . ." *See* Koehler and Islamic Republic of Iran, Dec. 43-11713-1 (Böckstiegel, Holtzmann & Mostafavi (DS), arbs., July 3, 1986), 11 IRAN-U.S. C.T.R. 285 (1986 I). *See also* Trustees of Columbia Univ. and Islamic Republic of Iran, Dec. 42-10517-1 (Böckstiegel, Holtzmann & Mostafavi (DS), arbs., July 3, 1986), 11 IRAN-U.S. C.T.R., *supra*, at 283; Baygell and Islamic Republic of Iran, Dec. 46-10212-2 (Briner, Aldrich & Bahrami-Ahmadi (DS), arbs., Aug. 7, 1986), 11 IRAN-U.S. C.T.R., *supra*, at 300. Since that time, Iranian arbitrators have filed separate opinions arguing that the claims for less than \$250,000 are espoused by the United States, and occasionally on their separate opinions have altered the case caption to read "[name of private claimant] presented by THE UNITED STATES OF AMERICA in protection of its national." *See* opinions cited *supra* note 134.

As a precautionary measure, the United States also filed a claim for more than \$250,000 for all of the claimants potentially holding claims for less than \$250,000 (Case 86). The Statement of Claim in Case 86 was presented "in continuance of the exercise of diplomatic protection of its nationals, acting as *parens patriae*, trustee, guardian and representative on their behalf."

tionals been filed and argued by those very nationals, but it is also the national that decides whether to withdraw or to accept settlement. Indeed, the Agent for Iran reportedly supported the primacy of the national, arguing that the U.S. Agent may not speak at hearings on the claims of nationals because the United States is not a party to such proceedings.¹⁴¹

An example of the importance given to the owner of the claim can be found in the American-Turkish Claims Settlement of 1937, in which numerous claims were rejected almost immediately because they were filed directly with the commission by private counsel representing the nationals. The Agreement of December 24, 1923, between the United States and Turkey establishing the commission provided for governmental espousal of claims. The commission took the position that the direct presentation of claims by nationals was incompatible with the idea of diplomatic protection: "It would, of course, be monstrous to suggest that a government would through some subterfuge pretend to support a claim without having any knowledge of what, if anything, had in some way come before the Commission."¹⁴²

Just as importantly, the Security Account satisfies Tribunal awards *directly* to the benefit of the national who presents the claim and is the named party, and not to the benefit of the government of that national.¹⁴³ Indeed, the U.S. Government has been the subject of extensive litigation in the United States because of its efforts to recoup a part of awards to its nationals to cover the administrative expenses of the Tribunal.¹⁴⁴

A more subtle indicator of the nature of the arbitrations, suggested by David Lloyd Jones, is whether the duties placed on the respondent government flow to the claimant private party or to the private party's state.¹⁴⁵

This claim, often called the "blanket claim," has not been the subject of any proceedings. "The primary purpose of the filing was to provide a convenient mechanism for dealing with the claims if a lump sum settlement were reached with Iran." Response of the United States, Case A21, at 11 (September 1986), *reprinted in* MEALEY'S LITIGATION REP.—IRANIAN CLAIMS [hereinafter MEALEY'S], Oct. 3, 1986, at 4913, 4919.

¹⁴¹ See, e.g., Letter from A. Rovine to G. Lagergren (May 28, 1982) ("the Agent of the Islamic Republic of Iran, questioned my right to speak at the conference and stated that my attendance was at the 'courtesy' of his Government"). Indeed, the Tribunal in its awards in such arbitrations lists the U.S. representatives as merely "Also Present."

Likewise, Iran has reportedly characterized as "unwarranted and unjustified" the filing of comments by the U.S. Agent on proposed settlements of such arbitrations. Letter from M. Eshragh to M. Virally (Jan. 9, 1986), *cited in* Response of the United States, *supra* note 140, at 21, *reprinted in* MEALEY'S at 4924.

¹⁴² F. K. NIELSEN & J. MAKTOS, AMERICAN-TURKISH CLAIMS SETTLEMENT 6 (U.S. Government Printing Office, 1937). See also 6 J. B. MOORE, A DIGEST OF INTERNATIONAL LAW 616 (1906).

¹⁴³ Similarly, it is against the national, and not the government of that national, that the Tribunal's Rules require entry of counterclaims and awards of costs. See Introduction and Definitions, para. 3c, Final Tribunal Rules of Procedure, May 3, 1983, *reprinted in* 2 IRAN-U.S. C.T.R. 405, 406 (1983 I); Rules, Arts. 32 and 40, *id.* at 434 and 440.

¹⁴⁴ See *Sperry Corp.*, *supra* note 126.

¹⁴⁵ Jones, *The Iran-United States Claims Tribunal: Private Rights and State Responsibility*, 24 VA. J. INT'L L. 259, 261 (1984) (footnotes omitted). Jones asks:

Speaking in 1983, Jones speculated as to what the Tribunal's response would be to the many claims of nationals based on, for example, the Treaty of Amity between the United States and Iran, in which the duties accepted by each state run to the other. What Jones overlooked, however, is that the Tribunal was intended primarily as a substitute forum for private claimants in U.S. courts. The decision in the *Dual Nationality* case confirms this view.¹⁴⁶ Significantly, United States law provides private parties certain rights under international law otherwise belonging to the state. International law created by treaty is a part of the national law of both Iran¹⁴⁷ and the United States.¹⁴⁸ But "[i]t is only when a treaty is self-executing, when it prescribes rules by which private rights may be determined, that it may be relied upon for the enforcement of such rights."¹⁴⁹ Under U.S. law, the property protection provisions of treaties, such as the Treaty of Amity, have consistently been regarded as self-executing and granting a private right of enforcement.¹⁵⁰ Indeed, this right was recognized by U.S. courts in relation to the Treaty of Amity between the United States and Iran.¹⁵¹ Richard M. Mosk, an arbitrator with the Tribunal, concluded that if one took into account the existence of these private rights and the impediment they presented to the state parties' conclusion of the Accords, "[i]t does not seem logical that by shifting such disputes to arbitration before this Tribunal the parties to the Algiers Declarations intended to eliminate the substantive

Is the Tribunal a private arbitral tribunal created to resolve private law disputes arising under different systems of law and to hear private law claims against Iran and the United States, or is it an international or interstate tribunal charged with the task of ruling on the responsibility of the respondent State under public international law for the conduct which constitutes the subject matter of the claims? If the former is the case, the Tribunal would be required to rule on infringements of private law rights arising in municipal legal systems On this view, the United States and Iran may be regarded as having referred to a private transnational arbitral tribunal questions of private law which might in other circumstances be justiciable before domestic courts. If the latter is the case, the competence of the Tribunal lies in respect of such claims as are true international claims founded on an alleged breach of international law. On this view, the Tribunal is an international or interstate tribunal dealing with the rights and duties of States under public international law in relation to their activities on the international plane, and is primarily concerned with an exercise in diplomatic protection on behalf of the United States.

¹⁴⁶ The Full Tribunal held in the *Dual Nationality* case, *supra* note 123, at 19, 5 IRAN-U.S. C.T.R. at 261-62:

It seems clear that a major obstacle to the resolution of that crisis was the existence of much litigation in the courts of the United States brought against Iran by citizens of the United States, often involving judicial attachments of Iranian assets. In order to overcome that obstacle and permit the return of these assets and the termination of that litigation, a new substitute forum—this Tribunal—was established.

See also Esphahanian and Bank Tejarat, AWD 31-159-2 (Bellet, Aldrich & Shafeiei (RS/DO), arbs., Mar. 29, 1983), 2 IRAN-U.S. C.T.R. 157 (1983 I) ("the Tribunal has been substituted for the national courts of both countries"; *id.* at 166).

¹⁴⁷ IRANIAN CIVIL CODE Art. 9.

¹⁴⁸ U.S. CONST. Art. VI, cl. 2.

¹⁴⁹ *Dreyfus v. Von Finck*, 534 F.2d 24, 30 (2d Cir. 1976).

¹⁵⁰ *See Asakura v. Seattle*, 265 U.S. 332 (1924). *See also* R. WILSON, UNITED STATES COMMERCIAL TREATIES AND INTERNATIONAL LAW (1960).

¹⁵¹ *American Int'l Group v. Islamic Republic of Iran*, 493 F.Supp. 522, 525 (D.D.C. 1980).

rights of the parties to base a claim on a Treaty of Amity violation or otherwise to invoke that Treaty as applicable law."¹⁵²

Thus, the Tribunal, although international in origin, has before it both intergovernmental claims and claims by nationals of one state party against the government of the other state party. But their choice not to adopt the process of diplomatic protection does not necessarily mean that the state parties intended that the legal system of the place of arbitration rather than the international legal system should govern these arbitrations.

The Intent of Iran and the United States

The intent of a state in any given circumstance can be elusive. In the following analysis, I take the observational standpoint of a tribunal or court and attempt to find the objectively determinable intent of the United States and Iran. In a few instances, I note what sources have told me that U.S. government officials intended or could not have intended. In general, however, the analysis rests upon the agreements between, and the practice of, the two states.

The objectively determinable intent of the state parties initially should be sought in the Algiers Accords themselves. This inquiry should proceed in accordance with the interpretive provisions of the Vienna Convention on the Law of Treaties, in particular, its Article 31(1), which states that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."¹⁵³

The Accords contain no express statement on the *lex arbitri* intended by the parties, but three provisions have been referred to by one or the other of the state parties or by commentators. First, Article II(1) of the Claims Settlement Declaration refers to the Tribunal as an "international arbitral

¹⁵² Concurring Opinion of Richard M. Mosk at 8 (Dec. 30, 1983) to American Int'l Group and Islamic Republic of Iran, *supra* note 137, 4 IRAN-U.S. C.T.R. at 111. See also Separate Opinion of Charles N. Brower at 5 (Mar. 27, 1986) to SEDCO and Islamic Republic of Iran, ITL 59-129-3 (Mangård, Brower (SO) & Ansari (D), arbs., Mar. 27, 1986), 10 IRAN-U.S. C.T.R. 180, 189 (1986 I).

¹⁵³ Vienna Convention on the Law of Treaties, Art. 31(1), *opened for signature* May 23, 1969, 1155 UNTS 331, *reprinted in* 8 ILM 679 (1969) (entered into force Jan. 27, 1980).

Iran and the United States on several occasions declared that the Vienna Convention, although not directly applicable, governs interpretation of the Accords. See, e.g., Islamic Republic of Iran and United States (Dual Nationality), *supra* note 123, at 14-15, 5 IRAN-U.S. C.T.R. at 259. The Tribunal has also consistently applied the Vienna Convention. See, e.g., United States and Islamic Republic of Iran (Security Account Issues), Dec. 12-A1-FT, at 3 and 5 (Aug. 3, 1982), 1 IRAN-U.S. C.T.R. 189, 190 (1981-82); Islamic Republic of Iran and United States (Dual Nationality), *supra* note 123; United States and Islamic Republic of Iran (Standby Letters of Credit), AWD 108-A16/582/591-FT, at 15 (Jan. 25, 1984), 5 IRAN-U.S. C.T.R. 57 (1984 I); and United States and Islamic Republic of Iran (Iranian Bank Claims), Dec. 37-A17-FT, at 16 (June 18, 1985), 8 IRAN-U.S. C.T.R. 189 (1985 I). Notwithstanding the views of the state parties, the interpretation provisions of the Vienna Convention would likely be applicable since they are generally regarded "as declaratory of existing law." Jiménez de Aréchaga, *International Law in the Past Third of a Century*, 159 RECUEIL DES COURS 1, 42 (1978 I).

tribunal." Second, Article VI(1) of the same Declaration states that the "seat of the Tribunal shall be The Hague" or any other place agreed to by the state parties. Finally, Article III(2) provides that "the Tribunal shall conduct its business in accordance with the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL) except to the extent modified by the Parties or by the Tribunal."

The fact that the Tribunal was established by treaty and is thus an "international arbitral tribunal" has greatly influenced the commentators who have challenged review of the Tribunal's awards by Dutch courts. Indeed, Lake and Dana, in pointing to this language, are stressing the same phrase that Iran relied upon in support of its argument on diplomatic protection.¹⁵⁴ As in that argument, this approach confuses origin with purpose. In essence, these commentators find it significant, if not dispositive, that the state parties used a treaty to establish the Tribunal, but they suggest no alternative means by which the state parties might have done so. There appears to be no reason that an arbitral institution of private origin might not hear an interstate arbitration or that an institution of public origin might not hear international commercial arbitrations. Thus, the simple description of the Tribunal as an "international arbitral tribunal" provides little evidence of intent. As we have seen, this phrase did not mean that the parties intended that the claims of nationals be presented on the basis of diplomatic protection; rather, it characterizes the origin of the Tribunal. It also does not necessarily describe the nature of the disputes the institution was intended to adjudicate.

Likewise, locating the Tribunal in The Hague is not by itself a significant piece of evidence as to intent. Although the legal system of the place of arbitration is the *lex arbitri* for international commercial arbitration, the place of arbitration is commonly indicated in purely interstate arbitration as well, without any intent to subordinate the process to the local legal system.

The choice of the UNCITRAL Rules, however, is very significant. Other tribunals have regarded the parties' choice of procedural rules as an indication of intent.¹⁵⁵ The primary alternatives available to the drafters of the Accords were the United Nations Draft Convention on Arbitral Procedure and the UNCITRAL Rules of Arbitral Procedure. The Draft Convention was designed for use in interstate arbitration, while the UNCITRAL Rules were intended for use in international commercial arbitration. In the *ARAMCO* and *TOPCO* arbitrations, the only two arbitrations between a private party and a state in which the *lex arbitri* was found to be international

¹⁵⁴ They wrote:

The Tribunal is a very different institution from the tribunals to which national arbitration laws such as the Dutch Code typically apply. It is not an *ad hoc* entity called into life by a commercial contract to resolve disputes under the contract, but an "International Arbitral Tribunal," established by two sovereign states through an international agreement that has the status of a treaty under international law.

Lake & Dana, *supra* note 15, at 773 (footnotes omitted).

¹⁵⁵ See, e.g., text at note 84 *supra*.

law and not the legal system of the place of arbitration, the arbitrators employed the UN Draft Convention on Arbitral Procedure.¹⁵⁶

The UNCITRAL Rules chosen by the drafters of the Accords demonstrate both by their general structure and by Article 1(2) specifically that it can be "taken for granted that there is an applicable national law."¹⁵⁷ Article 1(2) provides that "[t]hese Rules shall govern the arbitration except that where any of the Rules is in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail." Thus, these internal rules of arbitration through Article 1(2) automatically adjust to the nonderogable provisions of the governing municipal arbitration law. Indeed, Article 1(2) assumes that a governing municipal arbitration law exists.¹⁵⁸ In this sense, the presumed intent of parties adopting the UNCITRAL Rules calls for municipal review as clearly as if the choice instead had been the American Arbitration Association Rules or the ICC Rules.¹⁵⁹ However, the presumed intent in the case of the Accords is merely presumptive because the Accords envisioned that their implementation might require modification of the Rules by the state parties or the Tribunal.¹⁶⁰

Interpretation of the Accords should also take into account that they were drafted in haste and that some clauses may not be the product of full deliberation.¹⁶¹ To "confirm the meaning resulting from the application of

¹⁵⁶ Both *ARAMCO* and *TOPCO* were decided prior to the adoption of the UNCITRAL Rules. Other private arbitration rules, however, were available at the time.

¹⁵⁷ Böckstiegel, *The Relevance of National Arbitration Law for Arbitrators under the UNCITRAL Rules*, 1 J. INT'L ARB. 223, 230 (1984). See also Sanders, *supra* note 110, at 179; AAA Report, *supra* note 59, at 5; I. DORE, *ARBITRATION AND CONCILIATION UNDER THE UNCITRAL RULES: A TEXTUAL ANALYSIS* 45-46 (1986).

¹⁵⁸ The entire UNCITRAL project was directed at developing rules of procedure for international commercial arbitration that would be acceptable worldwide and, in particular, to the developing world. See I. DORE, *supra* note 157, at 44; Introduction to Commentary on Preliminary Draft of the UNCITRAL Rules, UN Doc. A/CN.9/97 (1975). Originally, the drafters spread references throughout the Rules to the possible overriding effect of the governing legal system. At the ninth session, however:

Committee [II] considered the relationship between the Rules and the provisions of the national law applicable to the arbitration. It was agreed that the inclusion only in selected articles of the Rules of a proviso that the particular article was subject to the national law applicable to the arbitration would give rise to arguments *a contrario* in respect of other articles which did not set forth such a proviso. The Committee therefore decided to add to article 1 a general reference to the effect that all provisions in these Rules were subject to the national law applicable to the arbitration.

Report of Committee II, Ninth Session, UN Doc. A/CN.9/IX/CRP.1, para. 12 (1976).

¹⁵⁹ See *supra* text at note 109.

¹⁶⁰ Hardenberg, *supra* note 13, at 338.

¹⁶¹ As noted by Richard Lillich, "the Claims Settlement Agreement establishing the Tribunal was cobbled together in haste and confusion." Lillich, *supra* note 2, at vii. Indeed, Roberts B. Owen, a principal U.S. negotiator, later wrote that "although the initial draft of the claims settlement declaration [by the United States] was some twenty-five pages long . . . , it was ultimately revised down to about three-and-a-half pages—surely one of the most concise legal documents of its kind ever written." Owen, *The Final Negotiation and Release in Algiers*, in *AMERICAN HOSTAGES IN IRAN* 297, 312 (P. Kreisberg ed. 1986).

Article 31" and allow for the limitations inherent in textual interpretation, the Vienna Convention directs us to the preparatory work of the Accords. Unfortunately, little is known about the negotiating process. Several sources have indicated to me that more than a few of the American negotiators were unfamiliar with the idea of a *lex arbitri* and did not appreciate that the choice of the UNCITRAL Rules would accord supervisory jurisdiction to the legal system of the Netherlands. Indeed, one must remember that the UNCITRAL Rules were still quite new at the time the Accords were drafted and their UN origin might mistakenly lead one to conclude that they were designed for interstate arbitration rather than private international arbitration.¹⁶² On the other hand, several of the U.S. negotiators had come to the Department of State from private practice and were familiar with international commercial arbitration. The publicly available information on the negotiations indicates that some of the negotiators were familiar with the different processes and confirms at least the willingness of the United States to agree to a private, as well as a public, international arbitral process. In particular, such familiarity and willingness is apparent in the second U.S. negotiating response, given on December 3, 1980, when the United States, in referring to the settlement of claims of its nationals, indicated its agreement "that such arbitration may be conducted, at Iran's election, by and under rules of the *International Chamber of Commerce* or the World Bank's International Center for the Settlement of Investment Disputes" (emphasis added).

Furthermore, the "object and purpose" of the Accords and "surrounding circumstances" also support a private characterization. In part I, I concluded that the trend toward regarding arbitrations between a private party and a state as private reflects the perception that in contract negotiations the private party's need for enforceability of the award often outweighs the state's interest in not waiving whatever immunity it has. The Accords, it is true, did not result from commercial negotiations, but rather memorialize diplomatic efforts to end a crisis in relations between the two countries. For this reason, one may not assume that the state parties were motivated by concerns identical to those of parties contemplating a commercial relationship. Nevertheless, the creation of the Security Account and Article IV(3) of the Claims Settlement Declaration are striking evidence of the importance attached to enforceability.¹⁶³ Given the poor, if not hostile, relations be-

¹⁶² Consider, for example, the following somewhat ambiguous statement by Warren Christopher, chief U.S. negotiator of the Accords: "The settlement itself was simplified because a reliable body of arbitration law already existed in the United Nations system and could be lifted by reference into the agreement." Christopher, *Introduction*, in AMERICAN HOSTAGES IN IRAN, *supra* note 161, at 1, 10-11.

¹⁶³ Article IV(3) provides: "Any award which the Tribunal may render against either government shall be enforceable against such government in the courts of any nation in accordance with its laws." Claims Settlement Declaration, *supra* note 1. Moreover, as Roberts Owen noted:

Although the release of the hostages was far and away the top priority of the U.S. government, we also wanted to avoid, if we possibly could, leaving our claimants without a

tween the two countries, the U.S. concern about enforceability was not illusory. Thus, one probable objective of the United States in negotiating the Accords was to ensure the maximum enforceability of awards. Although the creation of the Security Account went far to satisfy this objective, it arguably is further satisfied by a private, rather than a public, characterization of the arbitrations involving nationals. Moreover, Iran may not have regarded a municipal *lex arbitri* as "an infringement of the prerogatives of the State which is a Party to the arbitration,"¹⁶⁴ since Iran at that time was the defendant in hundreds of lawsuits in the United States.¹⁶⁵ On the other hand, Iran's negotiating position, based on its control over 52 American nationals, was not weak. Indeed, the press of negotiations and the desire to avoid possibly contentious subsidiary issues may explain why the general approach of the UNCITRAL Rules was agreed to with the caveat that the parties or the Tribunal could modify those Rules at a later date.

The Vienna Convention also provides that parties may resort to "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation."¹⁶⁶ This rule of interpretation is particularly appropriate when, as here, it was anticipated that subsequent changes might be made.

After signing the Accords, the state parties closely examined the provisions to which they had agreed and began developing their positions with regard to possible changes.¹⁶⁷ The U.S. State Department recognized, for example, that the provision in the UNCITRAL Rules that the proceedings and resulting awards be kept confidential¹⁶⁸ would hamper dissemination of the Tribunal's developing jurisprudence to other parties.¹⁶⁹

A key concern was Article VI of the Claims Settlement Declaration, which provides for the seat of the Tribunal to be in The Hague "or any other place agreed by Iran and the United States." A debate commenced in the United States as to whether London might be more suitable.¹⁷⁰ Various U.S. officials wondered whether it was in the best interests of the United States and

remedy; and a remedy could be arranged only if Iran could be persuaded, through negotiation, to join in a responsible arrangement for adjudicating the claims. Indeed, for the U.S. government to have abandoned the claimants in the context of the hostage crisis might well have been regarded as a payment of ransom for the hostages' release . . .

Owen, *supra* note 161, at 301.

¹⁶⁴ ARAMCO, 27 ILR at 156.

¹⁶⁵ See Hertz, *The Hostage Crisis and Domestic Litigation: An Overview*, in IRAN-UNITED STATES TRIBUNAL, *supra* note 1, at 136.

Iran apparently considered itself in danger of losing such cases, although the U.S. negotiators were aware that the U.S. plaintiffs' actions were vulnerable ultimately to claims of immunity by Iran. See Owen, *supra* note 161, at 303-04.

¹⁶⁶ Vienna Convention on the Law of Treaties, *supra* note 153, Art. 31(3)(b).

¹⁶⁷ See *Iran-United States Litigation*, Remarks of Arthur M. Rovine, 77 ASIL PROC. 3 (1983).

¹⁶⁸ UNCITRAL Rules, *supra* note 26, Art. 32(5).

¹⁶⁹ See, e.g., Carter, *Iran-United States Claims Tribunal: Observations on the First Year*, 29 UCLA L. REV. 1076 (1982).

¹⁷⁰ See, e.g., *Symposium on the Settlement with Iran*, 13 LAW. AM. 1, 46 (1981). Indeed, during the negotiation of the Accords, "the United States was inclined to favor London as the site of the proposed international tribunal, [but] the Algerians urged [the United States] to suggest

U.S. nationals for the arbitral process to be governed by the Dutch legal system or by the English legal system, or whether the arbitrations should be subject to a municipal legal system at all.¹⁷¹ By the time the Agents of the two Governments and the party-appointed arbitrators first met in The Hague in May 1981, the debate within the United States apparently had ended in the belief that the arbitrations should be governed by the Dutch legal system. That this alternative was preferred at that time by the United States is reflected in the fact that it did not seek to change the situation by pursuing modifications in the UNCITRAL Rules.¹⁷² The clearest expression of this position can be found in the U.S. *amicus curiae* brief of July 1988 in *Ministry of Defense of the Islamic Republic of Iran v. Gould, Inc.*: "Tribunal awards appear to be valid and enforceable under Dutch law and therefore may be considered Dutch awards."¹⁷³

Four events show that Iran also considered the arbitral process to be governed by the Dutch legal system from 1981 until 1984; that Iran reversed this position from 1984 to 1987 when it no longer appeared to be in Iran's interest; and that since 1987 Iran has taken inconsistent positions on the issue.

The decision not to modify Article 1(2) of the UNCITRAL Rules. The parties' choice of the UNCITRAL Rules in the Algiers Accords indicates a common intent that the arbitral process be subject to review by the Dutch courts. The significance of this choice is confirmed by the fact that neither the parties nor the Tribunal exercised their power to modify the approach of the Rules. The Tribunal was formally established in July 1981, and its Rules of Procedure adopted in March 1982.¹⁷⁴ During this 9-month period, the Full Tri-

The Hague on the theory that it would be somewhat more palatable to the Iranians." Owen, *supra* note 161, at 313.

¹⁷¹ At a symposium at the University of Miami Law School on Apr. 14, 1981, Mark Feldman, a lawyer with the U.S. State Department during the negotiation of the Accords, discussed the internal debate in the Department over these concerns and stated his *personal* preference for a process in which national courts would not interfere:

We are at a stage which raises a very complicated question concerning the law applicable to the proceeding. . . . It is a subtle and difficult thing. We are struggling with it right now. . . . One of the things we will have to try and decide is how to keep the courts of the Netherlands or of England out of these cases.

Symposium, supra note 170, at 38.

¹⁷² Indeed, the statement of Mark Feldman at a second conference held on June 16-18, 1981, reflects this internal consensus:

At first blush, one might suppose that this arbitration is governed only by international law and that local law is irrelevant. . . . After careful review of the conflicting literature on this subject and the characteristics of this proceeding, the State Department decided that prudence requires that the United States act on the assumption that proceedings conducted in the Netherlands will be governed by Dutch law. . . .

Feldman, *Implementation of the Iranian Claims Settlement Agreement—Status, Issues and Lessons: View from Government's Perspective*, in 1981 PRIVATE INVESTORS ABROAD—PROBLEMS AND SOLUTIONS IN INTERNATIONAL BUSINESS 75, 97-98 (J. Moss ed.).

¹⁷³ See *Amicus Curiae* Brief, *supra* note 116, at 39.

¹⁷⁴ Provisionally adopted Mar. 10, 1982; permanently adopted May 3, 1983. See note 143 *supra*.

United States had pressured the Dutch Government into preparing legislation that would prejudice Iran before the Tribunal.¹⁸⁴ The Agent of Iran and one of the Iranian arbitrators appeared before the First Chamber to argue against passage of the law. Shortly thereafter, Iran withdrew all ten of its challenges before the Dutch courts so as to remove the motivation for the legislation. The Dutch Government, thereupon, without prejudice to its ability to renew the question if needed, ceased consideration of the legislation.

A letter from M. Eshragh, the Agent of Iran, protesting the proposed legislation after its passage by the Second Chamber suggests two reasons for the change in Iran's position.¹⁸⁵ First, Iran had come to realize that its previous position would be inconsistent with the then-pending and, for Iran, politically sensitive dual nationality proceedings, in which Iran was arguing that the arbitrations were based on diplomatic protection. Second, by clarifying and limiting somewhat the grounds for setting aside an award, the proposed legislation lessened the value to Iran of subordinating the arbitrations to the Dutch legal system because Iran probably realized that its challenges would not be sustained. Simultaneously, this whole series of events likely made Iran increasingly aware that a corollary of its right to challenge awards in Dutch courts was the right of U.S. claimants to enforce them elsewhere, possibly under the New York Convention. Finally, to the degree that the challenges were primarily an Iranian strategy to persuade the Algerian Government, as escrow agent for the Security Account, to withhold payment on awards, that effort had already failed.¹⁸⁶

Iran's action to enforce the Gould award in the United States. Iran's position in favor of characterizing the Tribunal's work as diplomatic protection and against passage of the proposed legislation remained constant from the spring of 1984 until June 1987, when Iran attempted to enforce an award of the Tribunal in the United States under the New York Convention on the ground that the award had Dutch nationality. On June 29, 1984, Chamber Two of the Tribunal had rendered an award in favor of the Ministry of Defence of the Islamic Republic of Iran and against Gould Marketing, the U.S. party, for \$3,640,247.13.¹⁸⁷ Gould failed to pay the debt. On June 9, 1987, 20 days shy of the 3-year limit under the New York Convention (9 U.S.C. §207 (1988)), Iran petitioned the U.S. District Court for the Central District of California to enforce the award.¹⁸⁸ Judge Gadbois's order hold-

¹⁸⁴ See MEALEY'S, Apr. 6, 1984, at 299-300.

¹⁸⁵ Reprinted in 5 IRAN-U.S. C.T.R. 405 (1984 I).

¹⁸⁶ Normally, the Algerian Government as escrow agent would order the payment of monies from the Security Account upon receipt of a notification of award from the President of the Tribunal. When challenging awards in 1983, Iran also persuaded Algeria for a time that it should withhold payments on those awards until the challenges to their validity were decided. By November 1983, however, the United States had convinced Algeria that Algeria's function was nondiscretionary and all payment orders were made. See I.A.L.R., Nov. 18, 1983, at 7,472.

¹⁸⁷ Gould Marketing and Ministry of Defence of Islamic Republic of Iran, AWD 136-49/50-2 (Riphagen, Aldrich & Shafeiei (CO/DO), arbs., June 29, 1984), 6 IRAN-U.S. C.T.R. 272 (1984 II).

¹⁸⁸ I.A.L.R., July 10, 1987, at 14,407.

ing that U.S. district courts have subject matter jurisdiction over actions to enforce Tribunal awards under the New York Convention, as codified in U.S. law, was recently affirmed by the U.S. Court of Appeals for the Ninth Circuit.¹⁸⁹ Iran's position, however, has not quite come full circle. It still maintains before the Tribunal that the United States espouses the claims of its nationals on the basis of diplomatic protection.¹⁹⁰

In conclusion, the Accords established a clear presumption that the legal system of the Netherlands would govern the Tribunal's arbitral process. The state parties and the Tribunal confirmed this desire by not modifying the UNCITRAL Rules in this regard. Finally, the subsequent practice and statements of the United States and Iran (although the latter's practice has been somewhat inconsistent) confirm their desire that the Tribunal's arbitrations be subject to review under the Dutch legal system.

Ability and Willingness of the Netherlands to Accommodate the Parties' Desire

Even if the United States and Iran intended that the Dutch legal system govern these arbitrations, the Dutch may not necessarily have been willing or able to accept this role.

As to willingness: The United States and Iran in essence requested that the Netherlands supervise the dispute settlement process they established. If the state parties had sought to place this supervisory role on the Dutch executive branch, the international consent of the Dutch Government would have been required. Whether two countries can avoid obtaining such consent by placing their disputes within the national arbitration scheme presents an issue of constitutional law regarding the respective roles of the executive and judicial branches of that country in foreign affairs.¹⁹¹ For example, if two countries sought to have the U.S. legal system govern the validity of a border arbitration between them, a strong constitutional argument could be made that the judiciary should abstain from assuming a role that could lead to substantial friction with at least one of the states involved and the concomitant embarrassment of the executive branch.¹⁹² The Netherlands, however, consistent with its long-time role as a mediator of international disputes, apparently did not hesitate to allow its judiciary to supervise the Iran-U.S. Claims Tribunal's proceedings concerning at least the claims of nationals.¹⁹³ Instead, the issue has been quite formal: did Iran and the United States create an arbitral process that meets the threshold requirements of arbitration as defined in the Dutch Code of Civil Procedure?¹⁹⁴ In particular, the question whether Article II(1) proceedings are arbitration

¹⁸⁹ *Id.*, Apr. 29, 1988, at 15,654.

¹⁹⁰ See *supra* note 132.

¹⁹¹ Indeed, such direct entry into a national arbitration scheme would not be possible in the United Kingdom where §9 of the Sovereign Immunity Act provides that although a state is not immune from proceedings before UK courts related to an arbitration to which the state agreed, this denial of immunity "does not apply to any arbitration agreement between states."

¹⁹² See, for example, the concerns expressed by the court in *Occidental of Umm al Qaywayn v. A Certain Cargo of Petroleum*, 577 F.2d 1196, 1203-05 (5th Cir. 1978).

¹⁹³ See *supra* text at notes 174-81.

¹⁹⁴ In at least one instance, a municipal court at the place of arbitration has held that the applicable municipal law did not govern an arbitration because the proceedings did not consti-

within the meaning of the Dutch code raises the technical, yet significant, requirement that the agreement to arbitrate shall be in writing and signed by the parties.¹⁹⁵ Van den Berg, referring to the New York Convention, states that the purpose of the written requirement "is to ensure that a party is aware that he is agreeing to arbitration."¹⁹⁶ In this sense, the writing is the objective manifestation of the consent of the parties, the voluntary act that underlies the notion and legitimacy of arbitration.

There can be little doubt that Iran and the United States, the two state parties, knew they were agreeing to arbitration. Moreover, the conduct of Iran from the time of its challenges in the Dutch court indicates that Iran, like the United States, was aware that it had agreed to arbitration governed by the Dutch legal system. Thus, Iran could be regarded as being estopped from raising the issue of its written agreement.¹⁹⁷ Hardenberg argues, however, that for claims of nationals before the Tribunal, there clearly is not an arbitration agreement between the litigants.¹⁹⁸ For support, he cites the Explanatory Note of the Dutch Foreign Ministry accompanying the proposed bill: "Given the absence of voluntary prior contractual agreement between the parties concerned in each individual case and the international nature of the agreement between States underlying the arbitration, doubts may arise as to whether this is indeed arbitration within the meaning of Dutch law."¹⁹⁹ The issue is therefore whether not only the state parties, but also their nationals, can be said to have agreed to arbitration.

tute "arbitration" as that term was defined by municipal law and that there was therefore nothing to be governed. See *SEEE v. Yugoslavia* (Swiss Fed. Trib., Sept. 18, 1957), *reprinted in* 47 RCDIP 366 (1958). Doctrinally, the position that there is nothing to be governed could be equated with the setting aside of an award. Compare *SEEE v. Yugoslavia* (Hague Ct. App., Sept. 8, 1972), *reprinted in French in 1974 REV. ARB.* 313, and *SEEE v. Yugoslavia* (Hoge Raad, Nov. 7, 1975), 1976 *Nederlandse Jurisprudentie* No. 774, *reprinted in French in 1978 REV. ARB.* 397. See also Delaume, *SEEE v. Yugoslavia: Epitaph or Interlude?*, 4 J. INT'L ARB. 25 (1987). Whether such a refusal to review an award should be viewed as the equivalent of setting aside the award or simply as abstention because of concerns with competence is a difficult question that turns upon the specific reason the court feels it cannot or should not examine the award.

¹⁹⁵ The provision of the Dutch Code of Civil Procedure referred to provides that the "arbitration agreement . . . must be made in writing and signed by the parties." Dutch Code of Civil Procedure, Art. 623(1) (unofficial translation prepared by the Asser Institute, 1980). The arbitration agreement is also significant because such a writing is essential to the enforceability of the award, given that the writing requirement is also set forth in the New York Convention, *supra* note 25. In particular, Article IV of the New York Convention requires that to obtain recognition and enforcement, the party applying shall present the award and the arbitration agreement, such agreement, by Article II of the Convention, being in writing by the parties.

¹⁹⁶ A. J. VAN DEN BERG, *supra* note 59, at 171.

¹⁹⁷ To van den Berg, estoppel in the context of the New York Convention would reflect "a fundamental principle of good faith, which principle overrides the formalities required by Article II(2) of the New York Convention." *Id.* at 185.

¹⁹⁸ Hardenberg, *supra* note 13, at 338.

¹⁹⁹ See note 178 *supra*. This problem may explain a less specific statement of a U.S. Department of State official some months after the signing of the Accords: "Upon examination of Dutch law, it became apparent that awards rendered pursuant to the Claims Settlement Agreement would not meet certain procedural requirements for valid arbitral awards under the Dutch civil code." Feldman, *supra* note 172, at 98.

One answer is that each state party possesses the authority to agree to arbitration on behalf of its nationals. As van den Berg wrote in response to Hardenberg: "It is arguable that an arbitration agreement can be considered to be present if one regards Iran and the United States as also representing the interests of their subjects when bringing about the *Claims Settlement Declaration*."²⁰⁰ Indeed, this position is supported by Article 1(3) of the Tribunal's Rules, which provides: "The Claims Settlement Declaration constitutes an Agreement in writing by Iran and the United States, on their own behalfs and *on behalf of their nationals* submitting to arbitration within the framework of the Algiers Declarations and in accordance with the Tribunal Rules."²⁰¹

Although the view of the state as agent is likely sufficient, for this Tribunal one can also find the direct agreement of the nationals to arbitrate. To do so, one must recognize that the Accords manifest a written agreement between Iran and the United States to participate in binding arbitrations of claims brought not only by the other, but also by nationals of the other, even though such nationals were not parties to the Accords. In this sense, the Accords embody a written offer by each state party to the nationals of the other state party to arbitrate certain claims.²⁰² This offer could be accepted in writing by individual claimants by filing Statements of Claim prior to January 19, 1982. Indeed, each Statement of Claim included an element not normally required by the UNCITRAL Rules, "[a] demand that the dispute be referred to arbitration by the Tribunal."²⁰³ Although it is true that the Algiers Accords compelled U.S. claimants to abandon their proceedings in U.S. courts, the Accords did not compel them to file or defend claims before the Tribunal. As Mr. Justice Hobhouse observed in *Dallal v. Bank Mellat*:

It was Mr Dallal's voluntary act to commence the proceedings before the Hague tribunal. It is true that he may have had no other alternative under the law of the United States if he wished to pursue his rights as he saw them. But that does not make it any the less a voluntary act.²⁰⁴

²⁰⁰ Van den Berg, *supra* note 14, at 343 (emphasis in original).

²⁰¹ This provision was added to Article 1 of the UNCITRAL Rules as a part of the Tribunal's modification of those Rules. See Tribunal Rules, *supra* note 143, 2 IRAN-U.S. C.T.R. at 408.

²⁰² Georges Delaume has argued that such a form of agreement would be sufficient for ICSID: "Consent may also result from the investor's acceptance of a unilateral offer from the Contracting State involved, when that State has already consented to ICSID arbitration in relevant provisions . . . of a bilateral treaty with the Contracting State of which the investor is a national." Delaume, *ICSID Arbitration: Practical Considerations*, 1 J. INT'L ARB. 101, 104 (1984). Similarly, although the recent UNCITRAL Model Law on International Commercial Arbitration requires a written agreement to arbitrate, a writing exists if there is "an exchange of statements of claim and defense in which the existence of an agreement is alleged by one party and not denied by another." UNCITRAL Model Law, *supra* note 49, Art. 7(2). See also Furnish, *Commercial Arbitration Agreements and the Uniform Commercial Code*, 67 CAL. L. REV. 317, 347 (1979) ("The arbitration agreement should be made amenable to autonomous creation through the same means recognized for the creation of a sales agreement . . .").

²⁰³ Tribunal Rules, *supra* note 143, Art. 18(1)(a), 2 IRAN-U.S. C.T.R. at 422.

²⁰⁴ *Mark Dallal v. Bank Mellat*, [1986] 1 All E.R. 239, 254.

A quick response might be that although Dallal's act could be said to be voluntary in that he was not coerced, is an act voluntary when there is no other choice? Yet, as Mr. Justice Hobhouse notes, what choice does any plaintiff have? "Most plaintiffs who commence proceedings are in a similar position. They have to commence proceedings before the appropriate municipal court or else be without legal remedy."²⁰⁵

In this connection, it must be recalled that the Tribunal possesses jurisdiction over the claims of nationals of one state party against the other state party, but not vice versa.²⁰⁶ The Tribunal is unlike a court in that the nationals of each state party may choose to be a plaintiff, but may not be forced to be a defendant. Thus, a written agreement to arbitrate lies in the acceptance by the national of one state party of the other state party's written offer in the Accords, through that national's choice to file a written demand for arbitration.

The Legal Character of Arbitrations before the Tribunal

The question of what legal system governs proceedings before the Tribunal is troublesome because, despite the apparent clarity of the state parties' intent, it does not fit neatly into the pigeonhole normally assigned to international arbitral tribunals created by states. At the beginning of this century, Iran and the United States probably would have intended that the claims of their nationals be espoused via diplomatic protection. They probably would have had no other choice. They certainly had other choices in 1981.

Granting that at the time of the signing of the Algiers Accords the state parties perhaps had not fully developed their negotiating position on the legal system that would apply to the arbitral proceedings, the Accords nonetheless establish a presumption that those involving claims of nationals are governed by the Dutch legal system. Granting also that there was both indecision and confusion about this question for several months following the signing of the Accords, this initial uncertainty is far outweighed by the subsequent practice of both the United States and Iran. Finally, although Iran has opposed Dutch judicial review at times, the Accords clearly provide that the choice of Dutch review cannot be altered without the consent of both state parties or action of the Tribunal itself, requirements that have not been met.

To conclude that Iran and the United States agreed that the Dutch legal system should govern the arbitrations involving claims of nationals does not necessarily mean that the choice promotes the interests of the parties or the Tribunal. Lake and Dana argue that awards do *not* require nationality to be enforceable under the New York Convention (the chief benefit, in their

²⁰⁵ *Id.*

²⁰⁶ Islamic Republic of Iran and United States (Jurisdiction Over Claims by a State Party Against Nationals of the Other State Party), Dec. 1-A2-FT (Lagergren, Holtzmann, Kashani (D), Bellet, Aldrich, Shafeiei (D), Mangård, Enayat (D) & Mosk, arbs., Jan. 26, 1982), 1 IRAN-U.S. C.T.R. 101 (1981-82).

view, of Dutch review), while the applicability of Dutch law might force claimants to defend against Iranian challenges in lengthy Dutch court proceedings.²⁰⁷ In addition, they argue that judicial recourse risks renewal of Iranian attempts to have the Algerian Escrow Agent withhold instructions for payment from the Security Account until such challenges are resolved.²⁰⁸

Putting aside the fact that it is the intent of the parties and not considerations of policy that determines the *lex arbitri*, the interests of the Tribunal and of international dispute settlement arguably are advanced by Dutch review. The ability to challenge the award at the place of arbitration continues to be appropriate and valuable. Fairness suggests that the losing party should have a primary place in which to question the award immediately, rather than being forced to raise the issue whenever and wherever the winning party seeks enforcement or recognition. Most national laws require that challenges be raised within a limited period after the rendering of the award. This requirement provides a basis for estopping a dilatory objecting party. If there is merit to the challenge, the court may wish to question the arbitrators and to examine the records of the Tribunal. Far less disruption is engendered if such inquiries are made at the place of arbitration rather than at the place of enforcement. Moreover, by providing a mechanism for setting aside fundamentally unfair awards, the state parties bolster the legitimacy of the process and the Netherlands furthers its own interest in continuing to serve as a fair and impartial site for the peaceful legal resolution of disputes.

Last, there is no apparent reason for the conclusion that the Dutch legal system governs the arbitrations involving claims of nationals not to be equally applicable to the arbitrations involving official claims and interpretive disputes. The presumption that the Accords involve the Dutch legal system flows from the choice of the UNCITRAL Rules, a choice that does not distinguish among the various bases of jurisdiction. Nor should we necessarily jump to the conclusion that the state parties would have desired to distinguish the bases of the Tribunal's jurisdiction. In particular, the official claims are based on "*contractual* [not treaty] arrangements between them for the purchase and sale of goods and services." Most, if not all, official claims, although intergovernmental, involve commercial matters.²⁰⁹ Moreover, the enforceability concerns cited above are also applicable to the official claims. On the other hand, several U.S. and Tribunal officials expressed to me the belief that if the circumstance arose, the state parties would act to block the subjection of proceedings involving official claims and interpretive disputes to the Dutch legal system. A further important difference might be the willingness of the Netherlands to accept these other two categories of disputes for judicial review. The proposed Dutch legislation puts that willing-

²⁰⁷ Lake & Dana, *supra* note 15, at 807.

²⁰⁸ *Id.* at 808-09.

²⁰⁹ The qualification "most, if not all," is used in the text to reserve the potentially important question whether the sale of arms by a government, although contractual, is or is not a commercial matter.

Today, depending upon the circumstances, similar claims likely would be handled through lump sum settlement or international commercial arbitration. Thus, the aggregate effect of the change in options described for Mavrommatis is that there quite plausibly has been a shift in dockets. Although further empirical study is necessary to establish the historical proposition, international commercial arbitration clearly has the capacity to take over the adjudication of many of the essentially private disputes previously addressed by the more politically contentious interstate mechanism of diplomatic protection.

The change is striking. In approximately half a century, an elaborate system for the resolution of international commercial disputes has evolved quietly and efficiently. When viewed against the history of international dispute resolution, this recent evolution is more accurately a revolution. Interstate arrangements, municipal court systems and private contractual dispute settlement systems reflect distinct doctrinal categories. In practice, however, they reflect different options for the resolution of disputes. Different groups can control the shape of each process, and they naturally shape and develop the process they control so that it addresses the needs of the group. The processes, although conceptually distinct, do not operate in isolation. Each evolves in response to the needs of the community controlling it and each of the other mechanisms may be affected by such changes. This is not to say that interstate arbitration, international commercial arbitration and municipal legal orders collectively are developing in accordance with some master plan or that they are not duplicating one another or not competing with one another.²¹² It is to say that the community of commercial actors operating internationally demanded a more efficient and enforceable system than traditional interstate arbitration. That it was primarily businessmen and private lawyers who built the international commercial

²¹² One cannot say that there was conscious interaction between the processes of private and public international arbitration during most of this century. Nor can the two processes be said to have been studied comparatively in detail. (A notable early exception in the form of a brief monograph is F. KELLOR & M. DOMKE, *ARBITRATION IN INTERNATIONAL CONTROVERSY* (1944).) Yet this should not be surprising. The joint existence of the two processes is a rather recent phenomenon, international commercial arbitration generally only having flourished since World War II. Sociologically, even today the two processes remain distinct, in part because, except for certain arbitrators, two very different groups deal with public and private international arbitration. (See *supra* note 28.) For a recent valuable interactive discussion of the two processes, see Vagts, *Dispute-Resolution Mechanisms in International Business*, 203 *RECUEIL DES COURS* 9, 71-88 (1987 III).

In a practical sense, the lack of attention presented few problems until the Iran-United States Claims Tribunal. The Tribunal brought under one roof both public and private international arbitration and the two groups associated with such proceedings. Government officials found themselves pondering the significance of the nationality of the awards, while private counsel contemplated the effect of declarations of nullity. On procedural matters one can find many instances of citation by the Tribunal of public international arbitral awards as precedent for procedural decisions it took in what it apparently regarded as a private international arbitral matter. In this sense, the Tribunal is serving as a vehicle whereby the groups dealing with public and private international arbitration are getting to know each other and each other's work.

arbitration system from the bottom up, rather than states from the top down, makes it no less of a revolution and all the more striking.

Many forces fueled the emergence of international commercial arbitration. There was an increased need for dispute resolution as the world saw a tremendous expansion of international commerce. Business executives sought security in an environment where previous assurances were no longer thought to suffice. The inability of public international law to adapt quickly to these changing circumstances and satisfy these concerns spurred a search for alternatives. Among other things, the strong tendency to limit standing in interstate arbitration to states did little to satisfy the concerns of the growing number of private international actors.²¹³

Thus, as the system that was intended to provide international order proved inadequate and, as important, unresponsive to private international actors, pressures grew within municipal legal systems for more liberal assertions of jurisdiction on the basis of contacts, and for the revision of laws pertaining to the immunity of states from jurisdiction and enforcement. Likewise, efforts were directed at developing international commercial arbitration as an alternative. The success of both international commercial arbitration and transnational litigation was facilitated by the internationalizing of finance and markets, and the consequent dispersal of assets around the world.²¹⁴

The effort to develop a private international arbitral system involved forming (1) a reliable means to enforce both arbitration agreements and arbitral awards, and (2) a fair and predictable arbitration process. From the first, enforcement was seen as the key to a meaningful process. Private international actors in conjunction with their governments used the basic tool of public international law, the treaty, to establish this enforcement regime.²¹⁵ In essence, the New York Convention places the coercive power of many of the world's courts at the disposal of private parties so that they may remove actions to, and ultimately implement the decisions of, their private legal systems.

²¹³ The institution of diplomatic protection must always have been somewhat suspect in the mind of the national involved. First, the national had to seek the consent of his or her government to raise the claim; second, the claim on the public plane could become politicized and thus subject to unknown influences; and third, the enforceability of any resulting award was uncertain. Moreover, the enforceability of awards based on diplomatic protection, uncertain as that was, became yet more uncertain after World War II, as the threat of using armed force (which, it has been argued, stood behind the claims commissions at the turn of the century) was, at least in theory, prohibited. See Shihata, *Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA*, 1 FOREIGN INVESTMENT L. REV. 1 (1986).

²¹⁴ See, e.g., Buxbaum, *supra* note 19. See also C. LIPSON, *STANDING GUARD: PROTECTING FOREIGN CAPITAL IN THE NINETEENTH AND TWENTIETH CENTURIES* (1985).

²¹⁵ The private, rather than governmental, hand in the design of the public law aspects of the private international arbitration system arguably is exemplified also by the recent rapid transformation of municipal arbitration statutes, which reduce court interference to a minimum while retaining the imprimatur of the state's endorsement of the validity of the process. See *supra* note 64.

The second dimension, development of a fair and predictable arbitral process, has been a more arduous task. States modernized their municipal laws, and regional efforts at harmonizing such laws were made. The legal profession engaged in massive educational programs and comparative studies of the private arbitration laws of all states. Ultimately, UNCITRAL has sought on a global basis to harmonize the internal and external dimensions of municipally governed arbitration through two ambitious efforts: the 1976 UNCITRAL Rules of Arbitral Procedure and the 1985 UNCITRAL Model Law on International Commercial Arbitration.

If the "top-down" mechanisms of public international arbitration inadequately responded to the needs of the private international community in the first two-thirds of this century, the Iran-United States Claims Tribunal signifies how quickly states have accepted municipally enforceable arbitration in the last third. ICSID can also be viewed in this manner. Like the Tribunal, ICSID originated in a treaty. Unlike the Tribunal, the validity of ICSID proceedings is expressly governed solely by the international regime established by its constituent instrument. Municipal courts of contracting states are expressly barred from reviewing or interfering in ICSID proceedings.²¹⁶ ICSID, however, like the international commercial arbitration system, responds to the demand for more effective dispute resolution. It does so by borrowing heavily from the structures of international commercial arbitration. ICSID replaces the traditional public approach of diplomatic protection with a regime permitting private parties to participate directly in arbitrations with states. Likewise, the traditional limitations on enforcement of awards are replaced by a direct private right of enforcement for both state and private parties in the municipal courts of any contracting state.

ICSID and the Tribunal are not isolated examples. The current arbitration between the United States and the Soviet Union over the U.S. Embassy under construction in Moscow rests upon an interlocking net of arbitration clauses, which, by adopting the UNCITRAL Rules of Arbitral Procedure and designating Stockholm as the place of arbitration, apparently establish a process within the supervisory jurisdiction of Sweden and the ambit of the New York Convention. The recent Treaty on Fisheries between the Governments of Certain Pacific Island States and the United States provides that a certain number of fishing licenses will be issued to U.S. nationals each year. Annex II to the Treaty carefully details the grounds upon which a license can be denied in any particular case. Any dispute between the state parties relating to or arising out of the Treaty is subject to arbitration under the UNCITRAL Rules.²¹⁷

The evolution from diplomatic protection to international commercial arbitration and to institutions such as the Tribunal and ICSID is in the international community's interest. The trend away from classic interstate arbitration is desirable politically because it reduces the significance of the

²¹⁶ See generally Delaume, *supra* note 38.

²¹⁷ Art. 6.2, Treaty on Fisheries, Apr. 2, 1987, 26 ILM 1048, 1062 (1987).

state as a world actor in areas where the sensitivities of the state need not be implicated. Moreover, the flexibility of private arrangements is coupled with the assurance of harmonized municipal enforcement standards. The resulting low-level national permeation supports the rule of law by its implicit reliance on the existence of independent national judiciaries.²¹⁸

The trend is desirable economically as well. Because the most directly affected parties are involved, both the costs and potential rewards of the process fall to the persons or entities that control it. This cost-benefit allocation promotes efficient decisions about the design and subsequent conduct of arbitral proceedings. Moreover, it is fair to say that the transfer of commercial disputes to the more enforceable process of private international arbitration not only prevents essentially private disputes from rising to the level of international conflict, but also furthers international investment and economic cooperation.

Finally, the transfer of certain disputes to private arbitration does not leave interstate arbitration bereft of content. Rather, it brings more clearly into focus what have always been the central tasks (and the major limitations) of interstate arbitration. Interstate arbitration has worked very well for resolving boundary disputes but not as well for disputes involving central interests of the state, such as the use of force. Although the volume of interstate arbitration may be less than it was at the turn of the century, international resolution of disputes *generally* is likely at an all-time high. Since these new mechanisms now address disputes that previously were elevated to the level of interstate arbitration by diplomatic protection, it would not be surprising to learn that true interstate arbitration in fact has remained relatively constant. Understanding this evolution helps strip away the false belief that somehow international arbitration accomplished much more in the past.

Understanding the evolution also lays bare what yet needs to be done and suggests directions for doing so. The development of alternative systems for international commercial disputes is in many respects far along, but the broad area of torts, in particular those involving the environment and human rights, appears to be at quite a different stage, dependent at present on transnational litigation (perhaps facilitated by treaty) or interstate fact-finding commissions. In this connection, it should be borne in mind that the foundation of the success of international commercial arbitration, the New York Convention, is not strictly limited to commercial matters.

²¹⁸ Arbitration awards may be brought directly before the courts of 82 countries under the New York Convention. UNCITRAL, Status of Conventions, UN Doc. A/CN.9/325 (May 17, 1989). Moreover, although one cynically might speculate that a local judge in some instances would feel constrained to contact his or her foreign ministry for "guidance," in time judges likely will fill the roles given. On the other hand, recognizing once again the evolutionary interplay of the various mechanisms, a counterbalancing consequence of globally elevating the international role of national judiciaries may be that as they are called upon to address more disputes with an international flavor, the more likely it will be that judicial doctrines will arise to assure deference to, and thereby enable courts to avoid embarrassment of, the executive.

IV. CONCLUSION

The arbitral proceedings before the Iran–United States Claims Tribunal involving claims of nationals are governed by the legal system of the Netherlands. This conclusion does not sit easily with the prevailing tendency to think that the proceedings of a tribunal formed by treaty to resolve a crisis between two countries are an interstate process not subject to interference by municipal legal orders. The tension between this conclusion and intuition is all the more striking, as the support for the former is extensive, if not overwhelming. The prevailing tendency nonetheless persists because it rests upon a categorical distinction between public and private international dispute resolution that in the past reflected practice quite faithfully. This distinction, however, no longer adequately describes the variations in international dispute resolution. The inadequacy of the distinction is problematic particularly for the interpreters of treaties because it may lead them unconsciously to force the innovative features of a treaty into the pigeon-holes of the past. Thus, unconscious reliance upon this distinction should be replaced with a case-by-case examination of the mechanism the parties intended to create. Where this is done, innovation through treaty is protected, and a means for the development of international organization preserved.

The desire to innovate is driven by the perception that existing mechanisms do not fulfill the needs of the parties. To the parties, the various mechanisms are not separate doctrines but, rather, alternatives that should be measured against their needs. In this way, the parties' needs fuel the evolution of these mechanisms. Two particularly important dimensions to international dispute resolution in which innovation has occurred are the means of reviewing the validity of the result and the means of gaining enforcement of the result. The emergence of specific machinery such as the Tribunal and ICSID, and the increasing incidence of transnational litigation involving states and international commercial arbitration with state parties—all concurrent with an arguably decreasing need to rely on diplomatic protection—indicate that the various private, state and interstate mechanisms for the resolution of international disputes should not be viewed as operating in isolation, but as competing with, and evolving in response to, one another. To be sure, this evolving system is not the result of a master plan; rather, it is the Darwinian consequence of numerous separate demands. A continuing task of scholarship is to inform the soundness of such demands, to make them more coherent and, consequently, to help guide the evolving structure of international dispute resolution.

THE CANADA-FRANCE MARITIME BOUNDARY CASE: DRAWING A LINE AROUND ST. PIERRE AND MIQUELON

*By Ted L. McDorman**

I. INTRODUCTION

Saint Pierre and Miquelon are two very small islands. Saint Pierre is ten square miles and Miquelon is 83 square miles. The total population for both islands is 5,800. Those islands are only 15 miles off the mouth of Fortune Bay in Newfoundland.

It can hardly be serious that anyone should think France would have a claim for 22,000 square miles or do anything like that under international law.¹

So mocked the Honorable John Crosbie in the Canadian House of Commons in 1982 before he became the Canadian government minister with responsibility for the Canada-France negotiations respecting St. Pierre and Miquelon.

France's ocean claim to 200 nautical miles for St. Pierre and Miquelon is very serious, as is Canada's rejection of that claim. Failed negotiations, going back several decades, induced the parties in March 1989 to conclude a special agreement to send the maritime boundary dispute to international arbitration.² Mr. Crosbie will now find out how seriously an independent tribunal views the French claim.

While it is difficult to envision the full extent of the arguments, positions and solutions that the two countries will present to the tribunal, Canada has publicly maintained that St. Pierre and Miquelon are only entitled to a 12-nautical-mile zone (enclaving the French islands³) and France apparently has advocated the use of equidistance, giving the islands full weight.

* Assistant Professor of Law, University of Victoria, Canada.

¹ Crosbie, Remarks, [1982] 15 CAN. PARL. DEB., H.C., 32d Parl., 1st Sess. 17,265.

² Agreement Establishing a Court of Arbitration for the Purpose of Carrying out the Delimitation of Maritime Areas between France and Canada, Mar. 30, 1989, *reprinted in* 29 ILM 1 (1990) [hereinafter *Compromis*]. The members of the tribunal are Eduardo Jiménez de Aréchaga, President; Professor Gaetano Arangio-Ruiz; Professor Oscar Schachter; Professor Prosper Weil, the French appointee; and Allan Gottlieb, the Canadian appointee.

The Agreement stipulates that the memorials are to be submitted to the tribunal by June 1, 1990, and the countermemorials no later than Feb. 1, 1991. The time periods, however, can be extended. Oral argument will be heard in New York at a time to be mutually agreed upon. A decision can be expected in late 1991 or early 1992.

³ It has become customary to refer to the Canadian position (that St. Pierre and Miquelon are only entitled to a 12-nautical-mile zone) as enclaving the islands and this shorthand will be used in this article. Enclaving has been applied in the past where islands of one state were located near the coast of another state and their use in constructing an equidistance or median line would not result in an acceptable solution. The islands were not used to construct the principal maritime boundary between the states but were given a maritime zone within the adjacent state's maritime zone. The Canadian proposal for St. Pierre and Miquelon would not be enclaving in this sense. However, its result would be a French enclave in Canadian waters.

Each country can be expected to argue its favored solution, first, regarding the line that should be drawn by the tribunal; and alternatively, regarding the point from which the tribunal must start before making any adjustments in the location of the maritime boundary. The alternative argument is the more important since recent adjudications have proceeded by establishing a provisional line and then adjusting the line to take relevant circumstances into account.

There are strong arguments in support of each country's favored solution based upon the practice of states, past adjudications⁴ and the equities of this particular dispute. This article will examine these arguments, but two matters must be covered first: the background to the Canadian-French dispute concerning St. Pierre and Miquelon, and the formulation of the question that the tribunal has been asked to decide.

II. BACKGROUND TO THE DISPUTE

St. Pierre and Miquelon, a collection of small islands located 12 nautical miles from the southern coast of the Canadian province of Newfoundland, are the footnote to the 18th-century French possession of much of North America. When France relinquished its colonial possessions in 1763, Great Britain ceded the islands to France "to serve as a shelter to the French fishermen."⁵ Since 1763, French fishing rights in Canadian coastal waters have been protected by several treaties,⁶ the most recent of which is the 1972 Agreement between Canada and France on Their Mutual Fishing Relations.⁷

Canada's concern in 1972 was to remove foreign fishing vessels from the Gulf of St. Lawrence. Canada had initiated such a policy in 1971, by use of a fishery closing line.⁸ As part of this "phasing out" of foreign fishing, the 1972 Agreement permitted vessels from metropolitan France to continue to fish in the gulf until May 1986.⁹ However, as "an arrangement between

⁴ The relevance of state practice and past adjudications to a tribunal's delimitation of a maritime boundary is questionable. It has been argued that past tribunals have not put much weight on derivative arguments or analogies, focusing rather on the particular situation before them. D. JOHNSTON, *THE THEORY AND HISTORY OF OCEAN BOUNDARY-MAKING* 210 (1988). However, in presenting legal argument, the parties can be expected to rely on state practice and past adjudications to support their positions.

⁵ Definitive Treaty of Peace, Feb. 10, 1763, France-Great Britain-Spain, 1 Brit. & Foreign St. Papers 422, 645, 42 Parry's TS 279.

⁶ See Canada-France Arbitration on the Dispute Concerning Filletting within the Gulf of St. Lawrence, award of July 17, 1986, paras. 7-9, reprinted in French in 90 *REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC* [RGDIP] 713 (1986), and 17 *REVUE GÉNÉRALE DE DROIT* [RGD] 831 (1987) [hereinafter *La Bretagne Award*].

⁷ Agreement on Their Mutual Fishing Relations, Mar. 27, 1972, Canada-France, para. 4 [hereinafter 1972 Agreement], reprinted in UNITED NATIONS, NATIONAL LEGISLATION AND TREATIES RELATING TO THE LAW OF THE SEA 570, UN Doc. ST/LEG/SER.B/16, UN Sales No. E/F.74.V.2 (1974), and U.S. DEP'T OF STATE, OFFICE OF THE GEOGRAPHER, LIMITS IN THE SEAS, No. 57 (1974) [hereinafter *LIMITS IN THE SEAS*].

⁸ See Johnson, *Canadian Foreign Policy and Fisheries*, in CANADIAN FOREIGN POLICY AND THE LAW OF THE SEA 52, 68-69 (B. Johnson & M. Zacher eds. 1977).

⁹ 1972 Agreement, *supra* note 7, Art. 3.

neighbours," the rights of vessels registered in St. Pierre and Miquelon to their traditional fishery in the gulf were continued.¹⁰ Moreover, the 1972 Agreement provided that if fishing zones were extended beyond the then-existing 12 nautical miles,¹¹ French nationals would have the right to fish in these waters subject to Canadian quota control.¹² The Agreement recognized, therefore, that France had fishing rights in Canadian waters in the Gulf of St. Lawrence and, in the event of extended fisheries jurisdiction, in undisputed Canadian waters outside the Gulf of St. Lawrence. These French rights are distinct from alleged rights arising from overlapping claims.

In 1972 both countries were aware of overlapping offshore claims arising from the presence of St. Pierre and Miquelon. Both countries had issued oil and gas permits in the mid-1960s for the same area, relying on the evolving international law of the continental shelf, which provided that national jurisdiction encompassed the adjacent shelf (see map 1, p. 160).¹³ The 1972 Agreement dealt primarily with fisheries and ignored the conflicting continental shelf claims. However, as part of that Agreement, Canada and France were able to draw a 54-nautical-mile territorial sea boundary between the French islands and Newfoundland.¹⁴

In 1977 both Canada¹⁵ and France¹⁶ extended their fishing zones to 200 nautical miles. Neither country could claim the full 200 nautical miles without encroaching on areas claimed by the other. Hence, overlapping claims, which had been confined to the continental shelf resources, also now applied to the living resources of the water column. Canada's official position has

¹⁰ *Id.*, Art. 4.

¹¹ In 1964 Canada put in place a 9-nautical-mile fishing zone in addition to the traditional 3-nautical-mile territorial sea. In 1970 the fishing zone was subsumed by a 12-nautical-mile territorial sea. Territorial Seas and Fishing Zones Act, CAN. REV. STAT. ch. T-7 (1970), amended by ch. 45, §3(1) (1st Supp. 1970).

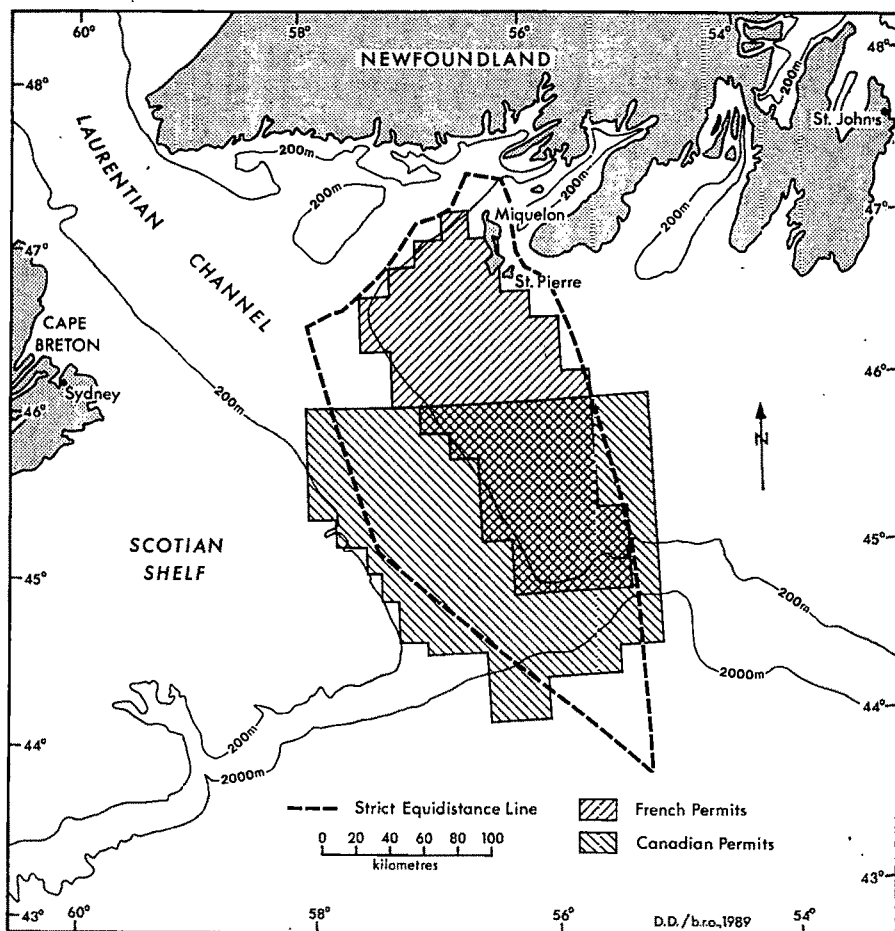
¹² 1972 Agreement, *supra* note 7, Art. 2.

¹³ On the competing oil and gas claims, see Day, *Maritime Boundaries, Jurisdictional Disputes, and Offshore Hydrocarbon Exploration in Eastern Canada*, 23 J. CAN. STUD. 60, 69-70 (1988). See also Symmons, *The Canadian 200-Mile Fishery Limit and the Delimitation of Maritime Zones Around St. Pierre and Miquelon*, 12 OTTAWA L. REV. 145, 149 (1980).

¹⁴ 1972 Agreement, *supra* note 7, Art. 8. This article refers to the boundary as defined in the annex to the Agreement. The boundary is based primarily, but not exclusively, upon equidistance. The northern termination point of the boundary, which is not based on equidistance, is 12.85 nautical miles from the Newfoundland shore and 14.5 nautical miles from the tip of the island of Miquelon. For the annex, a map of the boundary and analysis, see LIMITS IN THE SEAS, No. 57, *supra* note 7. See also Symmons, *supra* note 13, at 148-49.

¹⁵ See regulations under the Territorial Sea and Fishing Zones Act, *supra* note 11, as amended: Fishing Zones of Canada (Zones 1, 2 and 3) Order, 18 Consolidated Regulations of Canada, ch. 1547 (1977); Fishing Zones of Canada (Zones 4 and 5) Order, *id.*, ch. 1548; and Fishing Zones of Canada (Zone 6) Order, *id.*, ch. 1549.

¹⁶ Law No. 76-655 of July 16, 1976, regarding the Economic Zone off the Coasts of the Territory of the Republic, 1976 J.O. 4299. By Decree No. 77-169 of Feb. 25, 1977, 1977 J.O. 1102, the 200-nautical-mile zone applied off the coasts of St. Pierre and Miquelon. The legislation is reprinted in R. SMITH, *EXCLUSIVE ECONOMIC ZONE CLAIMS: AN ANALYSIS AND PRIMARY DOCUMENTS* 147 (1986). See Symmons, *supra* note 13, at 153-54.



MAP 1
AREA OF OVERLAPPING OIL AND GAS CLAIMS

been, and continues to be, that St. Pierre and Miquelon should be entitled to only a 12-nautical-mile offshore zone.¹⁷

The prime overlap is south of St. Pierre and Miquelon where a French exclusive economic zone delimited by the equidistance method would include an area rich in fishery resources. The area may also contain hydrocarbon resources, as oil has been found to the north of it and gas to the south.¹⁸ Although the hydrocarbon potential of the disputed area has not been fully assessed, the shelf close to St. Pierre and Miquelon does not

¹⁷ See Symmons, *supra* note 13, at 153; and Tom Siddon, Minister of Fisheries and Oceans, Remarks, [1987] 3 CAN. PARL. DEB., H.C., 33d Parl., 2d Sess. 2808-09.

¹⁸ In 1979 the Venture gas field was discovered near Sable Island off the coast of Nova Scotia. Also in 1979, the Hibernia oil field off the coast of Newfoundland was discovered. Approximately 50 significant discoveries of oil and gas have been made in the East Coast offshore area.

appear to be promising, in contrast with the southern part of the area.¹⁹ In fact, the southern part is where the exploration permits issued by Canada and France overlap.²⁰ The potential for hydrocarbon resources in the disputed area is particularly important to France, which is overwhelmingly dependent upon imported oil and gas.²¹ As one author summarized: "France has maintained a conspicuous presence in these islands partly to assert its claim to potential oil deposits in the surrounding Atlantic waters."²²

In December 1976, an interim agreement was reached to deal with the overlapping claims. The purpose of the agreement was "to prevent any disruption or serious change in the situation."²³ While never made public, the interim agreement apparently contained a moratorium on drilling in the disputed zone and permitted unchallenged access to it by fishermen from both countries.²⁴

The 1976 interim agreement and its subsequent extensions reportedly came to an end in 1981, when both countries began to have fish inspectors board each other's vessels found in the disputed zone.²⁵ In 1983 a French seismic vessel, accompanied by a French frigate, undertook work in the disputed zone. Canada protested this activity.²⁶ An agreement reached in June 1984, which remains in effect, provides that neither country will challenge the presence of the other in the disputed zone and, in particular, that national fisheries laws will not be enforced there against one another.²⁷

In recent years, Canada, pursuant to advice received from the scientific council of the North Atlantic Fisheries Organization (NAFO),²⁸ has set the quota for cod in the fishery area south of Newfoundland designated 3Ps, which includes the disputed zone, at 41,000 metric tons (M.T.). From this quota Canada has allocated France 6,400 M.T., an amount based upon Canada's assessment of France's traditional share of 15.6 percent of the total allowable catch for the 3Ps fishery area.²⁹ French scientists believe that the total quota for 3Ps is too low and the French Government has taken the

¹⁹ See Day, *supra* note 13, at 71.

²⁰ *Id.*

²¹ On France's energy position, see generally N. LUCAS, WESTERN EUROPEAN ENERGY POLICIES 1-62 (1985); and Giraud, *Energy in France*, in 8 ANN. REV. ENERGY 185 (1983).

²² Aquarone, *French Marine Policy in the 1970s and 1980s*, 19 OCEAN DEV. & INT'L L. 267, 276 (1988).

²³ Donald Jamieson, Secretary of State for External Affairs, Remarks, [1976] 1 CAN. PARL. DEB., H.C., 30th Parl., 2d Sess. 793.

²⁴ A moratorium on exploration had apparently been in place since 1966, with a defined moratorium zone that included the entire disputed area. See Day, *supra* note 13, at 70-71.

²⁵ Gordon, *A little bit of France wants to go a long way*, Halifax Chron.-Herald, Oct. 22, 1983, at 33.

²⁶ *Id.*; and Gordon, *France's explanation disputed*, Halifax Chron.-Herald, Oct. 17, 1983, at 1, 2.

²⁷ The 1984 agreement, which has not been made public, was referred to by Siddon, *supra* note 17, at 2809-10.

²⁸ Established under the Convention on Future Multilateral Co-operation in the Northwest Atlantic Fisheries, Oct. 24, 1978, 21 O.J. EUR. COMM. (No. L 378) 1 (1978), reprinted in NEW DIRECTIONS IN THE LAW OF THE SEA, Binder 3, No. P.2 (K. Simmonds ed. 1986).

²⁹ Siddon, *supra* note 17, at 2810.

position that whatever the total, it should be shared on a 50:50 basis.³⁰ Because of this difference of opinion, France has annually established its cod quota in the disputed zone at approximately 25,000 M.T.³¹

Canada was concerned that this alleged overfishing in the disputed zone would damage the fishery stocks and that metropolitan French vessels, which were to be displaced from the Gulf of St. Lawrence after 1986, would end up in the disputed zone, putting even greater pressure on the resources.

Negotiations took place in 1986 to attempt to deal with these concerns and also with two specific issues that had arisen regarding the 1972 Agreement. The specific issues involved the persistent problem of establishing quotas for French vessels in uncontested Canadian waters. Following years of difficulty, in 1980 a long-term agreement had been completed that established the quota for French vessels in the Gulf of St. Lawrence.³² This agreement was to expire in 1986. Consequently, the 1986 negotiations dealt with the establishment of quotas for vessels registered in St. Pierre and Miquelon in the Gulf of St. Lawrence; the establishment of quotas to be allotted for French nationals in undisputed Canadian waters outside the Gulf of St. Lawrence, pursuant to Article 2 of the 1972 Agreement; and the maritime boundary dispute.

Another element of the negotiations was the handing down in July 1986 of the decision of the Canada-France arbitration on *Filleting within the Gulf of St. Lawrence*.³³ The tribunal had been requested to decide whether French

³⁰ Sheppard, *No new fish pact without more fish, France insists*, Victoria Times-Colonist, Feb. 11, 1987, at A8.

³¹ These were the quotas set for 1987. Canada reacted strongly when they were announced. See text at note 42 *infra*.

In 1988 Canada again established the French quota in the disputed zone at 6,400 M.T. While France announced its intent to harvest 28,000 M.T. of cod, its actual catch was estimated at between 12,000 and 18,000 M.T., an indication of the state of the cod stock. Canadian Press, St. John's, *Cod war heats up as French trawlers head for Canada*, Toronto Globe & Mail, Jan. 4, 1989, at A1, A2.

The NAFO scientific council noted that the 3Ps area has been overfished and advised that the total allowable catch for 1989 in 3Ps should be only 20,500 M.T., half the previous quota. Greenspan, *Fish talks with France to resume*, Toronto Globe & Mail, May 27, 1988, at A1, A2. Despite the European Economic Community's challenge of the scientific council's conclusions, the conclusions were adopted by NAFO in September 1988. Canada reduced the quota for cod in 3Ps for 1989 to 35,400 M.T., which included 5,500 M.T. for France. As in 1988, no allocation of the quota to France was made. See text at note 43 *infra*. France set its 1989 quota for the disputed waters at 26,000 M.T. Binkley, *French decision on cod quota "irresponsible"*, Victoria Times-Colonist, Jan. 19, 1989, at A10.

³² La Bretagne Award, *supra* note 6, para. 12. On the quotas established for French vessels in undisputed Canadian waters, see Pharand, *The Cod War Between Canada and France*, 18 RGD 627, 632-35 (1987). The existence of quotas for French fishing vessels in undisputed Canadian waters was further complicated by the 1981 Agreement on Fisheries between the European Economic Community and the Government of Canada, 24 O.J. EUR. COMM. (No. L 379) 59 (1981), reprinted in 21 ILM 33 (1982). In 1987, the last year of the Agreement, France's share of the EEC quota for cod was 1,545 M.T. Siddon, *supra* note 17, at 2811.

³³ La Bretagne Award, *supra* note 6. See Burke, *A Comment on the "La Bretagne" Award of July 17, 1986: The Arbitration Between Canada and France*, 25 SAN DIEGO L. REV. 495 (1988); Arbour, *La Sentence arbitrale du 17 juillet 1986 concernant le filetage de poisson dans les eaux du golfe du Saint-Laurent*, 17 RGD 813 (1986); Arbour, *L'Affaire du chalutier-usine "La Bretagne" ou les droits de l'Etat côtier dans sa zone économique exclusive*, 24 CAN. Y.B. INT'L L. 61 (1986); Colliard,

trawlers registered in St. Pierre and Miquelon "may or may not be forbidden [by Canadian regulations] to engage in fish filleting within the Gulf of St. Lawrence."³⁴ The three-person panel established pursuant to Article 10 of the 1972 Agreement decided by two to one that the Agreement did not authorize Canada to make any such prohibitions. However, the tribunal recognized Canada's concern that the introduction of trawlers with filleting capacity (freezer trawlers) into the Gulf of St. Lawrence would lead to increased French pressure for larger quotas. The tribunal indicated that the French quota could be unilaterally determined by Canada on the basis of conservation considerations rather than vessel number and capacity.³⁵

Agreement on quotas in undisputed Canadian waters for 1987 was not forthcoming and Canada unilaterally reduced the French cod quota in the Gulf of St. Lawrence from 20,500 to 3,600 M.T. The French were allocated 5,000 M.T. of cod in undisputed Canadian waters outside the gulf.³⁶ France strongly protested these actions.³⁷

Both sides, however, did agree in early 1987 to negotiations to conclude a special agreement to send the maritime boundary dispute to international arbitration and to establish quotas for French vessels in undisputed Canadian waters for the period 1988–1991.³⁸ Canada was anxious to adjudicate the maritime boundary dispute because the 1984 Agreement allowed unrestrained French fishing in the disputed area and Canada feared that significant damage to the stocks was imminent.³⁹

While the tentative agreement of January 1987 did not deal directly with the alleged French plundering of resources in the disputed fishing zone, the parties agreed that scientists from the two countries would evaluate the fish stocks in the zone and attempt to recommend total allowable catches for 1988–1991.⁴⁰ Both sides anticipated working out a temporary arrangement in the disputed zone pending the outcome of the boundary case.⁴¹

Le Différend Franco-Canadien sur le "Filetage" dans le Golfe du Saint-Laurent, 92 RGDIP 273 (1988); and McDorman, *French Fishing Rights in Canadian Waters: The 1986 "La Bretagne" Arbitration*, 4 INT'L J. ESTUARINE & COASTAL L. 52 (1989).

³⁴ La Bretagne Award, *supra* note 6, para. 21.

³⁵ *Id.*, paras. 58, 61 and 63.

³⁶ Canadian Department of External Affairs, Note Verbale No. 026 to France (Jan. 27, 1987) (unofficial trans.).

³⁷ French Ministry of Foreign Affairs to Canadian Embassy, response to the Canadian Note Verbale of Jan. 27, 1987 (unofficial trans.). Regarding the quotas agreed upon in January 1987 and the legitimacy of the French protests of Canada's unilateral establishment of quotas, see Pharand, *supra* note 32, at 635–36.

³⁸ Agreed Record of Canada-France of 27 January 1987 (unofficial trans.). See generally Pharand, *supra* note 32, at 635–38.

³⁹ Earlier in the 1980s, it was France that had sought to adjudicate the issue and Canada that had pursued negotiations. Allan J. MacEachen, Secretary of State for External Affairs, Remarks, [1983] 21 CAN. PARL. DEB., H.C., 32d Parl., 1st Sess. 24,212; MacDonald, *Pepin wants negotiated solution*, Halifax Chron.-Herald, Oct. 1, 1983, at 3; and Meek, *Canada makes new offer in boundary dispute*, Halifax Chron.-Herald, May 10, 1984, at 3.

⁴⁰ Annex to Agreed Record, *supra* note 38 (unofficial trans.).

⁴¹ Siddon, *supra* note 17, at 2810; and Siddon, Remarks, CAN. PARL., H.C., MINUTES OF PROCEEDINGS AND EVIDENCE OF THE STANDING COMMITTEE ON FISHERIES AND OCEANS, NO. 12, Mar. 31, 1987, at 12 [hereinafter FISHERIES COMM. MINUTES].

Despite the agreement of January 1987, relations between the two countries deteriorated. In March of that year, Canada closed its ports to French fishing vessels and protested France's alleged exceeding of the Canadian-granted quota for the disputed zone.⁴² When resumed negotiations in the fall of 1987 were terminated by France, Canada announced that *no* French vessels would be permitted to fish in Canadian waters in 1988, irrespective of the rights contained in the 1972 Agreement.⁴³ Canada backed up this threat in April 1988 by arresting a vessel registered in St. Pierre and Miquelon that was allegedly fishing in Canadian waters.⁴⁴ France responded by recalling its ambassador to Canada and arbitrarily delaying Canadian citizens at Parisian airports.⁴⁵ Several weeks later, a Canadian vessel was seized by a French naval tug off the coast of St. Pierre and Miquelon.⁴⁶ Commenting on the action by the French Government, then under Prime Minister Jacques Chirac, French Prime Minister Michel Rocard stated that France had been "just inches away from breaking diplomatic relations with Canada, in the name of a chauvinist national policy and table-thumping that passed for negotiation."⁴⁷

With the assistance of a mediator appointed in the fall of 1988,⁴⁸ Canada and France reached an agreement on quotas for French and St. Pierre and Miquelon vessels in undisputed Canadian waters and an arrangement on quotas in the disputed waters.⁴⁹ The Canadian strategy of trade-off, offering

⁴² Canadian Press, Ottawa, *Ports closed to French fishermen*, Toronto Globe & Mail, Mar. 18, 1987, at A1, A2. See also Siddon, in FISHERIES COMM. MINUTES, *supra* note 41, at 12.

⁴³ Fraser, *France breaks off fishing negotiations*, Toronto Globe & Mail, Oct. 10, 1987, at A6.

⁴⁴ Canadian Press, St. John's, *Crew, politicians jailed after arrest of trawler in island fishing protest*, Toronto Globe & Mail, Apr. 16, 1988, at A1, A2.

⁴⁵ Howard & Fisher, *France recalls its ambassador in fishing row*, Toronto Globe & Mail, Apr. 18, 1988, at A1, A2.

⁴⁶ Canadian Press, *French vessel seizes Canadian trawler*, Toronto Globe & Mail, May 6, 1988, at A1, A5. See Joe Clark, Secretary of State for External Affairs, Remarks, [1988] CAN. PARL. DEB., H.C., 33d Parl., 2d Sess. 15,207-10 (May 6) and 15,255-58 (May 9). See also Peter Meyboom, Deputy Minister of Fisheries and Oceans, and Bob Applebaum, Acting Assistant Deputy, International, Minister of Fisheries and Oceans, Remarks, FISHERIES COMM. MINUTES, *supra* note 41, No. 38, May 17, 1988, at 5-7.

The vessel in question was a small fishing boat from Newfoundland that traditionally had been allowed to fish in the waters close to St. Pierre and Miquelon, just as small vessels from the French islands could fish undisturbed near the coast of Newfoundland. The Canadian Government undertook to pay the legal expenses of the Newfoundland fishermen. The French court found the ship's captain guilty but assessed no penalty. The situation then returned to normal, i.e., small vessels could fish in the waters of both St. Pierre and Miquelon and Newfoundland.

⁴⁷ Reuters, Paris, *Fishing row almost cut tie to Canada, Rocard states*, Toronto Globe & Mail, May 30, 1988, at A9.

⁴⁸ *Uruguayan to mediate fish dispute*, Toronto Globe & Mail, Nov. 3, 1988 (nat'l ed.); Canadian Press, Ottawa, *Deadline extended for fishing mediator*, Toronto Globe & Mail, Feb. 17, 1989, at A5.

⁴⁹ Agreement relating to Fisheries for the Years 1989-91, Mar. 30, 1989, France-Canada; Canadian Note Verbale No. 220 to France (Mar. 30, 1989); and French Note Verbale to Canada (Mar. 30, 1989) (documents released by Canadian Dep'ts of External Affairs and Fisheries and Oceans).

In undisputed Canadian waters, the French quota for cod for 1989 was 11,450 M.T. Of this, 4,000 M.T. was for St. Pierre and Miquelon fishermen in the Gulf of St. Lawrence and 2,950 M.T. was northern cod. Newfoundland attaches great importance to the northern cod stock

a significant quota to the French in uncontested Canadian waters in return for an agreement to adjudicate the boundary, finally succeeded.⁵⁰ The fishermen of Newfoundland affected by the quotas were unimpressed,⁵¹ but the Canadian Government has risked short-term loss for long-term gain.

The political status of St. Pierre and Miquelon also has bearing on Canadian-French relations. Prior to 1976, the islands were French overseas territories. From 1976 to June 1985, they were a *département* of France. In 1985 the status of the islands changed again, to that of a territorial collectivity of France.⁵² From the Canadian perspective, the political changes were important. When St. Pierre and Miquelon were a French *département*, the fisheries law and policies of the European Economic Community applied to the islands and the surrounding waters. Thus, not only French vessels, but also vessels from other EEC states were entitled to the resources of those waters. The 1985 change in status removed the EEC from involvement in the islands' fisheries and maritime boundary affairs.⁵³ According to EEC law, St. Pierre and Miquelon are now to be treated like the Netherlands Antilles, New Caledonia, Mayotte, Montserrat and the Faeroes—non-European territories for which EEC states conduct external relations but to which EEC law does not automatically apply.

III. FORMULATION OF THE QUESTION

The court of arbitration has been asked the following:

Ruling in accordance with the principles and rules of international law applicable in the matter, the Court is requested to carry out the delimi-

and has been opposed to allocating France a quota from this stock. When negotiation of the January 1987 agreement first publicly raised the possibility of a trade-off of northern cod for an agreement to adjudicate, the Newfoundland government strongly protested, going so far as to convene a provincial premiers' meeting on the issue. Canadian Press, Toronto, *Premiers ask PCs to review fish deal*, Victoria Times-Colonist, Feb. 10, 1987, at A2. The northern cod quota for French vessels is to be reduced if, as has happened, the Canadian quota for northern cod decreases. See Canadian Press, St. John's, *Cod quota cuts hit big fish firms*, Toronto Globe & Mail, Feb. 9, 1989, at B1, B7. Canada has noted that these allocations exceed Canada's legal obligations under the 1972 Canada-France Agreement and were made "solely to facilitate" the boundary agreement. France categorically rejects these Canadian statements, taking the view that the allocations are an application of the 1972 Agreement.

In the disputed area, the two countries have agreed to disagree about quotas. France announced a unilateral quota for the disputed area of 15,600 M.T. for 1989, 15,100 M.T. for 1990, and 14,600 M.T. for 1991. Canada reaffirmed that these quotas have no legal basis and constitute overfishing, which France rejects.

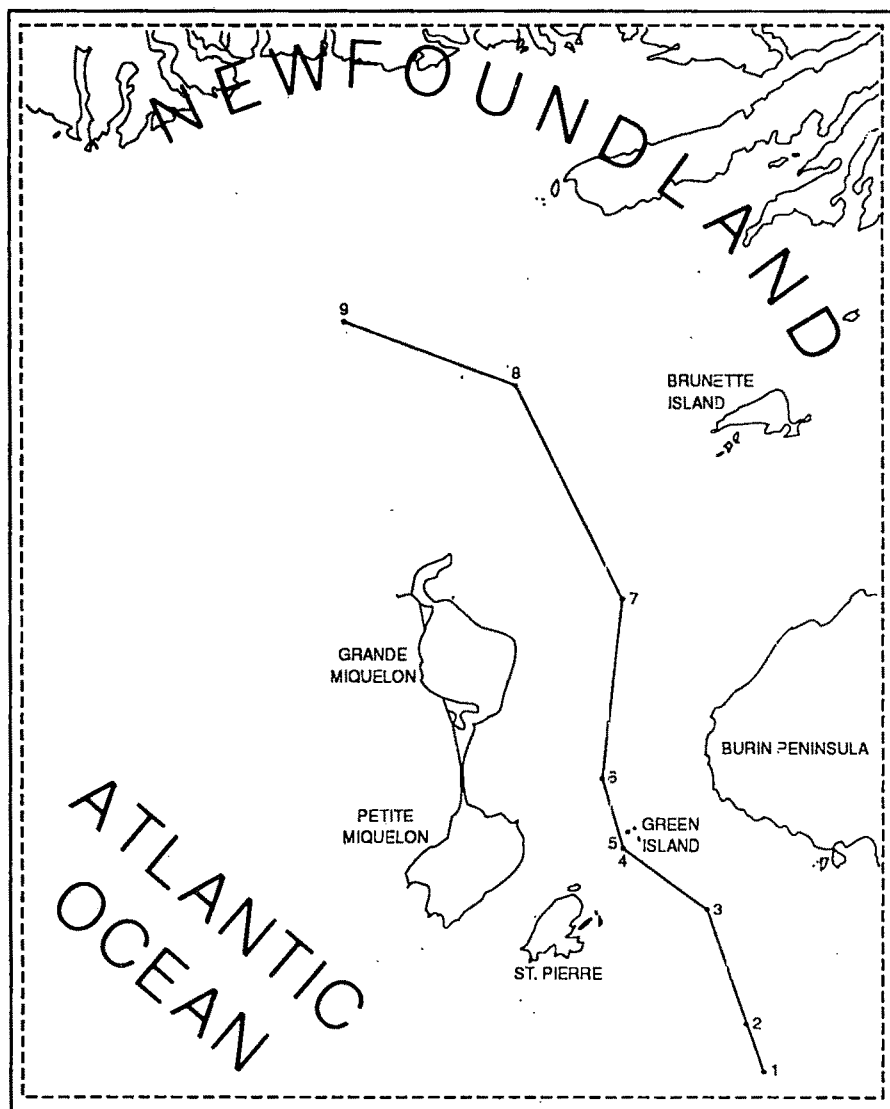
⁵⁰ See Siddon, *supra* note 17, at 2774 and 2776; and Keuning, *Canada-France agreement called a trade-off*, Halifax Chron.-Herald, Apr. 4, 1989, at 8. The quotas granted to France in Canadian waters are viewed as being inconsistent with conservation and will result in overfishing. Cox, *Ottawa agrees overfishing is part of deal with France*, Toronto Globe & Mail, Apr. 4, 1989, at A1, A2.

⁵¹ Gorham, *Ottawa paid "high price" for deal with France—industry spokesman*, Halifax Chron.-Herald, Apr. 1, 1989, at 1, 2; and Cleroux & Cox, *Canada-France cod deal greeted with outrage by Newfoundlanders*, Toronto Globe & Mail, Apr. 1, 1989, at A1, A2.

⁵² See A. P. Blaustein, *France, French Overseas Territories, Saint-Pierre and Miquelon*, in 1 CONSTITUTIONS OF DEPENDENCIES AND SPECIAL SOVEREIGNTIES (A. P. Blaustein & P. M. Blaustein eds. 1987).

⁵³ See R. CHURCHILL, EEC FISHERIES LAW 66 and 72 (1987).

tation as between the Parties of the maritime areas appertaining to France and of those appertaining to Canada. This delimitation shall be effected from point 1 and from point 9 of the delimitation referred to in Article 8 of the Agreement of March 27, 1972 and described in the Annex thereto. [See map 2, below.] The Court shall establish a single



MAP 2

DELIMITATION PER 1972 AGREEMENT ON FISHING PRACTICES

Source: Symmons, *The Canadian 200-Mile Fishery Limit and the Delimitation of Maritime Zones Around St. Pierre and Miquelon*, 12 OTTAWA L. REV. 145, 148 (1980) (slightly modified for publication in AJIL).

delimitation which shall govern all rights and jurisdiction which the Parties may exercise under international law in these maritime areas.⁵⁴

Canada and France had to decide whether the tribunal was to concern itself with only the continental shelf, the fishing zones or the economic zone,⁵⁵ or with all of these regimes. Given the history of the *Canada-France* dispute and the concern for both living and nonliving resources of the disputed area, it was unlikely that the tribunal's mandate would be limited to the continental shelf alone. Moreover, when the International Court of Justice was asked in the 1985 *Libya / Malta* case to deal only with the shelf, the Court was reluctant to ignore economic zone considerations because of the close relationship that now exists between the two regimes.⁵⁶ It is not surprising, therefore, that the tribunal has been requested to deal with *all* of the ocean regimes.

Canada and France also had to decide whether the tribunal should construct a line (or lines) that would be binding on the parties. The parties could simply have asked the tribunal to determine "what principles and rules of international law are applicable" and how these might be applied in the particular situation. This formulation, used in the *Libya / Malta* case,⁵⁷ leaves to the parties the actual drawing of the boundary line. In the *Gulf of Maine* case,⁵⁸ the *Anglo-French Continental Shelf* arbitration⁵⁹ and the *Guinea / Guinea-Bissau* arbitration,⁶⁰ the parties requested that the tribunal draw the precise boundary. In *Libya / Malta*, the International Court, notwithstanding the parties' request, found it necessary to produce a line⁶¹ that was subsequently ratified by an agreement between the two countries.⁶² Again, it is not surprising that Canada and France invited the tribunal to establish a line that will be binding.⁶³

⁵⁴ Compromis, *supra* note 2, Art. 2(1).

⁵⁵ Canada has not declared an exclusive economic zone, although through sectoral legislation Canada exercises almost all the rights provided for by the exclusive economic zone regime. On France's exclusive economic zone, see *supra* note 16.

⁵⁶ Continental Shelf (Libyan Arab Jamahiriya/Malta), 1985 ICJ REP. 13, 33, para. 33 (Judgment of June 3) [hereinafter *Libya/Malta*].

⁵⁷ Special Agreement for the Submission to the International Court of Justice of Difference, May 23, 1976, Libya-Malta, *reprinted in* 21 ILM 971 (1982), and Libya/Malta, 1985 ICJ REP. at 16, para. 2.

⁵⁸ Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.), 1984 ICJ REP. 246 (Judgment of Oct. 12) [hereinafter *Gulf of Maine*].

⁵⁹ Case concerning the Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic, Decisions of 30 June 1977 and 14 Mar. 1978, 18 R. Int'l Arb. Awards 3, *reprinted in* 18 ILM 397 (1979) [hereinafter *Anglo-French Award*].

⁶⁰ Tribunal arbitral pour la délimitation de la frontière maritime (Guinea/Guinea-Bissau), *reprinted in* 25 ILM 251 (1986) (Award of Feb. 14, 1985) (trans.).

⁶¹ *Libya/Malta*, 1985 ICJ REP. at 23-24, para. 19.

⁶² Agreement Implementing Article III of the Special Agreement and the Judgement of the International Court of Justice, Malta-Libyan Arab Jamahiriya, Nov. 10, 1986, *reprinted in* 1 MEDITERRANEAN CONTINENTAL SHELF 117 (U. Leanza & L. Sico eds. 1988).

⁶³ On the resolute versus the facilitative role that can be assigned an adjudicative body, see D. JOHNSTON, *supra* note 4, at 29 and 237-38.

Another important aspect of the decision to have the tribunal construct a boundary is whether the tribunal must draw a single line for all purposes or whether it may construct different lines for different purposes or even develop joint management and development areas. Past tribunals, with one exception, have not been given this broad a mandate, having been confined to drawing a single line. In the *Anglo-French* arbitration the arbitral panel established both a continental shelf boundary and a separate 12-nautical-mile enclave for the Channel Islands. There the court of arbitration had been asked to draw "the course of the boundary (or boundaries)," clearly permitting the drawing of separate boundaries.⁶⁴ The conciliation commission that assisted in resolving the *Norwegian-Icelandic* dispute concerning Jan Mayen recommended a boundary line and a joint development zone that was subsequently adopted by the two states.⁶⁵ Considering that Canada and France have recognized both the need for joint resource management and the uselessness of a single line to manage all resources, and have apparently negotiated at length over complex bilateral boundary arrangements⁶⁶ (admittedly to no avail), it might have been appropriate to give the tribunal broad authority to establish joint management zones, and, if reasonable, to allow for different boundaries for different functions. The assignment of different boundaries for different ocean zones could easily be accomplished by a tribunal. It is not known whether this possibility was raised during the negotiations on the question to be presented to the tribunal, but France would not have been receptive to the idea, because it had previously concurred in a 12-nautical-mile fishery enclave for the islands and a more expansive French continental shelf claim.⁶⁷ Unquestionably, this concurrence would be seized upon by a tribunal and would therefore seriously undermine France's reliance on equidistance. The two countries agreed that the tribunal is to "establish a single delimitation" for all maritime zones.

⁶⁴ Arbitration Agreement, July 10, 1975, France-United Kingdom, Art. 2(1), reproduced in *Anglo-French Award*, *supra* note 59, para. 1.

⁶⁵ Conciliation Commission on the Continental Shelf Area between Iceland and Jan Mayen, Report and Recommendations to the Governments of Iceland and Norway, reprinted in 20 ILM 797 (1981); Agreement on the Continental Shelf between Iceland and Jan Mayen, done Oct. 22, 1982, Iceland-Norway, reprinted in 21 ILM 1222 (1982). See Richardson, *Jan Mayen in Perspective*, 82 AJIL 443 (1988). See generally Churchill, *Maritime Delimitation in the Jan Mayen Area*, 9 MARINE POL'Y 16 (1985).

⁶⁶ In 1972 joint management of the hydrocarbon resources of the disputed zone was suggested in exchange for the renunciation of French claims beyond a 12-nautical-mile territorial sea. The suggestion was contained in the "*relevé des conclusions*" (summary of conclusions) signed by the two countries in May 1972. The document has never been made public, but its purported contents were revealed in Parliament by John Crosbie, *supra* note 1, at 17,265; and prior to that in the French arguments in the *Anglo-French* arbitration. See notes 155-56 *infra*. The *relevé des conclusions* was not an agreement since it was ultimately rejected by Canada. Mark MacGuigan, Secretary of State for External Affairs, CAN. PARL., H.C., MINUTES OF PROCEEDINGS AND EVIDENCE OF THE STANDING COMMITTEE ON EXTERNAL AFFAIRS AND NATIONAL DEFENSE, NO. 69, May 4, 1982, at 12-13; see further text at notes 188-89 *infra*.

In 1984 it was reported that Canada had proposed a comprehensive package involving joint fisheries management and resource sharing in the disputed zone. Meek, *Canada makes new offer in boundary dispute*, Halifax Chron.-Herald, May 10, 1984, at 3.

⁶⁷ See note 66 *supra*.

Finally, Canada and France had to agree upon the body of law to which the tribunal must look for guidance in making its decision. Although both countries are parties to the 1958 Geneva Convention on the Continental Shelf,⁶⁸ they did not explicitly require the tribunal to base its decision on this Convention. Consequently, the tribunal will undoubtedly ignore the provision on delimitation, Article 6, which emphasizes equidistance when read literally.⁶⁹ In the *Gulf of Maine* case, even though both Canada and the United States were parties to the Convention, the Chamber held that the Convention was not binding because it dealt only with the continental shelf and the Chamber had to determine a single maritime boundary.⁷⁰ In *Libya/Malta* the Court indicated that modern boundary delimitation had to involve both the shelf and the water column and that the continental shelf could not be delineated solely on the basis of geological considerations.⁷¹ Because the 1958 Convention defines the continental shelf primarily by its geological characteristics, the *Libya/Malta* case is further evidence of the decreasing relevance of the delimitation provision of the 1958 Convention.⁷²

The formulation agreed upon by Canada and France, requesting that the tribunal rule "in accordance with the principles and rules of international law applicable in the matter," is similar to that used in *Gulf of Maine*. In that case the tribunal was asked to make its decision "in accordance with the principles and rules of international law applicable . . . between the parties."⁷³ The formulation selected by Canada and France ensures that the tribunal will rely upon the generally accepted proposition of maritime boundary delimitation, that equitable principles are to be applied, taking into account all the relevant circumstances, to reach an equitable result.⁷⁴ This proposition, with the elastic terms "equitable principles, relevant circumstances and equitable result," affords little direction to a tribunal in a specific case. Previous judicial and arbitral decisions, conventional law and

⁶⁸ Apr. 29, 1958, 15 UST 471, TIAS No. 5578, 499 UNTS 311.

⁶⁹ Article 6 provides that equidistance is to be employed unless there are special circumstances that would make an equidistance line inequitable. *Gulf of Maine*, 1984 ICJ REP. at 300-01, para. 115. In the *Anglo-French* arbitration, Article 6 was interpreted in such a way that equidistance and special circumstances were given the same weight rather than primary weight to equidistance. *Anglo-French Award*, *supra* note 59, para. 70. See generally 1 E. BROWN, SEA-BED ENERGY AND MINERAL RESOURCES AND THE LAW OF THE SEA, at I.6 15-20 and 27-37 (1984); and D. JOHNSTON, *supra* note 4, at 134-35.

⁷⁰ *Gulf of Maine*, 1984 ICJ REP. at 301-02, paras. 118-19.

⁷¹ *Libya/Malta*, 1985 ICJ REP. at 35, para. 39.

⁷² See McDorman, *The Libya-Malta Case: Opposite States Confront the Court*, 24 CAN. Y.B. INT'L L. 335, 361 (1986).

⁷³ Special Agreement [to send the boundary dispute to the International Court], Mar. 29, 1979, Canada-United States, Art. II, *quoted in* *Gulf of Maine*, 1984 ICJ REP. at 253, para. 5.

⁷⁴ This formulation of law was proposed by both Libya and Malta and accepted by the International Court in *Libya/Malta*, 1985 ICJ REP. at 31, para. 29, and 38, para. 45. The formulation of the fundamental norm in *Gulf of Maine* was: "delimitation is to be effected by the application of equitable criteria and by the use of practical methods capable of ensuring, with regard to the geographic configuration of the area and other relevant circumstances, an equitable result." 1984 ICJ REP. at 300, para. 112.

the practice of states assist a tribunal in identifying relevant factors to consider, but how it chooses and weighs those factors cannot be predetermined.⁷⁵

It is the achievement of an equitable result that the tribunal is directed toward by the accepted proposition of maritime boundary delimitation.⁷⁶ The emphasis placed on result forces a tribunal to give primacy to context rather than general principle.⁷⁷ Not surprisingly, therefore, there exists little agreement *in abstracto* on when a result is equitable or how to test its equitableness.⁷⁸

To summarize, the tribunal in the *Canada-France* arbitration has been requested to construct a single maritime boundary in accordance with the applicable principles and rules of international law.

IV. THE FRENCH AND CANADIAN POSITIONS

Islands that can sustain human habitation, that are inhabited and that are the size of St. Pierre and Miquelon (93 square miles and 6,500 people) are entitled in customary and conventional international law to claim a 12-nautical-mile territorial sea, a continental shelf and a 200-nautical-mile exclusive economic zone, subject, of course, to bilateral delimitation where the

⁷⁵ On "factor analysis" and boundary delimitation, see Charney, *Ocean Boundaries Between Nations: A Theory For Progress*, 78 AJIL 582 (1984); see also Charney, *The Delimitation of Ocean Boundaries*, 18 OCEAN DEV. & INT'L L.J. 497, 507-21 (1987).

Maritime boundary delimitation law has frequently been criticized for vagueness and the uncertainty of its application in a given situation. Much of the criticism is directed at adjudicative decisions that do not provide clear guidance for the settlement of future disputes. As has been argued elsewhere, these criticisms are misdirected since an inflexible rule would not encourage boundary settlements; rather, it would encourage states to avoid negotiation and third-party dispute settlement where application of arbitrary rules would have unacceptable results. See McDorman, *supra* note 72, at 362-64; and D. JOHNSTON, *supra* note 4, at 246.

⁷⁶ Moreover, an equitable result is what a tribunal is directed to consider by the delimitation provisions, Articles 74 and 83 of the 1982 United Nations Convention on the Law of the Sea, opened for signature Dec. 10, 1982, UN Doc. A/CONF.62/122, reprinted in UNITED NATIONS, OFFICIAL TEXT OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA WITH ANNEXES AND INDEX, UN Sales No. E.83.V.5 (1983), 21 ILM 1261 (1982) [hereinafter LOS Convention]. Article 74(1) states: "The delimitation of the exclusive economic zone between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution." For an insightful discussion of these two provisions, see D. JOHNSTON, *supra* note 4, at 164-65 and 243-45.

⁷⁷ D. JOHNSTON, *supra* note 4, at 144, 210 and 245-46. On the debate respecting equity and *ex aequo et bono*, see *id.* at 246-47 and the comments in note 75 *supra*. Past adjudicators have denied that their decisions were made on the basis of *ex aequo et bono*. *Libya/Malta*, 1985 ICJ REP. at 39, para. 45; see also McDorman, *supra* note 72, at 346-48.

⁷⁸ In the *Libya/Malta* case, the Court determined the equitableness of the line by noting that "no evident disproportion" existed because of the decision. 1985 ICJ REP. at 55, para. 75. In the *Gulf of Maine* case, the Chamber reviewed the equitableness of its line by considering whether the result would "entail catastrophic repercussions for the livelihood and economic well-being of the population of the countries concerned." 1984 ICJ REP. at 342, para. 237.

claims overlap with claims made by other islands or states.⁷⁹ France clearly takes the view that its islands in North America are entitled to such regimes. In the late 1960s and early 1970s when only the continental shelf was in dispute, France considered that the strict application of the equidistance principle to St. Pierre and Miquelon would provide an equitable result.⁸⁰ When the dispute became one involving fishery and economic zones, France apparently continued to hold this position.⁸¹ Although France's official position has not been made public, the strict equidistance solution would be most favorable to France and can be expected to be advocated by it before the tribunal.

Canada's official position is that the islands of St. Pierre and Miquelon are only entitled to a 12-nautical-mile zone.⁸² The full details of Canada's position have not been made public, but Canada is likely to argue that the small French islands are an anomaly on the Canadian coastline, that there is thus an exception in this special case to the normally acceptable entitlement of islands to full economic zones, and that the appropriate solution is a 12-nautical-mile enclave for the French islands.

It will likely be argued in favor of both the equidistance and the enclave solutions that they can produce an equitable result to the dispute. As a secondary and more important argument, the two sides will probably argue not that equidistance or enclaving should be the final result, but rather that the one or the other should be the method employed to start the tribunal's boundary-making process.

The importance of the method of drawing the provisional line is demonstrated by the way that the International Court of Justice in the *Libya / Malta* case and the Chamber in the *Gulf of Maine* case set about drawing those boundaries. In both, a three-step approach was used: (1) determination of the criteria and methods that satisfied equitable principles and location of a provisional line by using such a method; (2) adjustment of the line to take relevant circumstances into account; and (3) examination of the line to see if it met the test of equitableness.⁸³ From the provisional line determined under step 1, adjustments were made under step 2. It is inherent in the three-step approach that adjustments made in step 2 will be minor; other-

⁷⁹ LOS Convention, *supra* note 76, Art. 121. See generally C. SYMMONS, *THE MARITIME ZONES OF ISLANDS IN INTERNATIONAL LAW* 1-151 (1979).

The 1981 Iceland-Norway Conciliation Commission took the view that Article 121 represents customary international law. Conciliation Commission, *supra* note 65, at 803. It is questionable whether there is international consensus on the differentiation made in Article 121 between islands and rocks, the former of which are entitled to the full array of maritime zones, and the latter to only a 12-nautical-mile territorial sea. See generally Van Dyke & Brooks, *Uninhabited Islands: Their Impact on the Ownership of the Ocean's Resources*, 12 OCEAN DEV. & INT'L L. 265 (1983).

⁸⁰ See Symmons, *supra* note 13, at 151.

⁸¹ Gordon, *supra* note 25, at 33.

⁸² Siddon, *supra* note 17.

⁸³ See McDorman, *supra* note 72, at 357-59; and McDorman, Saunders & VanderZwaag, *The Gulf of Maine Boundary: Dropping Anchor or Setting a Course?*, 9 MARINE POL'Y 90, 100 (1985) (for a discussion of this important aspect of the two cases).

wise, the method used to draw the provisional line must not have been based upon equitable principles. In the previous adjudications, the adjustments were minor. In *Libya/Malta* it involved moving the provisional line toward Malta by 18' of latitude;⁸⁴ and in *Gulf of Maine* it involved shifting the median line to give effect to a small island, but the Chamber noted that its practical impact would be limited.⁸⁵ Hence, the location of the provisional line is crucial. The final line, if based on a provisional line constructed by the equidistance method, would give the French islands considerable ocean space. If the provisional line is based upon encaving, the final result would give the French islands much less space.

To arrive at the geometric method to be employed in drawing the provisional line in step 1, the appropriate criteria must be selected. An important element in that selection is the tribunal's characterization of the geographic situation where the boundary is to be drawn.⁸⁶

In the *Libya/Malta* case, the criterion selected was distance, since distance was the basis of legal title to the continental shelf.⁸⁷ The characterization of the geographical setting as one of opposite states was not an explicit consideration in the choice of the distance criterion. However, the determination that the states were opposite made equal division of the distance (a median line) particularly appropriate.⁸⁸ In the *Gulf of Maine* case, numerous criteria were discussed,⁸⁹ but the criterion adopted was the equal division of those areas where the maritime projections of the states' coastal frontages overlapped.⁹⁰ The Chamber noted that "[t]here has been no systematic definition of the equitable criteria that may be taken into consideration for an international maritime delimitation"⁹¹ and commented about its own choice of criterion that "[t]he multiplicity and diversity of geographical situations frequently call for this criterion [equal division] to be adjusted or flexibly applied to make it genuinely equitable, not in the abstract, but in relation to the varying requirements of a reality that takes many shapes and forms."⁹²

The criteria adopted and the method employed must accord with equitable principles. The Court provided examples of these equitable principles in the *Libya/Malta* case. The most prominent consideration was that "there is to be no question of refashioning geography" or "compensating for the inequalities of nature."⁹³

Equidistance is a well-recognized method of delimiting a maritime boundary. Geographically, employment of equidistance results in a line every point of which is an equal distance from the nearest point on the coasts of

⁸⁴ *Libya/Malta*, 1985 ICJ REP. at 52, para. 73.

⁸⁵ *Gulf of Maine*, 1984 ICJ REP. at 336-37, para. 222.

⁸⁶ This is consistent with the emphasis a tribunal is to give an equitable result. See text at notes 76-78 *supra*.

⁸⁷ *Libya/Malta*, 1985 ICJ REP. at 46, para. 61.

⁸⁸ *Id.* at 47, para. 62.

⁸⁹ *Gulf of Maine*, 1984 ICJ REP. at 312-13, para. 157.

⁹⁰ *Id.* at 327, para. 195. On geographical characterization in this case, see McDorman, Saunders & VanderZwaag, *supra* note 83, at 94-95 and 100.

⁹¹ *Gulf of Maine*, 1984 ICJ REP. at 312, para. 157.

⁹² *Id.* at 327, para. 196.

⁹³ *Libya/Malta*, 1985 ICJ REP. at 39-40, para. 46.

two states. Equidistance is compatible with equitable criteria such as "equal division" and "distance"⁹⁴ and also with equitable principles.

Enclaving is not a well-recognized method of delimiting a maritime boundary primarily because the possibility or necessity of enclaving rarely arises. Like equidistance, however, it is a geometric method. Enclaving, as a method, would be compatible with equitable criteria that stress the anomaly of sovereignty over a distant island, the inequalities in extent of the coasts of the two states and the nonencroachment of an extended zone into areas too close to the coast of another state. The Chamber in *Gulf of Maine* noted that the latter two criteria had been argued in various cases.⁹⁵ Enclaving as a method can be supported by reliance upon the equitable principle that respect must be paid to all relevant circumstances.⁹⁶

In light of the above, it is necessary to consider enclaving and equidistance, not just as the basis for the final resolution of the dispute, but also as the basis for a preliminary solution to which adjustments can be made. Before proceeding, however, it is useful to review what state practice indicates about distant islands and maritime boundaries.

V. DELIMITATION INVOLVING ISLANDS

Boundary Agreements involving Distant Islands

Throughout the oceans numerous islands that are far distant from their home state must be considered by other states in determining the extent of their 200-nautical-mile zones. Ownership of these scattered islands is spread among the United States, Australia, India, France, the United Kingdom, Denmark, Norway, the Netherlands, Spain and China.⁹⁷ Not uncommonly, the sovereignty of these distant islands is disputed. Where bilateral boundary agreements exist, the practice has been to give the islands full weight in the delimitation, irrespective of their size, political nature or distance from the home country; as a result, most such boundaries approximate equidistance lines.

The earliest example of such an agreement is the 1942 Treaty between the United Kingdom and Venezuela regarding the then UK colonies of Trinidad and Tobago.⁹⁸ The line drawn between the coasts approximates a median line.⁹⁹ No boundary lines were drawn on the seaward side of the islands. The situation is therefore similar to that of St. Pierre and Miquelon: there is a boundary where the coasts are opposite the mainland state but no seaward boundary. Now an independent state, Trinidad and Tobago in

⁹⁴ *Gulf of Maine*, 1984 ICJ REP. at 333-34, para. 216.

⁹⁵ *Id.* at 312-13, para. 157.

⁹⁶ *Libya/Malta*, 1985 ICJ REP. at 39, para. 46.

⁹⁷ Both the People's Republic of China and the Republic of China have claimed islands far distant from their shores in the South China Sea. Closer states have also laid claim to all or some of the Spratly Islands. See K. KITTICHAISAREE, *THE LAW OF THE SEA AND MARITIME BOUNDARY DELIMITATION IN SOUTH-EAST ASIA* 141-44 (1987); M. SAMUELS, *CONTEST FOR THE SOUTH CHINA SEA* (1982).

⁹⁸ Treaty relating to the Submarine Areas of the Gulf of Paria, Feb. 26, 1942, United Kingdom-Venezuela, 205 LNTS 121, reprinted in *LIMITS IN THE SEAS*, *supra* note 7, No. 11 (1970).

⁹⁹ S. JAGOTA, *MARITIME BOUNDARY* 101 (1985).

1977 reached an agreement with Venezuela on common fisheries zones seaward of the islands in which fishermen from both countries may fish.¹⁰⁰

The Indian islands in the Andaman Sea lying 600 nautical miles from mainland India have figured in boundary agreements with Indonesia,¹⁰¹ Thailand¹⁰² and, most recently, Burma.¹⁰³ The agreed-upon boundaries were based on the equidistance principle. Denmark, on behalf of Greenland, entered into an accord with Canada that applied equidistance,¹⁰⁴ and, on behalf of the Faeroe Islands, arranged for a median line boundary with Norway.¹⁰⁵ The United States in 1980 agreed to boundaries between American Samoa and the Cook Islands and American Samoa and Tokelau that relied on equidistance.¹⁰⁶

The French have been the most successful in providing for the equidistance method in bilateral agreements concerning their far-flung island possessions and other states. In fact, in some agreements equidistance is expressly referred to in the preamble; for example, the 1980 France-Mauritius boundary agreement regarding Réunion in the Indian Ocean,¹⁰⁷ and the 1981 France-St. Lucia boundary agreement regarding Martinique in the Caribbean Sea.¹⁰⁸ New Caledonia's 1982 ocean boundary with Australia is a median line,¹⁰⁹ as is New Caledonia's ocean boundary with Fiji.¹¹⁰ France's

¹⁰⁰ J. R. V. PRESCOTT, *THE MARITIME POLITICAL BOUNDARIES OF THE WORLD* 345 (1985). See W. EDESON & J.-F. PULVENIS, *THE LEGAL REGIME OF FISHERIES IN THE CARIBBEAN REGION* 106-07 (1983).

¹⁰¹ Agreement regarding the Delimitation of the Continental Shelf in the Great Channel between Great Nicobar Island and Sumatra, Aug. 8, 1974, India-Indonesia, *reprinted in* LIMITS IN THE SEAS, *supra* note 7, No. 62 (1975).

¹⁰² Agreement on the Delimitation of the Seabed Boundary between the Two Countries in the Andaman Sea, June 22, 1978, Thailand-India, *reprinted in id.*, No. 93 (1981).

¹⁰³ Agreement on the Delimitation of the Maritime Boundary in the Andaman Sea, in the Coco Channel and in the Bay of Bengal, Dec. 23, 1986, Burma-India, UNITED NATIONS, *LAW OF THE SEA BULL.*, No. 10, November 1987, at 105. See K. KITTICHAISAREE, *supra* note 97, at 95-96 and 123-24.

¹⁰⁴ Agreement relating to the Delimitation of the Continental Shelf between Greenland and Canada, Dec. 17, 1973, Canada-Denmark, 1974 Can. TS, No. 9, *reprinted in* LIMITS IN THE SEAS, *supra* note 7, No. 72 (1976).

¹⁰⁵ Agreement between Norway and Denmark (Faeroes), June 15, 1979, *reprinted in* Gulf of Maine Case, Reply submitted by Canada, 1 Annex 603 (1983); *cited by* S. JAGOTA, *supra* note 99, at 115 and 340.

¹⁰⁶ Treaty on Friendship and Delimitation of the Maritime Boundary between the United States and the Cook Islands, June 11, 1980, United States-Cook Islands, TIAS No. 10,774; and Treaty on the Delimitation of the Maritime Boundary between Tokelau and the United States, Dec. 2, 1980, TIAS No. 10,775, *reprinted in* LIMITS IN THE SEAS, *supra* note 7, No. 100 (1983).

¹⁰⁷ Accord de délimitation des zones économiques (Réunion), Apr. 2, 1980, France-Mauritius, J.O. July 19, 1980, at 1830, 1980 Recueil des Traités No. 37, *reprinted in* LIMITS IN THE SEAS, *supra* note 7, No. 95 (1982).

¹⁰⁸ Convention de délimitation (Martinique), Mar. 4, 1981, France-St. Lucia, J.O. May 21, 1981, at 1608, *reprinted in* 85 RGDI 654 (1981).

¹⁰⁹ Convention de délimitation maritime (New Caledonia), Jan. 4, 1982, France-Australia, J.O. Feb. 15, 1983, at 562, 1983 Recueil des Traités No. 3(8). See also J. R. V. PRESCOTT, *AUSTRALIA'S MARITIME BOUNDARIES* 124 (1985).

¹¹⁰ See Prescott, *Maritime Boundaries and Issues in the Southwest Pacific Ocean*, in *OCEAN BOUNDARY MAKING: REGIONAL ISSUES AND DEVELOPMENTS* 268, 291 (D. M. Johnston & P. M. Saunders eds. 1988) [hereinafter Johnston & Saunders].

negotiated boundaries with Tonga in 1980¹¹¹ and Australia in 1982 for Wallis and Futuna in the southwest Pacific Ocean were both drawn utilizing the equidistance method. However, the 1980 French-Venezuelan boundaries involving the islands of Martinique and Guadeloupe did not employ or explicitly recognize equidistance. As one commentator noted, the agreed-upon boundary "does not seem . . . to follow any known formula."¹¹² Nevertheless, the French islands were given considerable weight in the delimitation.

Two other exceptions can be noted to the trend toward the use of equidistance lines for distant islands. These are the 1980 and 1982 Iceland-Norway agreements regarding Jan Mayen¹¹³ and the Netherlands-Venezuela boundary accord of 1978,¹¹⁴ which is particularly relevant to St. Pierre and Miquelon because of the proximity of the Netherlands Antilles to the Venezuelan coastline.

In the former, Norway agreed that Iceland was entitled to the full extent of its 200-nautical-mile exclusive economic zone, irrespective of Jan Mayen. An important part of the package was the creation of a joint development zone for hydrocarbon resources that straddle the delimitation line. This unusual arrangement was acceptable because of the close, friendly relations between Norway and Iceland.¹¹⁵

As for the Netherlands-Venezuela agreement, the three southern islands in the Netherlands Antilles, Aruba, Curaçao and Bonaire, are the most relevant to this discussion. Aruba lies only 15 nautical miles north of the Venezuelan coast and has an area of 75 square miles and a population of over 65,000. Curaçao is 60 nautical miles from Venezuela; it has an area of 171 square miles and a population of over 160,000. Bonaire, which lies 50 nautical miles north of Venezuela, is the second largest of the three (111 square miles) but is the least populated, with approximately 10,000 inhabitants. In 1978 the Netherlands, on behalf of these three dependencies and St. Maarten, Saba and St. Eustatius,¹¹⁶ which lie to the northeast, entered into a maritime boundary accord with Venezuela.¹¹⁷

For Aruba, Curaçao and Bonaire, a "slightly" modified equidistance line was employed in the ocean area where the islands are opposite Venezuela.¹¹⁸

¹¹¹ Convention relative à la délimitation des zones économiques (Wallis-Futuna Islands), Jan. 11, 1980, France-Tonga, J.O. Apr. 19, 1980, at 987, 1980 Recueil des Traités No. 18.

¹¹² Traité de délimitation (Martinique), July 17, 1980, France-Venezuela, J.O. Mar. 16, 1983, at 782, 1983 Recueil des Traités No. 6(13). See Nweihed, *Delimitation Principles and Problems in the Caribbean*, in MARITIME ISSUES IN THE CARIBBEAN 19, 40 (F. Jhabvala ed. 1983).

¹¹³ See *supra* note 65.

¹¹⁴ Treaty of Delimitation, Mar. 31, 1978, Venezuela-Netherlands, 1978 Tractatenblad van het Koninkrijk der Nederlanden, No. 61, reprinted in LIMITS IN THE SEAS, *supra* note 7, NO. 105 (1986).

¹¹⁵ See Rolston & McDorman, *Maritime Boundary Making in the Arctic Region*, in Johnston & Saunders, *supra* note 110, at 16, 32-37.

¹¹⁶ On the ocean interests of these small islands, see de Jong, *Extension of the Territorial Sea of the Kingdom of the Netherlands*, 30 NETH. INT'L L. REV. 129, 137-39 (1983).

¹¹⁷ See *supra* note 114.

¹¹⁸ Kingdom of the Netherlands, Explanatory Memorandum to the Bill of Approval of the 1978 Delimitation Treaty between the Kingdom of the Netherlands and Venezuela, reprinted in 10 NETH. Y.B. INT'L L. 367, 370 (1979).

However, equidistance was definitely not adopted for the seaward areas. One geographer has estimated that the Netherlands conceded 12,200 square nautical miles of ocean space by not insisting on strict equidistance.¹¹⁹ The Dutch explained this as follows:

Considering the geographic position of [Aruba, Curaçao and Bonaire] in respect of the Venezuelan coast, and taking into account the size of the respective territories, the Kingdom was prepared during the negotiations to accept a correction in the application of the equidistance method, since application of this method, in the case of the Netherlands Antilles, would result in a relatively large sea area as compared with what would belong to Venezuela.

The weight that should be given to the difference in size between the land territory of [Aruba, Curaçao and Bonaire] and that of the opposite Venezuelan territory, as compared with the respective sea areas, has had particular relevance in the northern sea areas situated far off the coast. In these northern areas, where the sea is from approximately 2000 to over 4000 metres in depth, the existence of natural resources in the sea-bed and subsoil—quite apart from the possibilities of economic exploitation—is much less likely than in more southern areas.¹²⁰

A Venezuelan commentator noted that the boundary favored Venezuela “on the assumption that continental masses engender more jurisdiction proportionally than do smaller islands.”¹²¹ The same commentator suggested that the Netherlands Antilles were compensated for their lost territory by receiving a potentially oil-rich area.¹²²

For the northern Antilles, equidistance was strictly applied between the Dutch islands and the uninhabited Venezuelan island of Aves.¹²³ The Dutch willingness to give Aves Island full weight was important for Venezuela and facilitated Venezuela's acceptance of significant offshore zones for Aruba, Curaçao and Bonaire.¹²⁴

Agreements Providing for Enclaving

Various bilateral boundary agreements have provided for enclaves or semienclaves where islands were inconveniently located. In the Australia–Papua New Guinea Treaty on the maritime boundary for the Torres Strait,

¹¹⁹ J. R. V. PRESCOTT, *supra* note 100, at 344–45.

¹²⁰ Kingdom of the Netherlands, *supra* note 118, at 370–71.

¹²¹ Nweihed, *supra* note 112, at 40. A similar argument was advanced by Libya but rejected by the International Court. *Libya/Malta*, 1985 ICJ REP. at 40–41, para. 49.

¹²² Nweihed, *supra* note 112, at 40.

¹²³ Kingdom of the Netherlands, *supra* note 118, at 370.

¹²⁴ The status and effect that should be given Aves Island has been highly controversial. See Nelson, *The Delimitation of Maritime Boundaries in the Eastern Caribbean*, in *A NEW LAW OF THE SEA FOR THE CARIBBEAN* 27, 39–44 (E. Gold ed. 1988).

enclaving was used extensively.¹²⁵ The agreement also provides for a separate boundary for the seabed and fishing zone in the most contentious area. The seabed boundary is essentially a modified equidistance line, apparently based on some, but not all, of the Australian islands in the Torres Strait.¹²⁶ The small, uninhabited Australian islands, cays and reefs to the north of this median line have a 3-nautical-mile territorial sea. The inhabited Australian islands of Boigu, Dauan and Saibai, which lie within a few miles of Papua New Guinea, were also given a 3-nautical-mile territorial sea, except where the islands are directly opposite the coast of Papua New Guinea, in which case a median line divides them. These islands, however, fall within Australian fisheries jurisdiction, as it is in this area that the seabed and fisheries lines diverge. All of the relevant islands are enclosed in a joint protection zone whose purpose is to "protect the traditional way of life and livelihood of the traditional inhabitants."¹²⁷

The Australia-Papua New Guinea Agreement is an imaginative approach to a difficult ocean boundary problem. The special relationship between the two countries made the arrangement possible. Of particular importance was the willingness of Australia to make concessions about the sovereignty and weight to be given the islands in the Torres Strait.¹²⁸

In several agreements, the islands were semi-enclaved, that is, were permitted a zone on one side of a boundary but not permitted to influence the location of the principal boundary. The result is a bulge in the boundary line. The best example is the 1971 Agreement between Italy and Tunisia, which allocated a territorial sea and contiguous zone to the small islands of Partelleria, Lampedusa and Linosa.¹²⁹ If the Italian islands had been used to construct an equidistance line, it would have passed within 30 nautical miles of the coast of Tunisia.¹³⁰ However, the islands were in the middle of the area to be delimited, and not within a few miles of the Tunisian coast.

Unresolved Boundaries Involving Distant Islands

Of the numerous unresolved boundaries involving islands of one state that are very close to the coast of another state, the best known is the Greek islands of the Aegean Sea. Greece and Turkey have actively disputed the

¹²⁵ Treaty concerning Sovereignty and Maritime Boundaries in the Area between the Two Countries, Including the Area Known as Torres Strait, and Related Matters, Dec. 18, 1978, Australia-Papua New Guinea (entered into force Feb. 22, 1985), *reprinted in* 18 ILM 291 (1979).

¹²⁶ See Burmester, *The Torres Strait Treaty: Ocean Boundary Delimitation by Agreement*, 76 AJIL 321, 336-37 (1982).

¹²⁷ Torres Strait Treaty, *supra* note 125, Art. 10(3); see Burmester, *supra* note 126, at 330-32.

¹²⁸ Burmester, *supra* note 126, at 323-24.

¹²⁹ Agreement relating to the Delimitation of the Continental Shelf between the Two Countries, Aug. 20, 1971, Italy-Tunisia (entered into force Dec. 6, 1978), *reprinted in* LIMITS IN THE SEAS, *supra* note 7, No. 89 (1980).

¹³⁰ J. R. V. PRESCOTT, *supra* note 100, at 302.

weight to be given the Greek islands; if strict equidistance were observed, it would deny Turkey any offshore zone in the Aegean.¹³¹ As one authority has commented: "it must surely be conceded that to apply article 121(2) of the 1982 Convention [on territorial sea, contiguous zone, economic zone and continental shelf of islands] and also a median line boundary . . . would be to produce an inequitable result."¹³²

A less well-known problem is caused by the Spanish *Islas Chaferinas*, which are situated 4 nautical miles from the coast of Morocco.¹³³ If these islands were given full weight in drawing a boundary, the line would significantly favor Spain. Another example is South Africa's claimed ownership of twelve islands along the coast of Namibia. If its claims are sustained, South Africa could obtain a substantial zone for the islands through the application of strict equidistance.¹³⁴ Finally, Equatorial Guinea's island of Fernando Poo is located only 18 nautical miles from the coast of Cameroon and effectively blocks Cameroon from claiming an extended zone.¹³⁵ Unlike the case of St. Pierre and Miquelon, all of these examples involve states that are opposite or adjacent, not states that have no connecting ocean boundaries or zones except for those of the island.

It is in the Caribbean Sea that one finds unresolved examples of island dependencies of a distant state that lie close to the shore of another state. Here the independent state involved is itself an island and is sometimes smaller, less populated and poorer than the distant island dependency. One such state is Dominica, which is located 13 nautical miles south of the French island of Guadeloupe and 22 nautical miles north of Martinique.¹³⁶ Guadeloupe also poses a problem for both Antigua and Montserrat. The French portion of St. Maarten is only a few miles from Anguilla. Another example is St. Eustatius, part of the Netherlands Antilles, which has an area of 8 square miles and a population of approximately 2,000 and lies only a few miles north of St. Kitts and Nevis.

* * * *

In general, it is difficult to argue, on the basis of the above state practice regarding distant islands, that a rule of customary international law has

¹³¹ The Greek and Turkish continental shelf dispute is documented in 2 *MEDITERRANEAN CONTINENTAL SHELF*, *supra* note 62, at 1515. See also D. BOWETT, *THE LEGAL REGIME OF ISLANDS IN INTERNATIONAL LAW* 249-81 (1979).

¹³² D. JOHNSTON, *supra* note 4, at 159.

¹³³ C. SYMONS, *supra* note 79, at 90; J. R. V. PRESCOTT, *supra* note 100, at 306.

¹³⁴ J. R. V. PRESCOTT, *supra* note 100, at 331-33. South Africa has made it clear that it will apply a 200-nautical-mile zone for each of the islands and also a 200-nautical-mile zone for Walvis Bay. South Africa would obtain about 7% of the offshore zone that would otherwise go to Namibia. South Africa's claim to the islands is challenged. See R. MOORSOM, *EXPLOITING THE SEA* 74-75 (1984). See generally on the sovereignty issue Partington, *Walvis Bay and the Penguin Islands: The Validity of South Africa's Claims to Sovereignty*, 16 *DENVER J. INT'L L. & POL'Y* 247 (1988).

¹³⁵ J. R. V. PRESCOTT, *supra* note 100, at 333; Underwood, *Ocean Boundaries and Resource Development in West Africa*, in Johnston & Saunders, *supra* note 110, at 229, 253.

¹³⁶ See generally C. MITCHELL & E. GOLD, *FISHERIES DEVELOPMENT IN DOMINICA* (1982).

evolved in favor of the employment of equidistance. State practice is not sufficiently uniform or extensive for that, even though distant islands have regularly been given full weight in maritime boundary delimitations. As for enclaving or semi-enclaving, on those occasions when it has been adopted, the islands involved were inconveniently located in an area of overlap, rather than being themselves the cause of the overlapping zones.

Specifically, it is difficult to find a situation replicating that of St. Pierre and Miquelon for which two states have been able to agree on a maritime boundary. The best analogue to St. Pierre and Miquelon is the Netherlands Antilles, where the parties settled on an adjusted equidistance line and unique trade-offs involving Aves Island and zones potentially rich in resources.

VI. EQUIDISTANCE

In many situations, the use of equidistance leads to an equitable result. The International Court of Justice recognized this in the *Libya/Malta* case.¹³⁷ It is also demonstrated by state practice, including that involving distant islands. However, the Court in *Libya/Malta* stressed that the employment of equidistance was *not* a legal requirement, and that there was no presumption in its favor.¹³⁸ This reasoning is consistent with the Court's handling of equidistance in previous cases.¹³⁹ Malta, which advocated the equidistance method, did not argue that it had to be applied as a matter of law. Rather, Malta took the view that the state practice on equidistance in boundary agreements was "significant and reliable evidence of normal standards of equity."¹⁴⁰

In the *Libya/Malta* case, the delimitation concerned a small island state confronting the extensive coastline of a continental state. A key determination made by the Court was that the exclusive economic zone had emerged as part of customary international law.¹⁴¹ The Court then had to consider how a state came to be entitled to an economic zone. The answer reached was that such entitlement was based on having a coastline and on distance.¹⁴² Irrespective of the geology of the seabed and any factors concerning the water column, title to the economic zone rested upon distance. It was easy to argue, therefore, that where the distance between two coasts is less than 400 nautical miles, the appropriate manner in which to divide title based upon distance was through equidistance, since *prima facie* it provides an equal division.

Despite the logic of the above, the Court did *not* arrive at a line that was equidistant between the coasts of Libya and Malta. A provisional median line was constructed and then adjusted to the disadvantage of the island

¹³⁷ *Libya/Malta*, 1985 ICJ REP. at 38, para. 44.

¹³⁸ *Id.* at 47, para. 63, and 56, para. 77.

¹³⁹ See *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, 1982 ICJ REP. 18, 79, para. 110 (Judgment of Feb. 24) [hereinafter *Tunisia/Libya*].

¹⁴⁰ *Libya/Malta*, 1985 ICJ REP. at 38, para. 44.

¹⁴¹ *Id.* at 33, para. 34.

¹⁴² *Id.* at 35, para. 39.

state of Malta. However, the acceptance of distance as underlying the basis of title might arguably compel a tribunal to give equidistance a special place as an appropriate method to begin fashioning a delimitation line.¹⁴³

The Court noted in *Libya/Malta* that where states have opposite coastlines, equidistance is a particularly valuable method for achieving an equitable result. However, where states are adjacent, the Court found that strict adherence to equidistance could lead to inequities because of distorting geographic anomalies.¹⁴⁴ The relationship between Canada and St. Pierre and Miquelon is predominantly one of adjacency; only a few points would control the location of an equidistance line.

Another aspect of the *Libya/Malta* case that relates to equidistance is that Libya argued that Malta's status as an independent state should not cause it to be treated differently from an island belonging to a mainland state. Malta accepted that it had no privileged status but argued that it must be treated differently from a dependent island. The Court held that Malta's relationship with Libya was "different" from what it would be if it were not an independent state.¹⁴⁵ This holding is relevant to St. Pierre and Miquelon since the Court's comments implied that the line would have been even more unfavorable to Malta had it not been an independent state. For a tribunal to adopt a strict equidistance solution for islands that are not a state after the International Court refused to do so for Malta would be unlikely, even though the geographical situations are very different.

In sum, despite the frequent use of equidistance in achieving an equitable result, the tribunal would find it difficult to accept a strict application of that method as its final solution to the *St. Pierre and Miquelon* dispute in light of the *Libya/Malta* case and previous decisions. However, the arguments in favor of using equidistance to construct the provisional line, subject to adjustment for relevant circumstances, are credible.

VII. ENCLAVING

There are also sound arguments for advocating enclaving as providing an equitable result for St. Pierre and Miquelon. There is the example of the enclaving of the Channel Islands in the *Anglo-French* arbitration. Considerations of importance include the proportionality of coastline lengths and political and economic factors peculiar to the relationship between Canada and the French islands.

¹⁴³ See McDorman, *supra* note 72, at 351. Note again, 1985 ICJ REP. at 56, para. 77, and 47, para. 63, where the Court emphatically rejected equidistance as a legal requirement.

¹⁴⁴ *Libya/Malta*, 1985 ICJ REP. at 51, para. 70. This point had previously been made in the North Sea Continental Shelf cases (FRG/Den; FRG/Neth.), 1969 ICJ REP. 3, 49, para. 89 (Judgment of Feb. 20). It was also commented upon in the Anglo-French Award, *supra* note 59, para. 95. The tribunal noted that the presence of the Scilly Isles off the coast of England enabled the United Kingdom, by use of equidistance, to claim approximately 4,000 square miles more than if the Scillies did not exist. *Id.*, para. 243. See Beazley, *Maritime Boundaries: A Geographical and Technical Perspective*, in *THE UN CONVENTION ON THE LAW OF THE SEA: IMPACT AND IMPLEMENTATION* 319, 325-27 (19 L. Sea Inst. Proc., E. D. Brown & R. R. Churchill eds. 1987).

¹⁴⁵ *Libya/Malta*, 1985 ICJ REP. at 42, paras. 52-53.

The Anglo-French Arbitration

The court of arbitration in this case was faced with the difficult task of what to do with the British Channel Islands, which lie only a few miles off the coast of France but many miles from the mainland coast of England.¹⁴⁶ The countries agreed that equidistance was the appropriate method for delimiting the boundary where the coasts are opposite one another.¹⁴⁷ The United Kingdom argued for using the Channel Islands in an equidistance line even though it would bring the shelf boundary very close to the French coast.¹⁴⁸ France, however, proposed that the Channel Islands be disregarded in delimiting the continental shelf in the English Channel and that they be given a 6-nautical-mile zone of their own.¹⁴⁹ The tribunal adopted the French recommendation, although the islands were awarded a 12-nautical-mile zone on their seaward side¹⁵⁰ because France had previously recognized the existence of a 12-nautical-mile fishing zone.¹⁵¹ Where the 12-nautical-mile zone would overlap with a French territorial sea claim, no line was drawn pending further negotiations.¹⁵²

Canada, in arguing for enclaving the French islands, can be expected to advance many of the same reasons put forward by France regarding the Channel Islands. For example, France argued that an equidistance line using the Channel Islands would confer an amount of ocean space on the United Kingdom "wholly disproportionate to the size of the Channel Islands and the length of their coasts."¹⁵³ This argument was not directly assessed by the tribunal, although it noted that the United Kingdom's arguments were not "sufficient to justify the disproportion or remove the imbalance . . . which adoption of the United Kingdom's proposal would involve"¹⁵⁴—implying that the existence and size of the Channel Islands clearly created an imbalance that had to be considered.

One of the precedents invoked by the French in support of enclaving was the so-called *relevé des conclusions* of 1972, which dealt with St. Pierre and Miquelon.¹⁵⁵ France did note, however, that the situations were not identical.¹⁵⁶ The arbitral tribunal misconstrued the nonbinding effect of the *relevé des conclusions*,¹⁵⁷ but it, too, found several differences between the two cases:

First, that case is not one of islands situated in a channel between the coasts of opposite States, so that no question arises there of a delimitation between States, whose coastlines are in an approximately equal

¹⁴⁶ The islands are fully described in Anglo-French Award, *supra* note 59, paras. 6–7.

¹⁴⁷ *Id.*, para. 87.

¹⁴⁸ *Id.*, para. 168.

¹⁴⁹ *Id.*, para. 150.

¹⁵⁰ *Id.*, para. 202.

¹⁵¹ *Id.*, para. 187.

¹⁵² The tribunal took the view that it was not competent to draw these lines. *Id.*, paras. 19–22.

¹⁵³ *Id.*, para. 161; on proportionality, see para. 166.

¹⁵⁴ *Id.*, para. 198.

¹⁵⁵ *Id.*, para. 177; see also *supra* note 66.

¹⁵⁶ Anglo-French Award, *supra* note 59, para. 159.

¹⁵⁷ See *supra* note 66.

relation to the continental shelf to be delimited. Secondly, there being nothing to the east of St. Pierre et Miquelon except the open waters of the Atlantic Ocean, there is more scope for redressing inequities than in the narrow waters of the English Channel. Even so, it appears from the *Relevé des Conclusions* that a delimitation according no more than a 12-mile zone of territorial sea to St. Pierre et Miquelon has been agreed between the French Republic and Canada. True, it also appears that this agreement includes a reservation of certain special privileges for St. Pierre et Miquelon; but for these special privileges there is a counterpart in the considerable extent of continental shelf left to Canada in the Atlantic to seawards of the islands.¹⁵⁸

The key to the tribunal's decision regarding the enclaving of the Channel Islands was the geographical factor of opposite mainland coasts, with the consequence that equidistance was an appropriate method for delimitation if the Channel Islands could be excluded from consideration.¹⁵⁹ The Channel Islands were "on the wrong side of the median line," France said, adopting the terminology of S. W. Boggs.¹⁶⁰

A delimitation of the waters between two states' primary coasts that is complicated by inconveniently placed islands is significantly different from a delimitation that is necessitated by the very presence of an island, far distant from the metropolitan state, near the coast of another state. Distinctions such as these between the Channel Islands' situation and that of St. Pierre and Miquelon make the *Anglo-French* enclaving precedent less than compelling, although certain statements in the decision may help the Canadian cause.¹⁶¹

Proportionality

The geographic reality of St. Pierre and Miquelon is that these tiny islands are dominated by the Canadian coastline and their proximity to Canada. Quite clearly, the coastline lengths of Canada and the French islands are vastly disproportionate, no matter how they might be measured.¹⁶² Consequently, if the French islands received a significant offshore zone, its size would be disproportionate to those relative coastline lengths.

In the *Libya/Malta* case, the Court stated bluntly that proportionality of coastlines was *not* an independent principle or method for the construction of a boundary.¹⁶³ However, a disproportion in coastal lengths was noted in the *Gulf of Maine* case as being an equitable criterion that could be consid-

¹⁵⁸ Anglo-French Award, *supra* note 59, para. 200.

¹⁵⁹ *Id.*, para. 196.

¹⁶⁰ *Id.*, para. 159.

¹⁶¹ A detailed analysis that applies the *Anglo-French* reasoning to St. Pierre and Miquelon has been done by Symmons, *supra* note 13, at 158-162; and Rigaldies, *L'Affaire de la délimitation du plateau continental entre la République française et le Royaume-Uni de Grande-Bretagne et d'Irlande du Nord*, 106 JOURNAL DU DROIT INTERNATIONAL 506 (1979).

¹⁶² The determination of the relevant coastline and its length has been a consideration in all the recent ICJ decisions. See, e.g., *Libya/Malta*, 1985 ICJ REP. at 50, para. 68; and *Gulf of Maine*, 1984 ICJ REP. at 335-37, paras. 221-22.

¹⁶³ *Libya/Malta*, 1985 ICJ REP. at 45, para. 58.

ered in determining the method of delimitation.¹⁶⁴ Moreover, even in *Libya/Malta* the Court recognized that one of the equitable principles that had to be satisfied in selecting the method of delimitation was respect for "all relevant circumstances,"¹⁶⁵ which included proportionality.¹⁶⁶ Hence, it can be argued that proportionality of coastal lengths, especially in cases of severe disproportion, must play an important role in determining the method of drawing a boundary.¹⁶⁷

In the recent adjudications, proportionality of coastlines has been applied directly as a relevant circumstance in adjusting a provisional line constructed by the tribunal.¹⁶⁸ In the *Libya/Malta* case, the provisional equidistance line was adjusted in favor of Libya because of the disproportion in the coastline lengths.¹⁶⁹ The adjustment was not a mathematical computation but a rationale for moving the provisional line.¹⁷⁰

More importantly, beyond this restricted application of proportionality, a delimitation must ultimately achieve an equitable result; the means the Court has used to test the equitableness of a result has been by examining the ratio of coastline proportionality to seabed proportionality.¹⁷¹ In the *Libya/Malta* case, the Court concluded that a broad assessment of the equitableness of the result revealed "no evident disproportion in the areas of shelf attributed to each of the Parties respectively such that it could be said that the requirements of the test of proportionality as an aspect of equity were not satisfied."¹⁷²

The three purported uses of proportionality—as a factor in determining the method of drawing the boundary, as a circumstance relevant to the subsequent adjustment of the provisional line, and as an overall test of the equitableness of the final result—ensure that proportionate coastal lengths could be of considerable importance in the determination of the boundary. Given the severe disproportionality in the St. Pierre and Miquelon situation, the use of proportionality favors Canada's argument for an enclave solution or, alternatively, militates against the tribunal's adoption of the equidistance method.

Economic Considerations

International tribunals have consistently denied that economic information and the socioeconomic impact the location of a boundary may have are

¹⁶⁴ *Gulf of Maine*, 1984 ICJ REP. at 312–13, para. 157.

¹⁶⁵ *Libya/Malta*, 1985 ICJ REP. at 39–40, para. 46.

¹⁶⁶ *Id.* at 44, para. 57.

¹⁶⁷ Willis, *From Precedent to Precedent: The Triumph of Pragmatism in the Law of Maritime Boundaries*, 24 CAN. Y.B. INT'L L. 3, 44 (1986). Mr. Willis, a Canadian government lawyer, was centrally involved in the *Gulf of Maine* case and is currently involved in the *Canada-France* dispute. More generally on proportionality, see Beazley, *supra* note 144, at 320–25.

¹⁶⁸ See McDorman, *supra* note 72, at 354–56.

¹⁶⁹ *Libya/Malta*, 1985 ICJ REP. at 50, para. 68. This was consistent with the treatment of disproportionality in the *Gulf of Maine* case. 1984 ICJ REP. at 334–35, para. 218.

¹⁷⁰ *Libya/Malta*, 1985 ICJ REP. at 50, para. 68.

¹⁷¹ See, e.g., *Tunisia/Libya*, 1982 ICJ REP. at 91, para. 131.

¹⁷² *Libya/Malta*, 1985 ICJ REP. at 55, para. 75.

relevant to boundary delimitation.¹⁷³ International tribunals do not see themselves as balancing inequities either economic or geographic. In the *Gulf of Maine* case, however, the Chamber specifically looked at the impact on coastal communities and other socioeconomic considerations in deciding whether the proposed delimitation would achieve an equitable result.¹⁷⁴ In the *Anglo-French* arbitration, the tribunal considered the economic importance, political status and size of the Channel Islands as relevant to the enclaving decision.¹⁷⁵ Despite their protestations, international tribunals do not make decisions in an economic and political vacuum.¹⁷⁶ The political and economic factors influence the tribunal's selection of appropriate criteria to which the method must conform.

An important element of Canada's position will likely be that the small population of the French islands will not be adversely affected by a 12-nautical-mile enclave. Although fishing is the islands' major industry (together with Canadian tourism),¹⁷⁷ under the 1972 Agreement Canada and France provided special arrangements to protect the livelihood of fishermen from St. Pierre and Miquelon. Article 4, which entitles vessels from St. Pierre and Miquelon to an annual quota from within the Gulf of St. Lawrence,¹⁷⁸ has been called "an arrangement between neighbours,"¹⁷⁹ the neighbor being St. Pierre and Miquelon rather than metropolitan France.¹⁸⁰ When the total French quota for the Gulf of St. Lawrence was dropped in 1987, the reduction amounted to the alleged catch of French vessels not registered in St. Pierre and Miquelon.¹⁸¹ Moreover, the 6,400 M.T. established as the French quota in the disputed zone was seen as being for the fishermen of St. Pierre and Miquelon.¹⁸² Canada has proved willing to give special treatment to its "true" neighbor to ensure the continuance of the islands' economic base.

The extra resources that would become available if the enclave solution were not accepted, Canada will probably argue, would go to metropolitan France and not to St. Pierre and Miquelon.¹⁸³ Interestingly, although the

¹⁷³ See, e.g., *Tunisia/Libya*, 1982 ICJ REP. at 77-78, paras. 106-07.

¹⁷⁴ *Gulf of Maine*, 1984 ICJ REP. at 342, para. 237.

¹⁷⁵ *Anglo-French Award*, *supra* note 59, paras. 197-98.

¹⁷⁶ McDorman, *supra* note 72, at 361. See the excellent paper on this subject by Sharma, *The Relevance of Economic Factors to the Law of Maritime Delimitation between Neighboring States*, in 19 L. Sea Inst. Proc., *supra* note 144, at 248.

¹⁷⁷ Approximately 40% of St. Pierre and Miquelon's work force is employed by the fishery and the fishery is worth about \$10 million to the economy. Canadian Press, Paris, *Paris supports island fishermen*, Toronto Globe & Mail, Jan. 26, 1989.

¹⁷⁸ As has been noted, Canada effectively suspended this treaty to put pressure on France to resolve the boundary dispute.

¹⁷⁹ 1972 Agreement, *supra* note 7, Art. 4.

¹⁸⁰ This was the position taken by Professor Donat Pharand, the dissenting arbitrator in the *La Bretagne Award*, *supra* note 6, Dissenting Opinion, para. 90.

¹⁸¹ Siddon, *supra* note 17, at 2810.

¹⁸² *Id.*

¹⁸³ France's insistence at the Third United Nations Conference on the Law of the Sea that distant islands be entitled to extended zones has been seen as designed to ensure that French fishermen would have a place to fish when traditional areas were closed because of 200-nautical-mile zones. It has been estimated that 75% of French landings in 1975 came from waters

French catch in the disputed zone was allegedly between 12,000 and 18,000 M.T. in 1988, the two processing plants in St. Pierre and Miquelon were closed because of the suspension of the 1972 Agreement.¹⁸⁴ Canadian sources have estimated that metropolitan French vessels harvested half of the total catch in the disputed zone in 1988.¹⁸⁵ Moreover, fishermen from St. Pierre and Miquelon have been upset by the alleged overfishing of the disputed zone by metropolitan French vessels.¹⁸⁶ In early 1989, concern about damage to the depleted cod stocks in the disputed area led St. Pierre and Miquelon to react strongly against metropolitan France's plan to have two freezer trawlers fish in the disputed zone. The sit-ins and protests ended when one of the trawlers returned to France.¹⁸⁷

In 1972 France apparently found it acceptable to limit the offshore zone of St. Pierre and Miquelon to 12 nautical miles, the arrangement in the May 1972 *relevé des conclusions* or summary of conclusions.¹⁸⁸ The *relevé* also provided for the creation of a joint zone for hydrocarbon resources in the disputed area. As has been noted, this arrangement was never consummated. It was expressly provided that it would only become binding if subsequently approved by the two Governments, and the Canadian cabinet rejected it. Nevertheless, the unconcluded arrangement shows some receptivity to an enclave solution, which is strengthened by France's reference to the arrangement as a precedent for enclaving in the *Anglo-French* arbitration.¹⁸⁹

now within other countries' 200-nautical-mile zones. The relatively small French fishing community has significant political clout, which largely explains the French Government's posture on foreign fishing issues. See Aquarone, *supra* note 22, at 270 and 276.

In January 1989, a severe dispute arose between metropolitan France and St. Pierre fishing interests when two trawlers from metropolitan France were scheduled to fish in the disputed waters. The French Government acceded to the islanders' position that only one trawler be permitted to fish in the zone. In response, the owner of the unwanted trawler and the vessel's home community staged protests, blockaded the home port and occupied government buildings. The protests and threats that the unwanted trawler would indeed fish in the disputed area ended when the French Government agreed to compensate the affected parties for fish not caught. Canadian Press, St. Mâlo, *Angry French plug port in protest*, Victoria Times-Colonist, Jan. 28, 1989, at A3; *id.*, *Cod war trawler recalled*, Victoria Times-Colonist, Jan. 29, 1989, at A1, A2.

¹⁸⁴ Fraser, *Paris halts fish talks: Canadians are blamed*, Toronto Globe & Mail, Sept. 13, 1988, at A1, A2.

¹⁸⁵ Canadian Press, St. John's, *St-Pierre-Miquelon protest ends after Paris pledge on trawlers*, Toronto Globe & Mail, Jan. 6, 1989, at A4. The French division of the 1988 quota was 64% for St. Pierre and Miquelon vessels and 36% for metropolitan French vessels. The 1989 quota of 26,000 M.T. was supposed to be divided into 79% for St. Pierre and Miquelon and 21% for metropolitan France. Binkley, *supra* note 31.

¹⁸⁶ Ross & McLaren, *St-Pierre business joins row over fish*, Toronto Globe & Mail, Feb. 12, 1987, at A1, A2.

¹⁸⁷ Canadian Press, St. Pierre, *Residents of French islands savour victory*, Toronto Globe & Mail, Jan. 20, 1989, at A4. See *supra* note 183. It has been suggested that the French Government's agreement to two freezer trawlers for the disputed zone was designed to pressure Canada on the boundary dispute and the suspended 1972 Agreement, which allowed French vessels to fish in undisputed Canadian waters. *St. Pierre 1, Armada 0*, Halifax Chron.-Herald, Jan. 23, 1989, at 6 (editorial).

¹⁸⁸ See *supra* note 66.

¹⁸⁹ See text at notes 155-60 *supra*.



In the mid-1970s, Canada argued for an extended national fishing zone, contending that the living resources adjacent to its coasts were in serious decline. Since Canada was the state with the predominant interest in these living resources, Canada argued that it should be delegated the custodial function of protecting them.¹⁹⁰ This approach resulted in the concept of the 200-nautical-mile fishing zone, the details of which are set out in the 1982 United Nations Convention on the Law of the Sea.¹⁹¹ The relevant provisions of the 1982 Convention emphasize the custodial functions and management responsibilities that the adjacent coastal state is to exercise over the living resources.¹⁹² In arguing in favor of enclaving, Canada can be expected to claim that it alone can adequately manage the living resources of the entire area and that to provide France with an extensive zone in the middle of Canada's 200-nautical-mile zone would be inconsistent with the efficient management of the resource.¹⁹³ As part of this argument, Canada will likely attempt to show the success and merit of its fishery management policies and the inadequacies of French fishery management, particularly respecting the resources of France's far-flung island colonies. The latter point is reinforced by the concerns expressed in St. Pierre and Miquelon about metropolitan France's overfishing tendencies.¹⁹⁴

While the enclave solution seems particularly strong when fisheries are considered, the tribunal must devise a single maritime boundary, which means that nonliving resources of the continental shelf must also be considered. The benefits of any hydrocarbon resources in the disputed zone would accrue to both St. Pierre and Miquelon and France,¹⁹⁵ and Canada has not made any special agreements with the French islanders regarding these resources.¹⁹⁶ Since the extent of the hydrocarbon resources in the disputed

¹⁹⁰ See Johnson, *supra* note 8, at 72-73.

¹⁹¹ See LOS Convention, *supra* note 76, Arts. 56, 61-73. The Convention is not yet in force and the detailed fishery provisions, according to the 1986 Canada-France La Bretagne Award, *supra* note 6, paras. 52 and 53, have not yet emerged as part of customary international law. The dissenting member of the panel, Professor Pharand, took the contrary view. *Id.*, Dissenting Opinion, para. 11. See generally on this arbitration and the LOS Convention, Burke, *supra* note 33, at 517-26.

¹⁹² See D. JOHNSTON, *THE INTERNATIONAL LAW OF FISHERIES*, at LVIII-LX and LXIV-LXXV (1987).

¹⁹³ Although in a different situation, the United States argued that a boundary across Georges Bank in the Gulf of Maine would lead to difficulties in managing the living resources of the area. This argument was rejected by the Chamber. *Gulf of Maine*, 1984 ICJ REP. at 276-77, paras. 51-56, 319, paras. 172 and 174, and 343-44, para. 240.

¹⁹⁴ Ross & McLaren, *supra* note 186; and Canadian Press, *St. Pierre, Fishermen set to confront French ship*, *Toronto Globe & Mail*, Jan. 18, 1989, at A4.

¹⁹⁵ France is heavily dependent on imported oil (almost 100%) and gas (almost 85%). See *supra* note 21.

¹⁹⁶ If the role of the tribunal were to facilitate the reaching of boundary arrangements between Canada and France, having the tribunal recommend (or impose) a narrow French fishing zone around St. Pierre and Miquelon and a joint development zone for hydrocarbons in the disputed area would appear to be consistent with the needs and interests of both countries. But the tribunal has been given the task of resolving the dispute by constructing a single maritime boundary. See text at notes 64-67 *supra*. On the facilitative and consultative roles of an adjudicative body, see D. JOHNSTON, *supra* note 4, at 29-30, 243-44, 281-84.

zone is unknown, Canada might argue that "potential" resources are unrealistic economic and political factors. In the end, Canada might be forced to try to show the geographical illogic of allowing such small islands any significant amount of ocean space.

Political Considerations

The political status of Malta was taken into consideration in the *Libya / Malta* case to the extent that Malta was to be treated better than if it had been a dependent entity.¹⁹⁷ France argued in the *Anglo-French* arbitration that the Channel Islands' lack of independent status was a relevant factor for the arbitral tribunal's consideration.¹⁹⁸ The tribunal did take the political status of the Channel Islands into consideration, stating that it would "treat the Channel Islands only as islands of the United Kingdom, not as semi-independent States entitled in their own right to their own continental shelf *vis-à-vis* the French Republic."¹⁹⁹ This decision was reached despite the United Kingdom's argument that the 130,000 people occupying 75 square miles of territory had their own legislative assemblies, fiscal and legal systems, courts of law and systems of local administration, as well as their own coinage and postal service, and that the delimitation therefore had to take into account more than just the concerns of the mainland of the United Kingdom.²⁰⁰

In the negotiations leading to the Netherlands-Venezuela boundary treaty, both sides foresaw that in time Aruba would become an independent state. This eventuality influenced the location of the maritime boundary in favor of the southern group of Antilles.²⁰¹

The above practice suggests that dependent entities or islands that may become independent states should not be enclaved and that only dependent islands may be enclaved. St. Pierre and Miquelon, as has been noted, were changed in 1985 from a *département* to an overseas territory. The territory is again listed under Annex IV to the Treaty of Rome as an entity to which EEC law does not apply. The other entities on the list are ones that have become or may soon become independent states.²⁰² France can argue that St. Pierre and Miquelon should be treated as a potentially independent state, to which enclaving would thus be inappropriate, and that the tribunal

Tribunals have been known to stray from their terms of reference. It could be argued that this situation is one where a departure from the terms of reference might be justified because of the apparent political and economic equitableness of a narrow fishing zone and a joint hydrocarbon zone.

¹⁹⁷ *Libya/Malta*, 1985 ICJ REP. at 51-52, para. 72.

¹⁹⁸ *Anglo-French Award*, *supra* note 59, para. 158.

¹⁹⁹ *Id.*, para. 186.

²⁰⁰ *Id.*, para. 171.

²⁰¹ Kingdom of the Netherlands, *supra* note 118, at 369. In the mid-1980s, Aruba did acquire a new status within the Dutch Kingdom as a transitional stage toward independence. See Kingdom of the Netherlands, Explanatory Memorandum respecting a 1985 bill concerning the establishment of a maritime frontier between the Netherlands Antilles and Aruba, *reprinted in* 17 NETH. Y.B. INT'L L. 128 (1986).

²⁰² The Channel Islands are not listed in Annex IV.

should not look behind the constitutional status of the islands to their minuscule population and area. Canada, on the other hand, to be successful with the enclaving position, will have to persuade the tribunal to pierce the *de jure* status of the islands to see that their limited size, resources and population do not make them a candidate for independence.

* * * *

Enclaving is supported by its use in the *Anglo-French* arbitration, where the islands were more populous and economically significant than St. Pierre and Miquelon. In addition, state practice has resorted to island enclaves in some particularly troublesome geographic situations. It can be argued specifically that a geographic accident should not allow a small island to control such a large area; that proportionality points to enclaving as an "equitable result"; and that existing Canadian-French arrangements designed to give special treatment to the citizens of St. Pierre and Miquelon should prevent the enclave solution from being detrimental to their interests.

Arguments militating against enclaving include its infrequent use in state practice and the frequent choice of the equidistance method to delimit ocean space for distant islands. The closest analogy that can be made to St. Pierre and Miquelon in state practice is the Netherlands Antilles-Venezuela delimitation, for which enclaving was not employed or apparently even contemplated. The *Anglo-French* arbitration and the Papua New Guinea-Australia Agreement dealt with islands that interfere with the coastlines of opposite states, creating a special situation that otherwise could easily be delimited on the basis of equidistance. These circumstances do not apply to St. Pierre and Miquelon. Moreover, in the 1972 Agreement Canada accepted the islands' entitlement to more than a 12-nautical-mile zone since the northern termination point of the boundary is over 14 nautical miles from Miquelon.²⁰³

The tribunal, in evaluating the above considerations, will probably decide that enclaving is not acceptable as a final result. However, the arguments in favor of enclaving as a method of plotting a preliminary line that is subject to adjustment are credible, based as they are on the geographic (proportionality), political and economic peculiarities of the case.

VIII. CONCLUSION

Unfortunate as it may be, a tribunal is faced with drawing a single maritime boundary, in accordance with the principles and rules of international law, to resolve the overlapping ocean claims of Canada and France in the area around St. Pierre and Miquelon. Canada's official position is that the French islands are entitled to only a 12-nautical-mile zone, the enclave solution; while France will presumably argue that the islands should be given full weight in an equidistance solution.

Both countries can be expected to press the tribunal to accept their solution as an equitable result. In the alternative, the tribunal may be urged to

²⁰³ See *supra* note 14.

accept either equidistance or enclaving as the basis for constructing a provisional line that will then be subject to minor adjustment to take relevant circumstances into account.

The arguments that favor equidistance as the basis of either the final result or the provisional line arise from its frequent use by states in bilateral boundary agreements, its selection in some situations by tribunals, its apparent conformity with the abstract notions of equitable principles and its reliance upon allegedly neutral geography. In the abstract, equidistance means equal division, which appears to be inherently equitable. However, tribunals have stressed that equidistance enjoys no special consideration in constructing a maritime boundary and that what is equitable in a given situation cannot be determined in the abstract.

The severe disproportionality in coastline lengths arguably will make it difficult for the tribunal to choose equidistance for the drawing of the provisional line. The use of equidistance in this geographical situation would be inconsistent with equitable principles, in particular the need to consider all relevant factors, of which disproportionality is the most obvious. Moreover, equidistance cannot lead to anything approaching an equitable result as determined by the ratio of proportionality of coastline lengths to offshore zone. For the reasons that disproportionality makes the adoption of equidistance problematic, it makes the enclave solution credible.

Furthermore, no tribunal can ignore the political and economic realities of a boundary. A large French zone in the middle of Canadian waters used by and benefiting the citizens of metropolitan France more than those of St. Pierre and Miquelon would be a strange result, particularly in view of Canada's previous agreements with France to ensure continued fishing for the islands' citizens in undisputed Canadian waters. The population and realistic political prospects of St. Pierre and Miquelon make it unlikely that they will someday become an independent state, a question that had bearing on the *Libya / Malta* case, the 1978 Netherlands-Venezuela Agreement and the *Anglo-French* arbitration. In the arbitration, the tribunal's acceptance of France's characterization of the Channel Islands as a dependency made enclaving possible; if Canada is successful in so characterizing St. Pierre and Miquelon, only a small area may be provided for the French islands.

Ultimately, the tribunal will probably be presented with one side's advocacy of a principle based on geography that cannot be refashioned, and the other side's invocation, in part of geographic peculiarities, but also of the underlying political and economic factors, to show that only a small zone is warranted. How the tribunal reconciles these considerations will be most interesting.

AGORA: WHAT OBLIGATION DOES OUR GENERATION OWE TO THE NEXT? AN APPROACH TO GLOBAL ENVIRONMENTAL RESPONSIBILITY

DO WE OWE A DUTY TO FUTURE GENERATIONS TO PRESERVE THE GLOBAL ENVIRONMENT?

A common assumption underlying nearly every book or essay on the global environment is that the present generation owes a duty to generations yet unborn to preserve the diversity and quality of our planet's life-sustaining environmental resources. This duty is sometimes said to be an emerging norm of customary international law,¹ including the more recently treaty-generated custom of the "common heritage of mankind."² Professor Edith Brown Weiss lists three different approaches one might take in response to an asserted environmental obligation to future generations: the "opulent" model, which denies any such obligation and permits present extravagance and waste; the "preservationist" model at the other extreme, which requires the present generation to make substantial sacrifices of denial so as to enhance the environmental legacy; and the "equality" model—favored by Professor Weiss—which says we owe to future generations a global environment in no worse condition than the one we enjoy.³

I. PARFIT'S PARADOX OF FUTURE INDIVIDUALS

International law scholars appear to have overlooked the startling thesis put forth by Derek Parfit in 1976.⁴ I will state his thesis in a somewhat stronger form than he did.⁵ Let us picture the people who will be living 100 years from now:⁶ they will be specific, identifiable persons. We can claim that we currently owe an environment-preserving obligation to those particular as-yet-unborn persons. Parfit's paradox arises when we seek to dis-

¹ Professor Weiss regards it as an obligation *erga omnes* that has some support in customary international law. See Weiss, *The Planetary Trust: Conservation and Intergenerational Equity*, 11 *ECOLOGY L.Q.* 495, 540-44 (1984).

² See D'Amato, *An Alternative to the Law of the Sea Convention*, 77 *AJIL* 281, 282-83 (1983).

³ E. BROWN WEISS, *IN FAIRNESS TO FUTURE GENERATIONS: INTERNATIONAL LAW, COMMON PATRIMONY AND INTERGENERATIONAL EQUITY* (1989).

⁴ Parfit, *On Doing the Best for Our Children*, in *ETHICS AND POPULATION* 100 (M. Bayles ed. 1976); Parfit, *Overpopulation: Part One* (ms. 1976), referred to in Parfit, *Future Generations, Further Problems*, 11 *PHIL. & PUB. AFF.* 113 (1982) [hereinafter *Future Generations*].

⁵ My restatement takes into account chaos theory; see *infra* text at notes 9-11. Parfit originally assumed large-scale environmental interventions, yet his thesis is in fact applicable to any environmental intervention.

⁶ In saying this, I do not assume that the human race will necessarily survive the next 100 years. Acts of cosmic stupidity are always possible: self-obliteration by nuclear war, depletion of the ozone layer, and so on.

charge that postulated obligation. Suppose that we undertake a specific environmental act of conservation. For example, we help to pass a law requiring catalytic converters on all automobiles in our state. We will thus have succeeded in intervening in the environment—making the environment slightly different from the way it would have been but for our action. Our intervention will reduce the amount of air pollution that otherwise would have taken place, and increase the utilization of energy and resources in the manufacture of catalytic converters.

Yet this slight difference resulting from our intervention in the environment will affect the ecosphere in the years subsequent to our intervention. In particular, it will affect the conditions under which human procreation takes place. The particular sperm and egg cells from which any human being develops is a highly precarious fact; the slightest difference in the conditions of conception will probably result in fertilization of the egg by a different sperm. Hence, when the environment is disrupted even a slight amount, a different future person will probably be conceived. According to Parfit's thesis, our intervention in the environment will make a sufficient impact to assure that different sperm cells will probably fertilize the egg cells in all procreations that take place subsequent to our environmental intervention. Different people will be born from those who would have been born if we had not intervened in the environment.

To be sure, in the first few years following our environmental intervention, there is very low probability that many subsequent human conceptions will be affected. But as years go by, the effect of our single environmental intervention increases exponentially⁷ until it is a virtual certainty that 100 years from now all human conceptions will have been affected a little bit from our single act of environmental intervention, and that this little effect will actually result in fertilization of egg cells by sperm cells different from those that would have fertilized those egg cells in the absence of our act. Parfit's conclusion is that every single person alive 100 years from now will be an entirely different individual from the person he or she would have been had we not intervened in the environment.

This fact creates a paradox in our attempt to discharge our moral obligation to future generations. How can we owe a duty to future persons if the very act of discharging that duty wipes out the very individuals to whom we allegedly owed that duty? Our attempted environmental altruism will prevent the birth of the precise beneficiaries of our altruism.

It is no answer to argue that the entirely new set of individuals who will replace those we wipe out will themselves greatly benefit from our intervention. For although they may be the beneficiaries of our environmental intervention, we could not have owed a *duty* to them because they were not probable persons at the time we claimed that we had a duty. Any present duty that we have to future generations can only be a duty to particular future persons who are awaiting their turn to be born. If in exercise of such an alleged duty we commit an act of environmental intervention that denies

⁷ According to chaos theory. See *infra* text at note 10.

the opportunity to be born to those very individuals, we cannot possibly be making *them* better off by virtue of our intervention. Thus, we find that any attempted altruism on our part to intervene in the environment to help future persons will make those persons incomparably worse off than if we had not intervened. They would be better off living in a degraded environment 100 years from now—that is, in an environment we did not act to preserve—than not living at all.⁸

Parfit's paradox is uncomfortable and counterintuitive. Is it somehow fallacious? If not, is there any way we can accept Parfit's thesis and still make sense of the notion of "obligation to preserve the environment"?

II. IS PARFIT'S REASONING FAULTY?

People encountering Parfit's thesis for the first time are properly skeptical that a minor intervention in the environment can actually result in entirely different individuals in 100 years from those who would have existed then had there been no such intervention. But the result is scientifically accurate, stemming from the discovery in recent years of chaos theory. In the 1950s, Edward Lorenz, a meteorologist at the Massachusetts Institute of Technology, discovered that a very slight shift in the initial data about weather conditions fed into a computer will result in drastic differences in simulated weather conditions after a number of iterations.⁹ The differences, or perturbations, grow exponentially, doubling every 4 days. Lorenz called this the "butterfly effect." An environmental intervention as slight as a butterfly flapping its wings near a weather station will change long-term weather predictions. Although 2 weeks after the butterfly's capricious flight the effect will hardly be felt outside an area 16 times the path of the butterfly, after 1 or 2 years the butterfly's flight could actually be the cause of a major storm that otherwise would not have taken place.¹⁰ A weekly quadrupling rate means that an initial perturbation will increase by 4 to the 52d power after just 1 year—enough to make itself felt anywhere on the planet. By my own rough calculations, after 3 years the number of perturbations will have increased by more than the total number of atoms in the universe. Thus, applying chaos theory in support of Parfit's thesis makes clear that any action we take will affect the environment in such a way as to change the conditions of all acts of human procreation several decades hence. Even minor acts in the present can substantially affect which particular sperm cells succeed in fertilizing human ova 60 years from now.

If there is no valid scientific objection to Parfit's thesis, can we argue that it proves too much? Can we argue that *any* act that we do, not just acts of environmental preservation, will have a similar exponentially increasing

⁸ What if the environment is so bad that even the act of living is a curse? Would any person choose not to have lived at all rather than to be born into a miserable and degraded situation? We can perhaps choose for ourselves, but I doubt that we have a moral right to make that choice for others yet unborn.

⁹ See, e.g., I. PETERSON, *THE MATHEMATICAL TOURIST* 144–49 (1988); J. GLEICK, *CHAOS: THE MAKING OF A NEW SCIENCE* (1987).

¹⁰ I. EKELAND, *MATHEMATICS AND THE UNEXPECTED* 66 (1988).

future effect?¹¹ For instance, a jogger will have this effect on the future, just as will the air-polluting automobile that drives by her as she jogs. Can we thus contend that since acts of environmental degradation as well as acts of environmental preservation equally change the composition of future populations, Parfit's thesis is vacuous?

No, because Parfit's thesis is aimed at moral considerations. It is premised on the generally accepted moral obligation not to act in any situation where our action would make others worse off.¹² Hence if we engage in an act of environmental preservation for the reason that we feel an obligation to future persons, our very act will make those persons worse off than if we had not acted at all; indeed, our act will make them totally worse off—they will be deprived of their existence. To be sure, the same is true of any environmentally *degrading* act that we might take—except that no one claims that we owe an obligation to future generations to degrade the environment! Parfit's thesis is thus pinpointed at only one claim of obligation: that if we act to *preserve* the environment out of a sense of obligation to future persons, that obligation is nonsensical because in so acting we destroy the obligees.

Indeed, this theme could be embellished by pointing out that all environment-preserving actions are supererogatory in contrast to all *selfish* uses that we might make of the environment. The argument would proceed as follows. Imagine that we could have a conversation with a lawyer who represents the class of actual persons who will be alive 100 years from now. She tells us that she is prepared to accept just our selfishly motivated environmental acts. For when we act to use up environmental resources just to gratify our immediate desires, we are at least motivated by an understand-

¹¹ Both Professor Weiss and Dr. Gündling, in their replies to my essay, chide me for failing to make the argument that I have just made. Professor Weiss says that I did not make my own case as strongly as I might, because "[v]irtually every policy decision of government and business affects the composition of future generations." See p. 206 *infra*. Dr. Gündling says I have "overlooked" the point that "man always interferes with history, even when he is not aware of, and taking care of, future generations." See p. 210 *infra*. But my argument is that although every policy decision of government and business surely affects the composition of future generations, we are nevertheless entitled to examine each and every one of those policy decisions from a moral point of view. If some are immoral, we reject them for that reason alone. But some policy decisions are asserted to be morally required solely because they will benefit future generations. It is just these policy decisions that are subject to the Parfit rejoinder: if you undertake a policy decision only to benefit future generations, and that is its only "moral" justification, it is not morally justifiable at all because it destroys the very persons you claim to protect.

Both Professor Weiss and Dr. Gündling suggest that they are talking about group rights, not individual rights, when they talk about future generations, and hence the composition of the group does not matter too much. The reader can decide whether, if every single member of group A is wiped out and replaced by someone else, we are still entitled to call it group A and claim that at least the group has been preserved.

¹² With appropriate caveats. For example, if we bar the establishment of a McDonald's hamburger shop directly next to the geyser Old Faithful in Yellowstone National Park, we are making a McDonald's franchisee worse off. As with any moral consideration, we have to balance that against the aesthetic sensibilities of numerous tourists who want to view Old Faithful without updated reminders of how many billions of hamburgers have so far been made out of how many millions of cows.

able *reason*—the reason of self-interest. True, she adds, those acts will operate to change the conditions of future human procreation in such a way that the class of persons she represents will change its members' identities each time we act. But she accepts this result as inevitable. On the other hand, she strenuously objects to any of our acts of environmental intervention that are motivated solely by a sense of obligation to her clients. That is not a good reason to act, she argues, because in so acting we will gratuitously destroy her clients. Our attempt to be altruistic to her clients will result in their destruction. "We don't need friends like you," she might conclude. "My clients would rather live in whatever environment is left to them than not be born at all."

Perhaps we can shift the ground of contention to argue that Parfit's thesis should be disregarded because our obligation to act to preserve the environment stems from a generic notion of "future generations" and not because we have any particular future individuals in mind. In other words, can we say that we do not care which persons inherit the earth so long as whoever inherits it inherits a habitable planet in no worse condition than the one we enjoy? Of course we can *say* all this, and in a rather rough way we probably think it and act upon it. But the argument, upon inspection, simply glosses over the problem. Future generations are not an abstraction; they consist of individuals. The particularity of the individuals is apparent when we consider how lucky it is for anyone to be born. The odds of your being born instead of one of your many potential siblings are comparable to the odds of winning the Pennsylvania Lottery in the recent drawing when the first prize was over \$100 million. The point is that the winner of the lottery would not be equally content to have any other person win the lottery; similarly, you and I would not be content if a different person had been born instead of us. We may have been lucky to have been born at all, but we are not ready to relinquish that luck simply on the ground that large numbers and vanishingly small probabilities are involved. The fact that *somebody* will be born does not mean that the person lucky enough to be born is indifferent about who it is.¹³ Future generations cannot be indifferent about whether it is *they* or other persons who will enjoy the fruits of the earth. If we feel we owe an obligation to *them*, we, too, cannot be indifferent about the question. We cannot discharge our obligation to them if in the process of doing so we deprive them of life.

III. GIVEN PARFIT'S PARADOX, DO WE HAVE ENVIRONMENTAL OBLIGATIONS?

At first blush, Parfit's thesis appears to set us back. It seems to justify Professor Weiss's "opulent" model in a way that most of us would instinctively find morally repulsive. Although I believe that Parfit's thesis is unsalvageable, I do not think it is retrogressive. Instead, it may help us to clear the ground of unnecessary conceptual confusion and proceed on a firmer footing.

¹³ Cf. Leslie, *No Inverse Gambler's Fallacy in Cosmology*, 97 MIND 269 (1988).

I suggest that we begin by noticing that the notion of obligation to future generations is typically located within the developing concept of international human rights. The general argument starts with the claim that human rights are more important than any other value in international law, including the rights of states. And it continues by claiming that future generations also have a human right—the right to inherit an environment no worse than the one we enjoy.

The foregoing are relatively uncontroversial assertions. But if we look closely, we see that the entire concept of “human rights” is species chauvinistic. This form of chauvinism is illustrated by the following quotation from Judge Richard Posner: “Animals count, but only insofar as they enhance wealth. The optimal population of sheep is determined not by speculation on their capacity for contentment relative to people, but by the intersection of the marginal product and marginal cost of keeping sheep.”¹⁴ Posner purports to derive these conclusions from his principle of wealth maximization, which for him constitutes the bedrock *moral* justification for all law.¹⁵ He characterizes “wealth” solely in human terms; the sheep’s own wealth, of course, is not to be maximized or even taken into account. Since a sheep’s own capacity for enjoying life has *by definition* nothing to do with maximizing human wealth, it becomes for Posner *morally and legally irrelevant*.

One of the most articulate opponents of “animal rights” is R. G. Frey, whose species chauvinism is explicit when he writes:

[I]t is the sheer richness of human life, and in what this richness consists, which gives it its superior quality. Some of the things which give life its richness we share with animals; there are other things, however, which can fill our lives but not theirs. For example, falling in love, marrying, and experiencing with someone what life has to offer; having children and watching and helping them to grow up; working and experiencing satisfaction in one’s job; listening to music, looking at pictures, reading books . . . By comparison with animals, our lives are of an incomparably greater texture and richness . . .¹⁶

Few persons would quarrel with this statement if Professor Frey has in mind the lowest forms of animal life such as insects and mollusks. But what about whales or chimpanzees? Some whales possess a brain six times bigger than the human brain; Dr. John Lilly has claimed that they are more intelligent than any man or woman.¹⁷ According to Dr. Kenneth Norris, whales see and taste through sounds, and possess many other faculties of which we are only vaguely aware.¹⁸ Chimpanzees, monkeys and gorillas take obvious pleasure in raising their young, and exhibit the same gamut of emotions in the process as do humans. They seem to understand human sign language

¹⁴ R. A. POSNER, *THE ECONOMICS OF JUSTICE* 76 (1983).

¹⁵ “Wealth maximization provides a foundation not only for a theory of rights and of remedies but for the concept of law itself.” *Id.* at 74.

¹⁶ R. G. FREY, *RIGHTS, KILLING, AND SUFFERING* 109–10 (1983).

¹⁷ J. LILLY, *MAN AND DOLPHIN* (1961).

¹⁸ Cited in D. DAY, *THE WHALE WAR* 154 (1987).

and, indeed, their "language ability" seems to increase the more researchers take pains to teach them our language.¹⁹

Are we bound by a notion of "human rights" to consider that the only things that are valuable in the world are those that directly benefit ourselves? Consider the following thought experiment. Suppose Robinson is the last person on earth. When he dies, the human species will have come to an end. During his lifetime, would he have a moral right to kill animals for sport, even knowing that some of those he would kill are the last survivors of their own species? Posner's principle of maximizing wealth would still apply in Robinson's case; it is not dependent upon the existence of other humans. Under that principle, Robinson has a moral right to do whatever would contribute to his own wealth, including the hunting and termination of various animal species for no other reason than the "sport" of it. And under Frey's view, Robinson can do anything he pleases because his life is incomparably richer than any lives of the animals or animal species that he destroys.

Note, however, that the same result obtains under the traditional international conception, mentioned at the outset of this discussion, of preserving the environment for the benefit of future generations. Since there will be no future generations, Robinson has a moral license under this conception—as well as under Posner's and Frey's views—to engage in hunting for sport even if in so doing he terminates entire animal species.²⁰

If this result is uncomfortable, it points to the shortcomings of the species chauvinism that underlies the theories of Posner, Frey and "fairness to future generations." All three are impoverished accounts of our actual sense of moral obligation. They are too dependent upon finding an articulate link to the improvement of the *human* condition.

It is important to recall that Parfit's thesis only deconstructs the notion of obligation *to future generations*, and not environmental obligations generally. If we have a choice between committing a wasteful act (such as killing a whale) or committing an environmentally preserving act (such as planting a tree), either act, under Parfit's thesis, will change the identity of future generations. Hence, we cannot assert a moral obligation *to future generations* to commit or refrain from committing either the wasteful or the conserving act. But that does not necessarily mean that we have no moral obligation at all.

¹⁹ See LANGUAGE LEARNING BY A CHIMPANZEE: THE LANA PROJECT (D. M. Rumbaugh ed. 1977).

²⁰ To be sure, we can argue that an "enlightened" Robinson might calculate that Darwinian evolution might result, 100 million years after his death, in the creation of a new human species. Hence, by not killing off various animal species, an enlightened Robinson might help speed up the evolutionary development of humans from those very animal species. Perhaps in that sense Robinson has a kind of obligation to a future to-be-evolved generation of humans. However, I would contend that this argument slyly begs the question. We can always define an "enlightened" human rights policy as including the preservation of nonhuman species. But then the same debate is reproduced as we argue about what is and what is not "enlightened."

Is there a different sense of moral obligation that could yield a duty to present generations to preserve the environment? Consider Parfit's own thoughts on the subject:

We need some new principle of beneficence, which is acceptable in all kinds of case. Though we have not yet found this principle, we know that it cannot take a person-affecting form. It will be about human well-being, and the quality of life, but it will not claim that what is morally most important is whether our acts will affect people for good or bad, better or worse. . . . [N]on-religious moral philosophy is a very young subject. We should not be surprised that much of it is still puzzling.²¹

I agree with the sentiment of these thoughts but take slight exception to Parfit's search for a moral principle. In fact, I think the search for moral principles and precepts can indirectly support much immoral conduct, because no matter how a principle is stated, it may be interpreted and construed in such a way as apparently to justify immoral behavior.²² In my view, it is better to begin with our preverbal *sense of morality*. That sense, I would suggest, tells us that it is somehow wrong to despoil the environment, to act in ways that waste natural resources and wildlife, and to gratify pleasures of the moment at the expense of living creatures who are no threat to us.²³

What George F. Will said about whales in a sense is true of all acts of environmental preservation: "The campaign to save whales is a rare and refreshing example of intelligence in the service of something other than self-interest."²⁴ Natural evolution has produced some prey-specific predatory animals that will hunt their prey to extinction, at which point they will become extinct themselves. Presumably if they had developed a greater intelligence, they would exercise restraint. Humans are lucky in that we are

²¹ Parfit, *Future Generations*, *supra* note 4, at 171–72.

²² In brief, any stated moral principle may be deconstructed. Contexts always exist in which a given moral principle, if strictly applied, would lead to an immoral result. See J. FLETCHER, *SITUATION ETHICS: THE NEW MORALITY* (n.d.); J. FLETCHER & J. W. MONTGOMERY, *SITUATION ETHICS: TRUE OR FALSE* (1972).

Consider the most morally repugnant behavior of recent times: Hitler's policy of extermination of minority groups. This was "justified" at the time in terms of moral utilitarianism—the need to "purify" the human race. Yet even entering into the "debate" about the immorality of "Aryan supremacy" was to compromise one's moral position—for it amounted to giving some degree of intellectual credence to the Nazi position! In other words, it wasn't the *principle* of utilitarianism that was "misapplied" by the Nazis; rather, *any* attempt to apply a "principle" to their acts was itself perverse.

²³ Professor Weiss interprets this passage as calling for a return to "our natural instincts." See p. 207 *infra*. But not everything that is preverbal is instinctual. Our sense of similarity (judging what objects are similar to others) is something we develop prior to learning the language—and may indeed be a prerequisite to language learning—without being a matter of instinct. See R. CARNAP, *THE LOGICAL STRUCTURE OF THE WORLD* §§67–109 (George tr. 1967). I suspect that much of the grounding of our developed sense of morality comes from thousands of observations of situations that we analyze morally on the grounds of their similarity to other situations.

²⁴ Quoted in D. DAY, *supra* note 18, at 9 (from Wash. Post).

blessed with the intelligence to figure out how to survive in an environment where we are not physically the strongest, fastest or best-protected animals. That same intelligence can be stretched to include a world-based empathy for the environment, "beneficent" in Parfit's sense.

We should not limit our actions to those we are able to determine now as directly or indirectly benefiting ourselves or our descendants. Rather, we should cultivate our natural sense of obligation not to act wastefully or wantonly even when we cannot calculate how such acts would make any present or future persons worse off.²⁵ There is good evidence that customary international law—with various fits and starts and setbacks—is moving generally in this direction, perhaps responding to a deep and inarticulate sense that human beings are not in confrontation with, but rather belong to, their natural environment. That such law is currently given the label "human rights" should not constrict our understanding of what it is or where it is going.

ANTHONY D'AMATO*

OUR RIGHTS AND OBLIGATIONS TO FUTURE GENERATIONS FOR THE ENVIRONMENT

This we know: the earth does not belong to man: man belongs to the earth. . . . Whatever befalls the earth, befalls the sons of the earth. Man did not weave the web of life: he is merely a strand in it. Whatever he does to the web, he does to himself.

Chief Seattle†

We read every day about the desecration of our environment and the mismanagement of our natural resources. We have always had the capacity to wreck the environment on a small or even regional scale. Centuries of irrigation without adequate drainage in ancient times converted large areas of the fertile Tigris-Euphrates valley into barren desert. What is new is that we now have the power to change our global environment irreversibly, with profoundly damaging effects on the robustness and integrity of the planet and the heritage that we pass to future generations.

In Fairness to Future Generations argues that we, the human species, hold the natural environment of our planet in common with all members of our

²⁵ This would be a pure example of deontological ethics in Kant's sense. For a brief discussion and references, see D'Amato & Eberle, *Three Models of Legal Ethics*, 27 ST. LOUIS U.L.J. 761, 772-73 (1983) ("a deontological theory of ethics says that some acts are morally obligatory regardless of their consequences for human happiness").

* Of the Board of Editors.

† Letter from Chief Seattle, patriarch of the Duwamish and Squamish Indians of Puget Sound, to U.S. President Franklin Pierce (1855). Although the letter appears in numerous anthologies, the original has never been located.

species: past generations, the present generation, and future generations.¹ As members of the present generation, we hold the earth in trust for future generations. At the same time, we are beneficiaries entitled to use and benefit from it.

There are two relationships that must shape any theory of intergenerational equity in the context of our natural environment: our relationship to other generations of our own species and our relationship to the natural system of which we are a part.²

The human species is integrally linked with other parts of the natural system; we both affect and are affected by what happens in the system. The natural system, contrary to popular belief, is in many ways a hostile one. Deserts, glaciers, volcanoes, tsunamis can bring havoc to our species. Moreover, the natural environment can be toxic to our species, as through the natural toxicity of some plants and animals or the dramatic release of toxic clouds of carbon dioxide from Lake Nyos in the Cameroon, which killed 1,700 people. On the other hand, the natural system makes life possible for us. It gives us the resources with which to survive and to improve human welfare.

Our actions affect the natural system. We alone among all living creatures have the capacity to shape significantly our relationship to the environment. We can use it on a sustainable basis or we can degrade environmental quality and the natural resource base. As part of the natural system, we have no right to destroy its integrity; nor is it in our interest to do so. Rather, as the most sentient of living creatures, we have a special responsibility to care for the planet.

The second fundamental relationship is that between different generations of the human species. All generations are inherently linked to other generations, past and future, in using the common patrimony of earth.³

To define intergenerational equity, it is useful to view the human community as a partnership among all generations. In describing a state as a partnership, Edmund Burke observed that "as the ends of such a partnership cannot be obtained in many generations, it becomes a partnership not only between those who are living but between those who are living, those who

¹ E. BROWN WEISS, *IN FAIRNESS TO FUTURE GENERATIONS: INTERNATIONAL LAW, COMMON PATRIMONY AND INTERGENERATIONAL EQUITY* (1989).

² The field of human ecology studies this relationship. See READINGS IN MAN, THE ENVIRONMENT, AND HUMAN ECOLOGY (A. S. Boughey ed. 1973) (good selection of readings in human ecology); R. & P. WATSON, *MAN AND NATURE* (1969) (thoughtful essay).

³ Professor D'Amato criticizes existing theories of equity for depending on "an articulate link to the improvement of the *human* condition" (i.e., as anthropocentric), rather than on a moral relationship with nature itself. It is certainly true that *In Fairness to Future Generations* is concerned with equity among generations of the human species. But it is equity with regard to the care and use of the planet, which is explicitly rooted in the recognition that the human species is part of the natural system. This implies great respect for the natural system of which we are a part, but it does not imply that all other living creatures are or should be treated equally. Rather, the human species, as a part of this natural system, has a special obligation to maintain the integrity of the planet, so that all generations will be able to enjoy its fruits.

are dead, and those who are to be born."⁴ The purpose of human society must be to realize and protect the welfare and well-being of every generation. This requires sustaining the life-support systems of the planet, the ecological processes and the environmental conditions necessary for a healthy and decent human environment.

In this partnership, no generation knows beforehand when it will be the living generation, how many members it will have, or even how many generations there will ultimately be. It is useful, then, to take the perspective of a generation that is placed somewhere along the spectrum of time, but does not know in advance where it will be located.⁵ Such a generation would want to inherit the earth in at least as good condition as it has been in for any previous generation and to have as good access to it as previous generations. This requires each generation to pass the planet on in no worse condition than it received it in⁶ and to provide equitable access to its resources and benefits. Each generation is thus both a trustee for the planet with obligations to care for it and a beneficiary with rights to use it.

Intergenerational equity calls for equality among generations in the sense that each generation is entitled to inherit a robust planet that on balance is at least as good as that of previous generations. This means all generations are entitled to at least the planetary health that the first generation had.⁷ In practice, some generations may improve the environment, with the result that later generations will inherit a richer and more diverse natural resource base. In this case, they would be treated better than previous generations. But this extra benefit would be consistent with intergenerational equity, because the minimum level of planetary robustness would be sustained and later generations would not be worse off than previous generations. The converse is also possible, that later generations would receive a badly degraded environment with major loss of species diversity, in which case they would be treated worse than previous generations. This latter case would be contrary to principles of intergenerational equity. Equity among generations provides for a minimum floor for all generations and ensures that each generation has at least that level of planetary resource base as its ancestors. This concept is consistent with the implicit premises of trusteeship, stewardship and tenancy, in which the assets must be conserved, not dissipated, so that they are equally available to those who come after.

The theory of intergenerational equity finds deep roots in international law.⁸ The Preamble to the Universal Declaration of Human Rights begins, "Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world." The reference to all members of the human

⁴ E. BURKE, *Reflections on the Revolution in France* 139–40 (1790), in 2 WORKS OF EDMUND BURKE 368 (London 1854).

⁵ See J. RAWLS, *A THEORY OF JUSTICE* (1971).

⁶ See Callahan, *What Obligations Do We Have to Future Generations?*, in RESPONSIBILITIES TO FUTURE GENERATIONS 73 (E. Partridge ed. 1981).

⁷ See B. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1980).

⁸ E. BROWN WEISS, *supra* note 1, at 25–26.

family has a temporal dimension, which brings all generations within its scope. The reference to equal and inalienable rights affirms the basic equality of these generations in the human family.

The United Nations Charter, the International Covenant on Civil and Political Rights, the Convention on the Prevention and Punishment of the Crime of Genocide, the American Declaration on the Rights and Duties of Man, the Declaration on the Elimination of Discrimination against Women, the Declaration on the Rights of the Child and many other human rights documents protect the dignity of all people and the equality of their rights. The Declaration of the Principles of International Cultural Co-operation provides in Article 1 that "each culture has a dignity and value which must be respected and preserved," and that "all cultures form part of the common heritage belonging to mankind." These instruments reveal a fundamental belief in the dignity of all members of human society and in an equality of rights that extends in time as well as space. Indeed, if we were to license the present generation to exploit our natural and cultural resources at the expense of the well-being of future generations, we would contradict the purposes of the United Nations Charter and international human rights documents.

It is not enough, however, to apply a theory of intergenerational equity only among generations. It also carries an intragenerational dimension. When future generations become living generations, they have certain rights and obligations to use and care for the planet that they can enforce against one another. Were it otherwise, members of one generation could allocate the benefits of the world's resources to some communities and the burdens of caring for it to others and still potentially claim on balance to have satisfied principles of equity among generations.

Moreover, the fulfillment of intergenerational obligations requires attention to certain aspects of intragenerational equity. As is well-known, poverty is a primary cause of ecological degradation. Poverty-stricken communities, which by definition have unequal access to resources, are forced to overexploit the resources they do have so as to satisfy their own basic needs. As an ecosystem begins to deteriorate, the poor communities suffer most, because they cannot afford to take the measures necessary to control or adapt to the degradation, or to move to pristine areas.

Thus, to implement intergenerational equity, countries need to help poor communities to use the natural environment on a sustainable basis, to assist them in gaining equitable access to the economic benefits from our planet, such as potable water, and to help protect them from degraded environmental quality. As beneficiaries of the planetary legacy, all members of the present generation are entitled to equitable access to and use of the legacy. The future nationals of all countries will benefit from efforts of the present generation to protect the general planetary environment for future generations. Conversely, all will suffer if the present generation does not make such efforts.

I have proposed three basic principles of intergenerational equity. First, each generation should be required to conserve the diversity of the natural

and cultural resource base, so that it does not unduly restrict the options available to future generations in solving their problems and satisfying their own values, and should also be entitled to diversity comparable to that enjoyed by previous generations. This principle is called "conservation of options." Second, each generation should be required to maintain the quality of the planet so that it is passed on in no worse condition than that in which it was received, and should also be entitled to planetary quality comparable to that enjoyed by previous generations. This is the principle of "conservation of quality." Third, each generation should provide its members with equitable rights of access to the legacy of past generations and should conserve this access for future generations. This is the principle of "conservation of access."

These proposed principles constrain the actions of the present generation in developing and using the planet, but within these constraints do not dictate how each generation should manage its resources.

These principles of intergenerational equity form the basis of a set of intergenerational obligations and rights, or planetary rights and obligations, that are held by each generation. These rights and obligations derive from each generation's position as part of the intertemporal entity of human society.

Planetary rights and obligations are integrally linked. The rights are always associated with obligations. They are rights of each generation to receive the planet in no worse condition than did the previous generation, to inherit comparable diversity in the natural and cultural resource bases, and to have equitable access to the use and benefits of the legacy. They represent in the first instance a moral protection of interests, which must be transformed into legal rights and obligations.

Planetary rights and obligations coexist in each generation. In the *intergenerational* dimension, the generations to which the obligations are owed are future generations, while the generations with which the rights are linked are past generations. Thus, the rights of future generations are linked to the obligations of the present generation. In the *intragenerational* context, planetary obligations and rights exist between members of the present generation. They derive from the *intergenerational* relationship that each generation shares with those who have come before and those yet to come. Thus, intergenerational obligations to conserve the planet flow from the present generation both to future generations as generations and to members of the present generation, who have the right to use and enjoy the planetary legacy.

Intergenerational rights of necessity inhere in all generations, whether these be immediately successive generations or ones more distant. There is no theoretical basis for limiting such rights to immediately successive generations. If we were to do so, we would often provide little or no protection to more distant future generations. Nuclear and hazardous waste disposal, the loss of biological diversity and ozone depletion, for example, have significant effects on the natural heritage of more distant generations.

Intergenerational planetary rights may be regarded as group rights, as distinct from individual rights, in the sense that generations hold these rights as groups in relation to other generations—past, present and future.⁹ They exist regardless of the number and identity of individuals making up each generation. When held by members of the present generation, they acquire attributes of individual rights in the sense that there are identifiable interests of individuals that the rights protect. However, those interests derive from the fact that those living now are members of the present generation and have rights in relation to other generations to use and benefit from the planet. The remedies for violations of these rights will benefit other members of the generation, not only the individual.¹⁰

Developments in international law outside the field of the environment make acceptance of intergenerational rights a natural and desirable evolution. Indeed, international human rights law—the genocide convention, and the prohibition against racial discrimination, to cite two examples—are arguably directed as much to the protection of future, as to present, generations. The extinction of, for example, an entire people is more odious in law than the murder of an equal number of people constituting a minority of each of several groups. Similarly, discrimination denies an “equal place at the starting gate” not only to the generation of the suppressed group but (by implication) also to future generations. Provisions in other human rights agreements refer to rights of children and of the elderly, and to education and training, which are implicitly temporally oriented.

One might still ask whether it is not preferable to speak only of planetary obligations toward future generations without corresponding intergenerational rights. Can intergenerational obligations exist without rights?¹¹ While rights are always connected to obligations, the reverse is not always true. Theoretically, an obligation need not always entail a right. For example, a moral obligation of charity does not give those who benefit a right to charity. The legal positivist Hans Kelsen hesitated to find a legal right connected to certain legal obligations.

⁹ For a thoughtful analysis of group rights in relation to goods that are enjoyed together, see J. Waldron, *Can Communal Goods Be Human Rights?* (paper delivered at Conference on Development, Environment and Peace as New Human Rights, Oxford University, Oxford, England, May 28–31, 1987).

¹⁰ The temporal dimension may offer a theoretical basis for unifying those human rights that we now consider to be group or social rights and for so-called new human rights. Group rights, such as cultural rights, have a temporal dimension since the community inherently extends over time. Theoretically, rights to development, to food, to health, and to the environment can be seen as intergenerational, or intertemporal, in that they are rights of access of each generation to use and benefit from our natural and cultural resources. See E. BROWN WEISS, *supra* note 1, at 114–15.

¹¹ Bryan Norton, a philosopher, argues that if one accepts the conceptual model of rights as limited to individual rights (which he does), it is preferable to recognize general obligations toward the integrity of environmental systems rather than to discuss environmental protection in the framework of rights, since this framework cannot encompass such categories as future generations, whose individual members are still contingent. Norton, *Environmental Ethics and the Rights of Future Generations*, 7 SOC. THEORY & PRAC. 319, 337 (1981).

If the obligated behavior of one individual does not refer to a specifically designated other individual . . . but refers only to the legal community as such, then . . . one is satisfied . . . to assume a legal obligation without a corresponding reflex right: for example in case of the legal norms that prescribe a certain human behavior toward some animals, plants, or inanimate objects by pain of punishment. It is forbidden to kill certain animals at certain times (or altogether), to pick certain flowers, to cut certain trees or to destroy certain historical monuments. These are obligations which—indirectly—exist toward the legal community interested in these objects.¹²

John Austin described some obligations as absolute duties, which exist independently of any correlative right. He defined absolute duties as those prescribing actions toward parties other than the one obliged, who are not determinate persons, such as members generally of an independent society and mankind at large.¹³

If we were to follow this analysis, we would contend that the obligations of the present generation to future generations constitute obligations or duties for which there are no correlative rights, because there are no determinate persons to whom the right attaches. Similarly, in the intragenerational context, obligations to conserve diversity, quality and access would be viewed as absolute duties for which there is no correlative right.

While this approach may be attractive, it ignores the fundamental temporal relationship that each generation has to all other generations and that gives rise to the rights of each generation to share equitably in the use of the planet and its natural resources. These rights focus discussion on the welfare of generations, what each generation is able to have and to enjoy, in a way that obligations cannot. If obligations of the present generation are not linked with rights, the present generation has a strong incentive to bias the definition of these obligations in favor of itself at the expense of future generations. Intergenerational rights have greater moral force than do obligations. They provide a basis for protecting the interests of all generations in a healthy and robust planet.

Professor D'Amato in his essay takes issue with the notion of rights of future generations to the planet by invoking Derek Parfit's famous paradox and combining it with the new theory of chaos. He argues that future generations cannot have rights because they are composed of individuals who do not exist yet and every intervention we take today to protect the environment affects the composition of these future individuals, robbing some potential members of future generations of their existence.

It is important to parse this analysis into its two component parts: that future generations cannot have rights because the individuals do not exist yet, and that actions to protect the environment for future generations will destroy the rights of some future individuals because different people will be born as a result of the intervention. The first is that future generations

¹² H. Kelsen, *PURE THEORY OF LAW* 62 (M. Knight trans. 1969).

¹³ 1 J. Austin, *AUSTIN'S JURISPRUDENCE, LECTURES ON JURISPRUDENCE* 413-15 (1873).

cannot have rights, because rights exist only when there are identifiable interests, which can only happen if we can identify the individuals who have interests to protect. Since we cannot know who the individuals in the future will be, it is not possible for future generations to have rights.

This paradox assumes the traditional conceptual framework of rights as rights of identifiable individuals. The planetary, or intergenerational, rights proposed in *In Fairness to Future Generations* are not rights possessed by individuals. They are, instead, *generational* rights, which must be conceived of in the temporal context of generations. Generations hold these rights as groups in relation to other generations—past, present and future. This is consistent with other approaches to rights, including the Islamic approach, which treats human rights not only as individual rights, but as “rights of the community of believers as a whole.”¹⁴ They can be evaluated by objective criteria and indices applied to the planet from one generation to the next. To evaluate whether the interests represented in planetary rights are being adequately protected does not depend upon knowing the number or kinds of individuals that may ultimately exist in any given future generation.

Enforcement of these intergenerational rights is appropriately done by a guardian or representative of future generations as a *group*, not of future individuals, who are of necessity indeterminate. While the holder of the right may lack the capacity to bring grievances forward and hence depends upon the representative’s decision to do so, this inability does not affect the existence of the right or the obligation associated with it.

Now it may be argued that such rights do depend upon knowing at least the number of individuals in the future, because if the earth’s population continues to grow rapidly, the amount of diversity and degree of quality that must be passed on will be higher than if the population in the future were at the same level or less than it is today.

But, if anything, the existence of these generational rights to the planet may constrain the population policies of present and future generations. Whether a generation chooses to meet its obligations by curtailing exploitation, consumption and waste or by constraining population growth is a decision it must make. The fact that future generations have a generational right to receive the planet in a certain condition puts constraints on the extent to which a present generation can ignore this choice.

The second part to Professor D’Amato’s argument is that if we intervene to conserve the environment to protect future generations, we cannot succeed in protecting them because our intervention will cause a different group of individuals to emerge. But since the rights of future generations exist only as generational rights, it does not matter who the individuals are or how many they may be. Only at the point where the individuals are born and by definition become members of the present generation do the generational rights attach to individuals.

Professor D’Amato’s response is that “[f]uture generations are not an abstraction; they consist of individuals.” But they do not consist of individ-

¹⁴ M. KHADDURI, *THE ISLAMIC CONCEPTION OF JUSTICE* 233 (1984).

uals until they are born, and hence it is necessary and appropriate to speak of future generations qua generations as having rights in relation to the planet.

Professor D'Amato correctly points out that the composition of future generations cannot be known in advance, in part because it is affected by actions of the present generation. Indeed, he does not make his own case as strongly as he might. For example, we do not need to limit ourselves to ascribing these effects to subtle changes in the biochemistry of conception, as Professor D'Amato does in his amusing excursion into the dynamics of egg and sperm.

Virtually every policy decision of government and business affects the composition of future generations, whether or not they are taken to ensure their rights under the guidelines enunciated above. Decisions regarding war and peace, economic policy, the relative prosperity of different regions and social groups, transportation, health, education—all influence the demographics and the composition of future generations by affecting the lives and fortunes of the present generation: who will succeed and prosper, who will marry whom, who will have children, and even who will emigrate.

In Fairness to Future Generations takes the view that our planetary obligations to future generations are owed to all the earth's future human inhabitants, whoever they may be. This opens the possibility that these decisions, too, deserve to be scrutinized from the point of view of their impact on future generations. Professor D'Amato's approach reflects an unnecessarily constrained view of human rights law that would shut off a useful and broadly acceptable theoretical underpinning to sustainable resource development. The possibility that intergenerational equity may place limits on our actions is an important new area of human rights research.

Such limitations should be applied very narrowly, lest the rights of future generations develop into an all-purpose club to beat down any and all proposals for change. But surely long-term environmental damage is a good place to begin. Future generations really do have the right to be assured that we will not pollute ground water, load lake bottoms with toxic wastes, extinguish habitats and species or change the world's climate dramatically—all long-term effects that are difficult or impossible to reverse—unless there are extremely compelling reasons to do so, reasons that go beyond mere profitability.

Professor D'Amato invokes chaos theory to justify his contention that any environmental intervention will produce different individuals in the future than would otherwise have been produced. But he overlooks the most important implication of chaos theory for the environment and for future generations: namely, that systems do not proceed on orderly, linear paths of change, but rather that they will abruptly change.¹⁵ This can be demonstrated on a home computer, using a very simple program. It has been

¹⁵ For catastrophe theory, see R. THOM, *MATHEMATICAL MODELS OF MORPHOGENESIS* (1983); for the theory of complex systems, see I. PRIGOGINE & I. STENGERS, *ORDER OUT OF CHAOS: MAN'S NEW DIALOGUE WITH NATURE* (1984). For a concise review of the influence of chaos theory, see *Chaos Theory: How Big an Advance?*, 245 *SCIENCE* 26 (1989).

suggested that there may be key breaking points in our global environmental system, beyond which systems will reorganize and substantially change their properties.¹⁶ If we are concerned about future generations, it is important to try to predict these breaking points. More importantly, the best tool that we could give future generations to respond to abrupt changes and reorganizations is a robust planet, which requires conserving a diversity of resources so that future generations have greater flexibility in designing responses.

Professor D'Amato proposes that there is a "preverbal sense of morality" that tells us not to waste resources, degrade the environment or wantonly kill animals. But, if anything, history in the last few centuries suggests that our natural instincts are self-indulgent. We have desecrated environments, wasted resources and slaughtered animals purely for pleasure or for modest personal gain. It may be that the human species carries both a selfish gene and an altruistic one, as the sociobiologists tell us,¹⁷ but it is hardly sufficient to rely on the generous gene to build a theory of morality to overcome the selfish genes, without more.

In Fairness to Future Generations relies on a fundamental norm of equality among generations of the human species in relation to the care and use of the natural system. But it recognizes that we are part of the natural system and that we, as all other generations, must respect this system. We have a right to use and enjoy the system but no right to destroy its robustness and integrity for those who come after us.

Whether we rely on a beneficent "preverbal sense of morality" toward the planet and its resources or on theories rooted in the welfare of the human condition and the ecological system of which people are a part, there is a shared recognition that the present generation has an obligation to care for the planet and to ensure that all peoples can enjoy its services.

EDITH BROWN WEISS*

OUR RESPONSIBILITY TO FUTURE GENERATIONS

In recent years, lawyers have begun to join ecologists in debating whether there are—or should be—obligations to protect the interests of future generations.¹ This legal debate was preceded by a philosophical one, dating back to the early 1970s, on the emergence of a new or "ecological" ethic

¹⁶ G. Gallopin, President, Fundación Bariloche, discussion with author, June 1986. This is consistent with the scientific paradigms in the theories of catastrophe and of the dynamics of complex systems far from equilibrium.

¹⁷ See, e.g., J. & J. BALDWIN, *BEYOND SOCIOBIOLOGY* (1981). Sociobiologists assert that there are four types of inherent behavior that explain all our social behavior: selfish, altruistic, cooperative and spiteful. Humans act so as to try to ensure that their genes will be carried forward into succeeding generations. *Id.* at 49–50.

* Of the Board of Editors.

¹ For the German-speaking context, see P. SALADIN & C. A. ZENGER, *RECHTE KÜNFTIGER GENERATIONEN* (1988).

redefining the relationship between man and nature in such a way as to ensure the survival of the human species on earth.² The background to the various ethical approaches has been the indisputable fact that humanity has accumulated a monstrous potential to destroy life on earth, and that it is using natural resources and the environment in a way that threatens the survival of future generations—at least, at a standard that we today consider worthy of human beings.

There is good reason to deal with our responsibility to future generations not only as a moral postulate, but also as a legal principle; I will return to that below.³ As to international law, one can state that the debate no longer is merely an academic one, but rather has found its way into international politics, which may mean that it has crossed the threshold of the law-creating process. The protection of future generations is mentioned specifically in various international instruments.⁴ In addition, responsibility to future generations is the implied subject of several recent developments: I am referring to the various efforts at the international level to reach a consensus on paths toward “sustainable development.” In this context, “sustainable development” is to be understood as development that takes into account not only the needs and interests of the present generation, but also those of generations to come.

A major achievement of these efforts has been the report *Our Common Future*⁵ of the World Commission on Environment and Development (WCED). The WCED—generally referred to as the “Brundtland Commission,” after its chairperson, Prime Minister Gro Harlem Brundtland of Norway—had been asked by the Secretary-General of the United Nations “to propose long-term environmental strategies for achieving sustainable development by the year 2000 and beyond.” The WCED defined “sustainable development” as “development that meets the needs of the present without compromising the ability of future generations to meet their own needs.”⁶ This definition clearly shows that the debate on “sustainable development” is, in fact, a discourse on our responsibility to future generations. The WCED proposed a set of legal principles for “sustainable development,”⁷ and suggested that a global convention on “environment and development” be prepared on the basis of those principles.⁸ The date envisaged

² H. JONAS, *DAS PRINZIP VERANTWORTUNG* (1979): *ÖKOLOGIE UND ETHIK* (D. Birnbacher ed. 1980); *RESPONSIBILITIES TO FUTURE GENERATIONS: ENVIRONMENTAL ETHICS* (E. Partridge ed. 1980).

³ See part III *infra*.

⁴ See Weiss, *The Planetary Trust: Conservation and Intergenerational Equity*, 11 *ECOLOGY L.Q.* 495, 540 ff. (1984).

⁵ WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, *OUR COMMON FUTURE* (1987) [hereinafter *OUR COMMON FUTURE*].

⁶ *Id.* at 43.

⁷ *Id.* at 348 (Ann. I); see also EXPERTS GROUP ON ENVIRONMENTAL LAW OF THE WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, *ENVIRONMENTAL PROTECTION AND SUSTAINABLE DEVELOPMENT* (1987).

⁸ *OUR COMMON FUTURE*, *supra* note 5, at 332.

by the Commission for the adoption of the convention (1988)⁹ has already passed, but there is some hope that such a convention could be adopted by 1992.

That protecting future generations raises some basic conceptual problems is demonstrated by the preceding articles by Anthony D'Amato and Edith Brown Weiss. Although it is difficult to accept all his arguments,¹⁰ Professor D'Amato is right in saying that duties of protecting future generations can be disputed and need to be justified. Duties toward future generations—or rights of future generations¹¹—ultimately rest on a value judgment: the fundamental assumptions that the human species (and all other species, since man is an inseparable part of nature) should survive, and that future generations are entitled to live in dignity. Professor Weiss shows in her article, as she has done previously,¹² that there is good reason to make this value judgment and to define its implications. According to Professor Weiss, future generations have rights and duties: rights flowing from preceding generations, duties toward the generations to follow. "Intergenerational equity," she continues, requires observance of three basic principles: conservation of options, conservation of quality, and conservation of access.

Both contributors deal with different dimensions of the subject, but both argue at a relatively abstract level. For this reason, I would like to add a view to the debate that may be a little more pragmatic. Given the limitations of an *Agora* contribution, my remarks will necessarily be abbreviated.

I. WHY A RESPONSIBILITY TO FUTURE GENERATIONS?

The starting point for all considerations concerning a responsibility to future generations has already been mentioned above. It is this: the way we currently deal with nature and the environment clearly threatens the survival of humankind under conditions worthy of human beings. If we are not prepared fundamentally to change our life style, i.e., our way of producing and consuming, we will plunder and irreversibly damage our bases of life in a very short time. However, even if we accept this proposition as true, there remains the additional question whether we are obliged to prevent the disaster from occurring to our posterity. This question involves both morals and the law. The responsibility to act does not result solely from the fact that posterity is threatened. It must also be manifest that it is our will that humankind should survive.

In my view, there can be no doubt that this will exists, and that it is based on a worldwide consensus. As Professor Weiss has shown in her previous work,¹³ the interest in survival is deeply rooted in the thinking of all peoples. And whenever we find different attitudes as to a responsibility of future generations, the reason is certainly not that the consensus I mentioned does not exist. More likely, the threat to posterity is considered less dramatic ("It will certainly not be that bad"), or future generations are given more credit

⁹ *Id.* at 333.

¹¹ See part II *infra*.

¹³ *Id.* at 499 ff.

¹⁰ See part I *infra*.

¹² Weiss, *supra* note 4.

for being able to cope with the problems ("People have always found a way; they'll make it this time, too").

Even if there is global consensus that the human species is to survive, do Parfit's paradox and/or chaos theory compel a different approach to that objective, as Professor D'Amato tells us? Professor D'Amato's argument seems to be that if we act in the interest of future generations, we will deprive the concrete individuals to be born of their identity, which, he suggests, is the most serious infringement of the interests of future generations.

Professor D'Amato is right in saying that if we care for, and act in the interest of, future generations, the individuals who will be born will not be the same as they would have been if we had not done so. They will certainly have a different identity. However, it is neither logically compelling nor acceptable that identity, as defined by Parfit (and Professor D'Amato), be the sole and decisive criterion for our behavior toward future generations.

The reasoning behind the identity and chaos arguments seems to be that, man should not interfere with historic events so as to preserve all options for posterity. What is overlooked is that man always interferes with history, even when he is not aware of, and taking care of, future generations. "Identity" in Parfit's (and Professor D'Amato's) sense in any event results from what man is doing today. The identity of future individuals is always constituted by the behavior of the preceding generations. Intervention is an inescapable fact of life. The only question is whether the interventions are conscious, deliberate and concerned, or not.

If we follow the identity/chaos arguments, future persons will have an identity we need not envy. And for many, the problems will not be raised because they will not be born at all.

II. RIGHTS OF OR DUTIES TOWARD FUTURE GENERATIONS?

If we accept that there is a responsibility to future generations, the question arises whether there are—should be—"only" duties of present generations. Professor Weiss, like others,¹⁴ argues strongly in favor of rights of future generations, for which she offers a theoretical rationale; she also believes that rights of future generations would have "greater moral force" than obligations of present ones.

I do not have any difficulty in following Professor Weiss's concept of rights of future generations, though it transcends the traditional understanding of rights, which ordinarily has reference to the individual. I also share the view that rights of future generations have "greater moral force" than mere obligations of present generations. However, I should like to suggest that the whole controversy should not be concentrated on the issue of rights of, or duties toward, future generations. This is really not the major problem, and it should therefore not consume all our time, energy and imagination. The major problem is what we have to do today to meet our responsibility to future generations—what the concrete obligations are—and how we can fulfill these obligations under the present circumstances

¹⁴ P. SALADIN & C. A. ZENGER, *supra* note 1.

of the international community. This remains the major problem even if we recognize rights of future generations because, as Professor Weiss rightly observes, rights are always connected to obligations.

Consequently, I prefer to emphasize the need to work, now, toward a global consensus on what those obligations entail. Specifically, the consensus should encompass a duty of our present generation to preserve nature and the environment so as to enable future generations to live on the same standard as we claim today. As soon as we reach this consensus—which should not really be difficult—we should apply all our powers of reasoning to define its fundamental implications. What we need are basic principles for acting in the interest of future generations.

We cannot simply rely on the assumption that our way of dealing with nature and the environment will turn out to be harmless. Nor can we expect that future generations will develop the knowledge and technology necessary to cope with all the problems they inherit from us. Therefore, today we must take true preventive action, or more precisely, precautionary action,¹⁵ which will ensure that natural resources are used sparingly and that degradation of the environment is reduced to a minimum. After two decades of experience with environmental protection, we know that we will not be successful if we only make marginal corrections or take sporadic protective measures. The objective of true preventive environmental protection will only be achieved if we change, fundamentally and on a global level, our way of running the economy. This, in turn, will be achieved only if we change our basic system of values. Economic growth is not per se an indicator of progress, nor is wealth necessarily an indicator of prosperity.

The most difficult challenge to all efforts to define and achieve “inter-generational equity” will turn out to be that we have failed to achieve equity within our own generation. The economic development of states continues to be fiercely unequal. Inequality of development is also reflected in the state of the environment; the environmental problems of many developing countries are far more serious than those of industrialized countries. Thus, we face a twofold challenge: we have to meet the “old” responsibility to achieve equity within the present generation and we have to be concerned about the future of humankind. These duties are linked to each other; poverty in the countries of Africa, Asia and Latin America is one of the most serious threats to future generations. One could also put it this way: without equity within the present generation, we will not be able to achieve equity among generations.

The inequities of the present imply that we cannot solve the problems of the future simply by postulating a global collective sacrifice. For many countries, restrictions would not be possible and would even deteriorate the economy and, thus, the environment. Many countries need development for the very reason that it is an essential prelude to finding long-term solutions to environmental problems. As a result, we also require a new order for the use of nature and the environment by the members of the

¹⁵ See Gündling, *The Status in International Law of the Principle of Precautionary Action*, INT’L J. ESTUARINE & COASTAL L. (forthcoming).

present generation, and any catalog of principles for our behavior toward future generations must take into account the unequal development that exists today and must provide for principles of allocation designed to overcome that inequality. I do not know whether we will be able to solve this tremendous problem, or how; but I am convinced that we have to work on it if the idea of equity really means something to us.

III. THE ROLE OF INTERNATIONAL LAW

Protecting the environment is primarily a duty of the state. It is the state that has to direct societal life in a way that ensures that the natural bases of life are preserved. Therefore, the postulate that we are responsible to future generations is, first of all, directed at the state and requires that the state adopt a policy, at both the national and international levels, that meets this responsibility.

Responsibility to future generations should entail not only moral duties but also duties of law. The threat to future generations is too serious, and the task of warding off this threat too complex, to be left to the informal and often uncertain domain of morals. Law should provide for the fundamental duty to preserve the environment for the benefit of future generations, and it should also provide the basic principles that states must observe in fulfilling this duty. The fundamental duty and basic principles should be part of both national and international law; without doubt, the responsibility to future generations is the common task of all states.

As has been demonstrated by Professor Weiss,¹⁶ the idea of protecting the interests of future generations has already been introduced into international politics and international law. However, this introduction is no more than a point of departure. We need universal and unequivocal recognition of the duty to protect the interests of future generations, as well as of the principles necessary to implement that duty. This recognition cannot be left to the development of customary law but, rather, has to be achieved on the basis of a treaty. I would therefore like to join all those who argue for a universal convention on the basic obligations of states to protect the environment; the duty to future generations should have a prominent place in the framework of this convention.

Among the basic principles provided for in the convention should be, to name only a few: the obligation to pursue a preventive (precautionary) environmental policy; the obligation to reduce environmental pollution to a minimum; and the obligation to develop technologies that do not harm the environment. In addition, the convention would have to allow for the economic development of the states of Africa, Asia and Latin America so as to meet the requirement of equity within our present generation and to solve the problems of poverty-based environmental degradation.

LOTHAR GÜNDLING*

¹⁶ Weiss, *supra* note 4, at 540 ff.

* Max Planck Institute for Comparative Public Law and International Law, Heidelberg.

EDITORIAL COMMENTS

ENHANCING THE EFFECTIVENESS OF THE PROHIBITION OF DISCRIMINATION AGAINST WOMEN

On December 18, 1979, the General Assembly of the United Nations adopted the Convention on the Elimination of All Forms of Discrimination against Women,¹ the first universal instrument to focus on the general prohibition of discrimination against women. In the succeeding decade, one hundred states² have become parties to the Convention, often, unfortunately, with far-reaching reservations.³ In contrast to its normative provisions, the implementation clauses of the Convention are far weaker⁴ than those in the other UN treaty addressed to discrimination, the International Convention on the Elimination of All Forms of Racial Discrimination.⁵ They are also weaker than those contained in other UN human rights treaties, such as the International Covenant on Civil and Political Rights⁶ and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.⁷ As discriminatory practices continue unabated, the tenth anniversary of the adoption of the Convention offers an opportunity to consider ways of enhancing the effectiveness of the norm prohibiting discrimination against women and of eliminating the second-class status of the Convention in the family of UN human rights treaties. This Editorial addresses four possible kinds of improvement. The first two can be accomplished through UN resolutions. The last two would require resort to treaty making through an optional protocol, but the far more complicated process of treaty amendment could thus be avoided. This range of improvements is offered as a catalyst for thought and action.

I.

The first difficulty that must be addressed arises from the language of Article 20, which provides that the Committee on the Elimination of Discrimination "shall normally meet for a period of not more than two weeks

¹ GA Res. 34/180, 34 UN GAOR Supp. (No. 46) at 193, UN Doc. A/34/46 (1979). See generally T. MERON, HUMAN RIGHTS LAW-MAKING IN THE UNITED NATIONS 53-82 (1986).

² As of Dec. 18, 1989, 100 states have become parties to the Convention (information supplied by the UN Secretariat).

³ For the texts of the reservations, see UNITED NATIONS, MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL: STATUS AS AT 31 DECEMBER 1988, at 165-74, UN Doc. ST/LEG/SER.E/7, UN Sales No. E.89.V.3 (1989).

⁴ T. MERON, *supra* note 1, at 80-82.

⁵ *Opened for signature* Mar. 7, 1966, 660 UNTS 195, *reprinted in* 5 ILM 352 (1966). Like the Convention on the Elimination of All Forms of Discrimination against Women, the Racial Convention also develops the fundamental norm of the Charter requiring respect for, and observance of, human rights for all, without distinction as to race, sex, language or religion.

⁶ Dec. 16, 1966, 999 UNTS 171.

⁷ GA Res. 39/46, 39 UN GAOR Supp. (No. 51) at 197, UN Doc. A/39/51 (1985).

annually in order to consider the reports submitted in accordance with article 18." This unusual provision reflects an overzealous effort to reduce expenditures; no other human rights treaty organs have been subjected to such constraints. This limitation has proved to be a serious obstacle to the Committee in examining, both thoroughly and promptly, the periodic reports on measures adopted to give effect to the provisions of the Convention and in conducting a meaningful dialogue with representatives of states parties in its discussion of state reports. The language of Article 20 is not consistent with the duty of the Committee under Article 21 to examine the reports by states parties and to report on them to the General Assembly. Considering the large number of states parties to the Convention, strict application of Article 20 would frustrate the timely consideration of reports. The inadequacy of the time available to the Committee has resulted inevitably in a backlog in the consideration of reports. As a consequence, "the Committee might well find itself in the position of considering initial reports which [have] already become obsolete."⁸ The attempts that have been made to reduce the backlog by convening a presessional working group of five members of the Committee for 3 working days⁹ have not fully served the purpose. A better solution is needed.

The language of Article 20 of the Convention is not categorical, since the word "normally" gives the Committee a certain latitude to meet for longer periods when the number of the reports awaiting consideration so requires. What is really needed is a wiser and more equitable exercise by the General Assembly of its power of the purse¹⁰ so that the Committee can meet for an additional week or more. The General Assembly would thus demonstrate its commitment to implementing the prohibition of discrimination on the basis of sex established in the Charter.

The Committee's work has also been hindered by the insufficiency of resources provided for analyzing the vast amount of information submitted by states in their periodic reports. It needs, therefore, a more effective secretariat. The Committee could greatly benefit from the expertise of the specialized agencies, such as the International Labour Organisation, to be provided through reports and participation in the Committee's meetings, in conformity with Article 22 of the Convention. The Committee should also encourage nongovernmental organizations to supply more information about women's rights in specific countries.¹¹

The Committee has a massive task and few resources. It can greatly contribute to the interpretation of the Convention through guidelines for reports and "general recommendations." These recommendations articu-

⁸ UN Doc. A/44/98, at 13 (1989); see also UN Doc. A/44/38, at 14 (1989). Byrnes, *The "Other" Human Rights Treaty Body: The Work of the Committee on the Elimination of Discrimination Against Women*, 14 YALE J. INT'L L. 1, 27 (1989); T. MERON, *supra* note 1, at 81.

⁹ UN Doc. A/44/38, at 11 (1989).

¹⁰ Under Article 17 of the Convention, the Committee and its work are funded by the United Nations, not by states parties. See also *Effective Implementation of International Instruments on Human Rights, including Reporting Obligations under International Instruments on Human Rights*, UN Doc. A/44/668, para. 104 (1989) (prepared by P. Alston).

¹¹ Byrnes, *supra* note 8, at 36-42.

late statements of principle and standards of achievement. To accomplish its tasks, the Committee requires wider support and better resources.

II.

The second problem is that UN action regarding gender discrimination has been isolated geographically and programmatically from the mainstream of the UN human rights program. The Commission on Human Rights meets in Geneva and is serviced by, and is a part of, the program of the Geneva-based Centre for Human Rights. The Committee on the Elimination of Discrimination against Women meets in Vienna and is serviced by, and is a part of, the program of the Vienna-based Branch for the Advancement of Women of the Centre for Social Development and Humanitarian Affairs. Both the geographical and the programmatic aspects of the Committee's work, including the possibility of a change of venue to Geneva, should be reexamined. As a result of this fragmentation,¹² the struggle against sex discrimination has received inadequate attention¹³ and has not benefited from some salutary innovations in UN human rights procedures, such as the appointment of special rapporteurs.¹⁴ To reduce these shortcomings, the UN Commission on Human Rights, in coordination with another functional commission of ECOSOC, the Commission on the Status of Women, might consider appointing a "thematic" rapporteur with a mandate similar, *mutatis mutandis*, to that of the rapporteur on religious intolerance or on torture. Acting under the powers flowing from the Charter prohibition of gender discrimination, the Commissions would authorize the rapporteur to investigate and report upon serious violations of sexual equality. The rapporteur would be permitted to receive information from governments and intergovernmental and nongovernmental organizations, to respond effectively to credible information of substantial violations and to recommend measures to prevent continuing violations. He or she could review the practice of all states members of the United Nations, including those not parties to the Convention, and would, of course, benefit from the greater specificity given to the Charter prohibition in some provisions of the Convention, while avoiding as far as possible encroachment upon the functions of the Committee.¹⁵ A degree of overlap with the Committee's func-

¹² On the "marginalization" and "invisibility" of the Committee on the Elimination of Discrimination against Women, see also *id.* at 56-65.

¹³ However, the important contribution made to the advancement of the equality of women by the Human Rights Committee established under Article 28 of the International Covenant on Civil and Political Rights must be recognized. See, e.g., Communication No. R.9/35, *Aumeeruddy-Cziffra v. Mauritius*, 36 UN GAOR Supp. (No. 40) at 134, UN Doc. A/36/40 (1981), discussed in T. MERON, *supra* note 1, at 104, 121-22; Communication No. 172/1984, *Broeks v. Netherlands*, 42 UN GAOR Supp. (No. 40) at 139, UN Doc. A/42/40 (1987); General Comment 4/13, 36 UN GAOR Supp. (No. 40), *supra*, at 109; General Comment 18(37), UN Doc. CCPR/C/21/Rev.1/Add.1 (1989).

¹⁴ See generally Weissbrodt, *The Three "Theme" Special Rapporteurs of the UN Commission on Human Rights*, 80 AJIL 685 (1986).

¹⁵ See the cogent arguments by the rapporteur on torture (Professor P. Kooijmans) that his role and that of the (Convention) Committee against Torture are complementary, rather than competitive. UN Doc. E/CN.4/1988/17, at 2-4.

tions, as well as with those of the Commission on the Status of Women, might occur, but it would be more than justified in the interest of enhancing the effectiveness of the prohibition of sexual discrimination.¹⁶ To provide for the necessary coordination with the Commission on the Status of Women, the rapporteur would report also to that body. In addition to the work of the new rapporteur, other rapporteurs and working groups of the Commission on Human Rights could and should, as far as their terms of reference allow, pay greater attention to, and report upon the persistence and gravity of, discriminatory practices against women.

III.

A major inadequacy stems from the absence of an optional procedure allowing the Committee to consider individual communications or complaints against states parties that have agreed to it.¹⁷ Such procedures have already been recognized in the Optional Protocol to the International Covenant on Civil and Political Rights and, in a different form, in optional articles in the body of certain conventions (Article 14 of the Convention on the Elimination of All Forms of Racial Discrimination and Article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment).

A procedure for the consideration of individual complaints should be established through an optional protocol, to which states parties to the Convention could—and, one hopes, many would—accede. Consideration of this possibility and the decision to draft the protocol (which undoubtedly meets the guidelines for international human rights instruments set out in General Assembly Resolution 41/120¹⁸ of December 4, 1986) should be initiated by the General Assembly, perhaps after consulting the Commission on the Status of Women, the Commission on Human Rights and the Committee. The drafting itself could be carried out principally by the Commission on the Status of Women, which did much of the drafting of the principal Convention. This work would not be technically difficult and there would be no need to create additional implementation organs; the existing Committee on the Elimination of Discrimination against Women would simply be authorized to carry out additional functions under the protocol.¹⁹

¹⁶ See discussion of overlapping human rights procedures in T. MERON, *supra* note 1, at 241–43. For a discussion of the relationship between remedies in human rights treaties and other remedies, see T. MERON, *HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW* 229–33 (1989).

¹⁷ Regarding the competence of the Commission on the Status of Women to consider communications concerning violations of human rights affecting the status of women, which appears to have had little impact, see UNITED NATIONS CENTRE FOR HUMAN RIGHTS, *UNITED NATIONS ACTION IN THE FIELD OF HUMAN RIGHTS* 325–26, UN Sales No. E.88.XIV.2 (1988); Guggenheim, *The Implementation of Human Rights by the UN Commission on the Status of Women: A Brief Comment*, 12 TEX. INT'L L.J. 239, 245–48 (1977).

¹⁸ GA Res. 41/120, 41 UN GAOR Supp. (No. 53) at 178, UN Doc. A/41/53 (1987).

¹⁹ For an example of extension through a protocol of the powers of an organ established by the principal convention, see Article 4 of the Second Optional Protocol to the International

To be sure, the Committee would apply the norms stated in the principal Convention. The General Assembly, of course, must appropriate the necessary resources for the Committee to meet its new obligations, especially the holding of meetings in which individual communications would be considered.

IV.

Finally, such a protocol might also include a provision on an interstate complaints (conciliation) procedure. Procedures of this type are established in Article 11 of the Convention on the Elimination of All Forms of Racial Discrimination²⁰ and, as optional provisions, in Article 41 of the International Covenant on Civil and Political Rights and Article 21 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Although in practice such provisions have not been invoked, they have symbolic importance, and do provide a potential basis for future interstate complaints. They give concrete expression to the important principle that, for a state party, human rights stated in a treaty constitute obligations running toward all of the other states parties (*obligationes erga omnes contractantes*) and that the standing of the complaining state is independent of nationality or other connection with the victims of the violations.²¹

V.

I have already had occasion to urge that the United Nations emulate the example given by the Council of Europe and treat the task of human rights lawmaking not merely as an operation designed to produce a particular instrument, but as a continuing process that includes extension, elaboration, consolidation and revision.²² The Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty²³ epitomizes such a process primarily in the area of normative obligations. The present Editorial focuses on methods of improving the implementation of norms that are already in place.

THEODOR MERON*

Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty. UN Doc. A/C.3/44/L.42 (1989), adopted by GA Res. 44/128 (Dec. 15, 1989). See also UN Doc. A/44/668, *supra* note 10, para. 190.

²⁰ Absent reservations, this provision is binding *ipso facto* on states parties upon their ratification of the Convention.

²¹ See also T. MERON, *supra* note 16, at 148-50, 194-95. Regional human rights treaties have established interstate complaints leading to binding decisions by judicial or quasi-judicial organs.

²² T. MERON, *supra* note 1, at 284.

²³ *Supra* note 19.

* The author acknowledges with thanks the helpful comments made by Andrew Byrnes, Luigi Condorelli, Elizabeth Evatt, Felice Gaer, Herbert Reis and Donna Sullivan on the draft of this Editorial.

ADMISSION OF "PALESTINE" AS A MEMBER OF A
SPECIALIZED AGENCY AND WITHHOLDING THE
PAYMENT OF ASSESSMENTS IN RESPONSE

I. INTRODUCTION

In May 1989, the Palestine Liberation Organization, claiming to represent a new state of "Palestine," sought full membership in the World Health Organization. The United States Government threatened to withhold its assessed dues to the WHO if it admitted "Palestine," as represented by the PLO, into its membership.¹ At its meeting later that month, the World Health Assembly voted to defer the PLO's application for a year.²

The PLO has said that it will pursue its application not only to the WHO, but also to such other specialized agencies as the Food and Agriculture Organization, the International Labour Organisation, the International Telecommunication Union, and UNESCO.³ The United States is currently a member of all of these agencies except UNESCO. It appears that the U.S. Government is prepared to withhold all dues assessed to it by any specialized agency of which it is a member, if the agency admits "Palestine" to full membership.⁴

This Editorial Comment addresses the questions whether "Palestine," as represented by the PLO, is eligible for membership in the specialized agencies, and whether U.S. withholding of all dues in response to Palestinian membership would be permissible as a matter of international law, so long as the United States remains a member of the organization from which the funds are withheld. The Comment does not address the lawfulness of U.S. withdrawal from these organizations. It should be noted, though, that if the United States decided to withdraw from an organization that admitted "Palestine"—an option that seems highly questionable as a matter of policy if there were no other reason for a decision to withdraw—it would be bound to follow the organization's established procedure for withdrawal. Insofar as this involves a waiting period from the giving of notice until withdrawal is effective, the United States during that period would remain a member with the normal obligations—including any obligation of a member to pay dues.⁵

The constituent instruments of the specialized agencies define the qualifications of membership in differing terms.⁶ One constant for full member-

¹ See N.Y. Times, May 7, 1989, §1, at 5, col. 1.

² N.Y. Times, May 13, 1989, at 3, col. 5.

³ Wash. Post, May 11, 1989, at A36, col. 2.

⁴ As a practical matter, this issue will not arise in the United Nations itself. Under UN Charter Article 4(2), as interpreted by the International Court of Justice in *Competence of the General Assembly for the Admission of a State to the United Nations*, 1950 ICJ REP. 4 (Advisory Opinion of Mar. 3), a recommendation of the Security Council is required before the General Assembly may admit a new member. Unless circumstances change substantially, the United States presumably would veto any such recommendation involving the PLO.

⁵ This is made explicit in the ILO Constitution, Article 1(5), during the 2-year waiting period required by that article. It would also be the case in any other agency that requires advance notice of intent to withdraw, since notice would not be equivalent to withdrawal.

⁶ Some provide for associate, as well as full, membership. This Comment is concerned only with full membership, since that is what the PLO currently seeks.

ship, though, is a form of international personality variously referred to in the constituent instruments as "state,"⁷ "nation"⁸ or "country."⁹ Approval for membership normally requires a two-thirds vote of the plenary body, but only a simple majority is required by the WHO.¹⁰ In some agencies there are procedural preconditions to the vote, such as screening by a committee to determine the applicant's capacity to perform the obligations of membership.¹¹

It is very doubtful that "Palestine" currently qualifies as a state under international law. A recent definition of state, based on an older, widely recognized definition, says: "Under international law, a state is an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities."¹²

Even though the Palestine National Council has declared "the establishment of the State of Palestine,"¹³ and even though many governments (the exact number is unclear) have apparently recognized such a state, several other governments have withheld recognition on the ground that "Palestine" does not meet the conditions required to be a state. When the United Nations General Assembly adopted its resolution on the "Question of

⁷ For example, the WHO Constitution provides, "Membership in the Organization shall be open to all States." WHO Constitution, July 22, 1946, Art. 3, 62 Stat. 2679, TIAS No. 1808, 14 UNTS 185. The Constitution of the ILO provides for membership by states members on Nov. 1, 1945, "and such other States as may become Members" under other paragraphs of Article 1. Constitution of the ILO, Oct. 9, 1946, Art. 1(2), 62 Stat. 3485, TIAS No. 1868, 15 UNTS 35. The Convention on International Civil Aviation defines ICAO membership in terms limited to members of the United Nations and other "States." Convention on International Civil Aviation, Dec. 7, 1944, Arts. 91-93, 61 Stat. 1180, TIAS No. 1591, 15 UNTS 295.

⁸ The FAO Constitution provides that the Conference may decide to admit "any nation which has submitted an application for membership and a declaration made in a formal instrument that it will accept the obligations of the Constitution as in force at the time of admission." Constitution of the United Nations Food and Agriculture Organization, Oct. 16, 1945, Art. II(2), 12 UST 980, TIAS No. 4803.

⁹ The International Telecommunication Convention provides that membership in the ITU is open to "any sovereign country" that is properly approved by the membership. International Telecommunication Convention, Nov. 6, 1982, Art. 1(1)(c), in G. WALLENSTEIN, INTERNATIONAL TELECOMMUNICATION AGREEMENTS, Binder *, pt. 3 (1985). Membership in the Universal Postal Union is also limited to "any sovereign country." Constitution of the Universal Postal Union, July 10, 1964, Art. 11(2), 16 UST 1291, TIAS No. 5881, 611 UNTS 7, as amended Nov. 14, 1969, 22 UST 1056, TIAS No. 7150, 810 UNTS 7.

¹⁰ WHO Constitution, *supra* note 7, Art. 6.

¹¹ See, e.g., Standing Orders of the International Labour Conference, Art. 28, in INTERNATIONAL LABOUR OFFICE, CONSTITUTION OF THE INTERNATIONAL LABOUR ORGANISATION AND STANDING ORDERS OF THE INTERNATIONAL LABOUR CONFERENCE 46 (1988). The ILO screening is more than a formality. See Vignes, *La Participation aux organisations internationales*, in A HANDBOOK ON INTERNATIONAL ORGANIZATIONS 57, 67 (R.-J. Dupuy ed. 1988).

¹² RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §201 (1987) [hereinafter RESTATEMENT (THIRD)]. The definition is based on the Montevideo Convention on Rights and Duties of States, Dec. 26, 1933, Art. 1, 49 Stat. 3097, TS No. 881, 165 LNTS 19.

¹³ Palestine National Council's Declaration of Independence, in UN Doc. A/43/827-S/20278, Ann. III, at 15 (1988), reprinted in 27 ILM 1668, 1670 (1988).

Palestine" in December 1988, it did not recognize a Palestinian state; nor did it call the PLO a provisional government. Instead, it acknowledged that the Palestine National Council had proclaimed the State of Palestine, affirmed the need to enable the Palestinian people to exercise sovereignty over the occupied territories, and changed the PLO's designation to "Palestine" in the UN system.¹⁴

If we leave aside the rather academic debate over the "constitutive" and "declaratory" theories of recognition¹⁵ and try to look objectively at only one aspect of the situation, it is clear that the population within the present territory of "Palestine," no matter how that territory may be defined, never has been under the control of the PLO or of any other indigenous government while the current claim of state status has been asserted. This alone would deprive "Palestine" of current state status under traditional principles.¹⁶

Enough has been said to show that a credible challenge, at the very least, may be made to the current claim of a Palestinian state. For the purposes of this Comment, a firm conclusion on this point is necessary only if the eligibility of "Palestine" for membership in the specialized agencies, and the lawfulness of the withholding of dues, turn on it. Obviously, if the challenge is somehow unpersuasive and "Palestine" is actually a state, and if it is then admitted by the proper procedure, dissenting members could not lawfully withhold otherwise obligatory dues in protest. More credibly, the definition of "state," "nation" or "country" in the constituent instrument of a specialized agency that admits "Palestine" might not be the same as the definition of "state" in customary international law.¹⁷ In that case, a determination of state status would be irrelevant.

It is not entirely fanciful to think that a "state" for purposes of admission to a specialized agency might be something other than a "state" for purposes of customary international law.¹⁸ It is generally left to each organ of an intergovernmental organization to interpret those parts of the constituent

¹⁴ GA Res. 43/177 (Dec. 15, 1988), adopted by a vote of 104-2 (Israel, United States)-36, with 15 member states absent and one (Iran) not participating in the vote. The General Assembly took no vote in 1989 on a draft resolution that would have construed "Palestine" to be the State of Palestine. The decision not to press for a vote occurred after the United States threatened to withhold its dues. N.Y. Times, Dec. 6, 1989, at A3, col. 4.

¹⁵ See RESTATEMENT (THIRD), *supra* note 12, §201 Reporters' Note 1; J. CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 16-25 (1979).

¹⁶ Cf. Italian Corte de cassazione decision of June 28, 1985, *Re Arafat*, 109 FORO ITALIANO II, at 277 (1986), translated in part in 7 ITAL. Y.B. INT'L L. 295 (1986-87). But see Flory, *Naissance d'un Etat palestinien*, 93 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 385, 396-99 (1989); Quigley, *Palestine's Declaration of Independence: Self-Determination and the Right of the Palestinians to Statehood*, 7 B.U. INT'L L.J. 1, 25-28 (1989).

¹⁷ Even where the applicant is required to be a "state," it does not inexorably follow that this means the traditional definition of a state. The meaning of a term or concept in one context is not necessarily its meaning in all contexts. For example, "treaty" has a narrower meaning in U.S. constitutional law than it does in international law. Compare U.S. CONST. Arts. II, §2, and VI, with Vienna Convention on the Law of Treaties, Art. 2(1)(a), May 23, 1969, 1155 UNTS 331, reprinted in 8 ILM 679 (1969).

¹⁸ Cf. D. BOWETT, *THE LAW OF INTERNATIONAL INSTITUTIONS* 385 (4th ed. 1982).

instrument that apply to its own functions, in the absence of an effective request to an international tribunal or other body to render an authoritative interpretation.¹⁹ If the entity seeking membership is required only to be a "country," or even a "sovereign country," its eligibility probably would not turn on its acquisition of all the elements of a "state" by any definition.²⁰

Even if "Palestine" need not meet the traditional requirements of a "state" to be eligible for membership in a specialized agency, it does not necessarily follow that it could lawfully be admitted. The specialized agencies have functions to perform. They depend on their members to assist them in the performance of those functions, or in some cases to carry out the functions themselves. For a new member, to do so normally would require at least some measure of control over the claimed territory and population by the political body applying for membership in the name of the new entity. To define an eligible entity as a "state," "nation" or "country" is to imply this much, whether or not the definition calls for all the attributes of a state. Thus, the new entity's eligibility would depend on its ability to carry out—at least in substantial measure—the essential, ongoing obligations of membership.²¹ In the case of "Palestine," the PLO currently does not have that ability.

Arguably, practice involving Namibia runs counter to the position taken in the preceding paragraph. Preindependent Namibia, represented by the United Nations Council for Namibia, was admitted as a full member of some specialized agencies. But the juridical propriety of its admission is at least questionable. In the ILO, Namibia was admitted despite an opinion from the ILO Legal Adviser concluding that full membership would be improper until Namibia became able to exercise all the rights and discharge all the obligations of membership.²² The Legal Adviser relied particularly on the Permanent Court of International Justice's opinion that the Free City of

¹⁹ With respect to the United Nations itself, this appears clearly in the Report of the Rapporteur of Committee IV/2 at the San Francisco Conference, Doc. 933, IV/2/42, 13 UNCIO Docs. 703, 709 (1945).

²⁰ See Omeorogbe, *Functionalism in the UPU and the ITU*, 27 INDIAN J. INT'L L. 50, 55, 60–61 (1987).

²¹ There has been debate about whether the United Nations has abandoned the express condition in UN Charter Article 4(1) that applicant states be, in the judgment of the Organization, able and willing to carry out the obligations of membership. See J. CRAWFORD, *supra* note 15, at 140. The debate has centered on the relatively recent practice of admitting microstates. The question about their ability and willingness to carry out the obligations of membership has revolved primarily around their ability to maintain military forces at the call of the Security Council under chapter VII of the Charter. But the chapter VII obligations with which they could not comply are dead letters.

The microentities that have been admitted to the United Nations are "states," no matter how small. See I. BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 88 (3d ed. 1979). They are capable of carrying out the principal, ongoing obligations of UN membership. Thus, their admission to the United Nations does not imply abandonment (or nonexistence) of a condition based on ability to participate in the fulfillment of an organization's purposes, if the means of fulfilling the purposes are taken as they exist at the time of admission.

²² See International Labour Conference, 64th Sess., Provisional Record of Proceedings 24/20, 24/21 (1978).

Danzig was ineligible for ILO membership so long as the conduct of its foreign relations was subject to the consent of the Government of Poland.²³

The Namibia precedent thus is not entirely convincing. Moreover, one might distinguish it on the basis of the direct UN appointment of an administering body to take the place of a government authoritatively held by the Security Council to have lost its legitimacy in the defined territory.²⁴ This action gave the General Assembly's request to the specialized agencies that they grant full membership to the UN Council for Namibia²⁵ a legal basis so far unavailable in the case of "Palestine."²⁶

In any event, if the preindependent Namibia precedent is both applicable and convincing, whether "Palestine" is a state becomes a moot point and the withholding of dues would be improper. The real question is: if "Palestine" is *not* eligible for membership (because it is not a "state" or because—not needing to be a "state"—it is nevertheless incapable of carrying out the obligations of membership), could the United States lawfully withhold all of its assessed dues in response to a vote to admit "Palestine" as a full member? If the answer is no, there is no scenario in which a firm conclusion regarding the status of "Palestine" as a state would determine the withholding issue.

II. WITHHOLDING IF A NONSTATE IS IMPROPERLY ADMITTED AS A FULL MEMBER

The Constituent Instrument and Treaty Law

The analysis must begin with the constituent instrument of the specialized agency that admits "Palestine" to membership. If the instrument imposes no duty to pay assessed dues, withholding for any reason short of bad faith would be lawful. But the constituent instruments of the specialized agencies typically do impose duties to pay dues.

For example, the WHO Constitution empowers the Health Assembly to approve the budget and "apportion the expenses among the Members"; it also refers to the members' "financial obligations" and provides a sanction for failure to meet them.²⁷ The FAO Constitution provides, "Each Member Nation and Associate Member undertakes to contribute annually to the Organization its share of the budget, as apportioned by the Conference."²⁸ The ILO Constitution says that the "expenses of the [ILO] shall be borne by the Members in accordance with the arrangements" established by the

²³ Free City of Danzig and International Labour Organization, 1930 PCIJ (ser. B) No. 18 (Advisory Opinion of Aug. 26).

²⁴ See GA Res. 2248, S-V GAOR Supp. (No. 1) at 1, UN Doc. A/6657 (1967); SC Res. 276, 25 SCOR Res. & Dec. at 1, UN Doc. S/INF/25 (1970); Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 ICJ REP. 16 (Advisory Opinion of June 21).

²⁵ GA Res. 32/9E, 32 GAOR Supp. (No. 45) at 19, UN Doc. A/32/45 (1978).

²⁶ At this writing, the General Assembly had not made a similar request regarding "Palestine." The point is that even if it does so, it would not have the same legal basis for its request as it did with the Council for Namibia.

²⁷ WHO Constitution, *supra* note 7, Arts. 7, 56.

²⁸ FAO Constitution, *supra* note 8, Art. XVIII.

Constitution, and imposes a sanction for failure to pay.²⁹ The International Telecommunication Convention refers to members' "contributions," but says that "Members shall pay in advance their annual contributory shares, calculated on the basis of the budget approved by the Administrative Council."³⁰ The Convention on International Civil Aviation authorizes the ICAO Assembly to "apportion the expenses of the Organization among the contracting States on the basis which it shall from time to time determine" and provides a sanction for failure to pay.³¹ Other examples could be given.

The question is thus one of possible excuse from a member state's international obligation to pay assessed dues. There is an initial question of the applicable source of international law. Although the specialized agencies' constituent instruments are multilateral treaties, it is not clear that international treaty law applies to the rights and duties of members when an organ—as distinguished from a member or a group of members acting in a way that does not purport to bind the organization—acts inconsistently with the instrument. Instead, the source may be the constitutional or administrative law of the organization, or of international organizations generally.³²

This problem, though, may be more conceptual than practical. It is reasonably safe to assume that general sources of international law—such as treaty law and the law of state responsibility—would apply by analogy even if not directly, in the absence of applicable provisions on remedies in the constituent instruments themselves.³³ This Comment considers these sources first, and then turns to an argument based on inherent powers of members of international organizations.

One treaty law argument, based on Article 62 of the Vienna Convention on the Law of Treaties, may be dismissed quickly. Article 62 permits a party to suspend the operation of a treaty if there has been an unforeseen, fundamental change of circumstances that constituted an essential basis of the parties' consent to be bound, and if the change radically transforms the

²⁹ ILO Constitution, *supra* note 7, Art. 13(3) and (4).

³⁰ International Telecommunication Convention, *supra* note 9, Art. 15(2) and (7).

³¹ Convention on International Civil Aviation, *supra* note 7, Arts. 61, 62.

³² See Cahier, *L'Ordre juridique interne des organisations internationales*, in A HANDBOOK ON INTERNATIONAL ORGANIZATIONS, *supra* note 11, at 237, 242–47; Zoller, *The "Corporate Will" of the United Nations and the Rights of the Minority*, 81 AJIL 610, 630–34 (1987). In the first UN admissions case, the International Court of Justice said, without identifying the source of law, "The political character of an organ cannot release it from the observance of the treaty provisions established by the Charter when they constitute limitations on its powers or criteria for its judgment." Admission of a State to the United Nations (Charter, Art. 4), 1948 ICJ REP. 57, 64 (Advisory Opinion of May 28).

Vienna Convention on the Law of Treaties, *supra* note 17, Art. 5, says that it applies to any treaty that is the constituent instrument of an international organization, "without prejudice to any relevant rules of the organization." The intent of Article 5 seems to be to regulate the relations between states members of an organization, but not necessarily to regulate the internal law of organizations. The Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, Mar. 20, 1986, UN Doc. A/CONF.129/15, reprinted in 25 ILM 543 (1986), does not apply to the internal affairs of international organizations.

³³ Cf. Zoller, *supra* note 32, at 630.

extent of obligations still to be performed. Admission of "Palestine" to any specialized agency would not radically transform the extent (or impact) of other members' obligations. Even if it did, Article 62 does not contemplate suspension of only a nonseparable part of a party's obligations. The obligation to pay assessed dues would not be separable from the remainder of the constituent instrument.³⁴ The United States thus could not rely on the changed circumstances doctrine to withhold its dues.

Article 60 of the Vienna Convention sets forth remedies for material breach of a treaty. As will be noted below, the remedies are rather limited in the case of a multilateral treaty. But before one gets to remedies, one must ask whether the breach in question is "material."

Vienna Convention Article 60(3)(b) defines material breach as "the violation of a provision essential to the accomplishment of the object or purpose of the treaty." A provision in a constituent instrument limiting eligibility for full membership to "states," "nations" or "countries" would be essential to the accomplishment of the organization's purposes, if the purposes require members to exercise national governmental functions. In the case of the ILO, for example, a political entity lacking effective control over a population and a territory would not be able to enact effective labor legislation. Admission of an entity lacking these attributes of a state would thus be inconsistent with an essential provision of the ILO Constitution, the preindependent Namibia precedent to the contrary notwithstanding.

It does not necessarily follow that admission of such an entity would be a material breach of an organization's constituent instrument. The breach in the case of "Palestine" (as in the case of preindependent Namibia) would involve the admission of a single nonstate having a plausible claim to eventual state status. Moreover, the Palestinian entity no longer declares that its claim is tied to a threat or use of force against another state.³⁵ Consequently, its admission to membership would be a relatively minor breach of the essential provision, if we consider the breach only in terms of its effect on the organization's ability to accomplish its purposes through such means (in the case of the ILO) as the adoption and enforcement of labor legislation by

³⁴ See Vienna Convention on the Law of Treaties, *supra* note 17, Art. 44.

³⁵ The declaration says that the "State of Palestine . . . rejects the threat or use of force, violence and intimidation against its territorial integrity and political independence or those of any other State." Palestine National Council's Declaration of Independence, *supra* note 13, at 16, 27 ILM at 1671. The declaration relies on GA Res. 181 (II), 2 GAOR Res. 131, UN Doc. A/519 (1947), the General Assembly's partition resolution, for the legitimacy of the Arab right to sovereignty and national independence in Palestine. The declaration thus recognizes the partition of Palestine between an Arab and a Jewish state, but it does not assert that the boundaries contemplated in the partition resolution have any current significance.

Yasir Arafat has acknowledged the right of all parties concerned in the Middle East conflict, including Israel, to exist in peace and security. See N.Y. Times, Dec. 15, 1988, at A19, col. 5 (transcript of Arafat statement).

Under *Nuclear Tests* (Austl. v. Fr.; NZ v. Fr.), 1974 ICJ REP. 253 and 457 (Judgments of Dec. 20), unilateral declarations may create binding international obligations, at least if made by, or on behalf of, the government of a state. If "Palestine" were recognized as a state, it is likely that both the Palestine National Council's declaration and the Arafat statement would meet the test of the *Nuclear Tests* cases.

its membership. To consider the breach in terms of its possible effect on a political situation outside the organization would be extraneous to the treaty law issue. To consider the likely effect of the breach on the willingness of individual members to pay their dues would be to beg the question.

The Vienna Convention does not on its face distinguish between significant and insignificant violations of essential treaty provisions. Respect for the efficient operation of treaty regimes, however, suggests that relatively isolated departures from the strictures of even an essential provision are not material breaches if they do not threaten to defeat the purpose of the treaty. The negotiating history of Article 60 tends to support this proposition.³⁶ It is a particularly compelling proposition when the treaty regime takes the form of an international organization serving the needs of humankind. Article 60 thus would not seem to justify the withholding of dues as a response to Palestinian membership in an organization that can accomplish its purposes even with such a nonstate in its midst.

If, contrary to what has just been said, admission of "Palestine" to full membership would be a material breach of a particular constituent instrument, the United States still could not invoke it under the Vienna Convention as a ground for withholding dues. Vienna Convention Article 60(2)(b) permits "a party specially affected by the breach" to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting party.³⁷ This formulation represents a narrowing of a draft article that would have authorized any party to invoke material breach as a ground for suspension between itself and the defaulting party.³⁸ The United States proposed the narrower language, apparently out of concern that the right to invoke a breach for suspension of obligations could otherwise be abused by a party anxious to find a pretext for suspending the operation of a treaty against an offending state.³⁹

The examples the United States gave of a party adversely affected by a breach involved breaches directed specifically at that party.⁴⁰ Admission of "Palestine" as a member of a specialized agency would not be an act directed specifically at the United States; nor would U.S. rights or obligations under a constituent instrument be affected any more (or less) than those of other member states. It is irrelevant that the United States has more strenuous objections than most other states, under present circumstances, to any action that could tend to legitimize the Palestinian claims.

³⁶ For discussion of the negotiating history, see Kirgis, *Some Lingering Questions About Article 60 of the Vienna Convention on the Law of Treaties*, 22 CORNELL INT'L L.J. 549, 550-55 (1989).

³⁷ Article 60(2)(c) gives another ground for suspension, but it applies when the treaty is of such a character that a material breach of one of its provisions radically changes the position of every party with respect to further performance of its obligations. It would be far-fetched to argue that admission to a specialized agency of "Palestine," under PLO auspices, radically changes the position of all members in the manner specified.

³⁸ See Sir Humphrey Waldock's Second Report on the Law of Treaties, [1963] 2 Y.B. INT'L L. COMM'N 36, 73, UN Doc. A/CN.4/SER.A/1963/Add.1.

³⁹ See [1966] 2 Y.B. INT'L L. COMM'N 34-36, UN Doc. A/CN.4/SER.A/1966/Add.1.

⁴⁰ *Id.* at 35.

If, contrary to all that has been said so far, admission of "Palestine" would be a material breach and the United States a party specially affected by it, the Vienna Convention still would not authorize an unrestrained unilateral response. A restriction arises from the law of state responsibility, in particular the law of reprisal, which applies to the action a state party to a treaty may take in response to either a material or a nonmaterial breach.⁴¹ Procedural requirements under the Vienna Convention, as well as under the law of reprisal, do not seem to pose a serious problem. They act as a surrogate in a case like this for the requirement that unilateral disregard of an otherwise applicable duty be "necessary" under the circumstances. Negotiations preceding a vote on admission of a new member would satisfy the spirit, if not always the letter, of any procedural requirements in the Vienna Convention or the law of reprisal.⁴² But under the law of reprisal, the response nevertheless could not be manifestly disproportional to the breach.⁴³ As described by one prominent commentator, "the importance of the rule disregarded [in reprisal] as well as the duration and global effects of its non-application should roughly correspond to those of the unlawful act to which one retaliates."⁴⁴

In the normal law of reprisal between states, a countermeasure is not manifestly disproportional just because it exceeds the breach in intensity by enough to provide some measure of deterrence against repeated or similar breaches.⁴⁵ It does not necessarily follow that the proportionality principle would be equally flexible when applied to reprisals against international organizations. But even if it is, withholding the full amount of a U.S. assessment that constitutes 25 percent of the budget of an organization, as is the case in many specialized agencies, would be manifestly out of proportion to a breach that would not significantly increase the burdens of membership or

⁴¹ See Vienna Convention on the Law of Treaties, *supra* note 17, Art. 73; Kirgis, *supra* note 36, at 559, 567.

⁴² The procedural duty to attempt dispute settlement appears in Vienna Convention Arts. 65 and 66. Since the Vienna Convention would be applied only by analogy, however, its purely procedural provisions might not bind states responding to a breach by an organ of a specialized agency. Even though the law of reprisal supplies a similar procedural duty when one state contemplates a reprisal against another, in the instance addressed in this report—admission of a new member into an international organization—there will have been negotiation and debate before a vote is taken. Thus, a traditional form of dispute settlement will have transpired, in the only forum to which the aggrieved state has ready access.

The caveat is that the aggrieved state could, and perhaps should, try to persuade the appropriate organ to seek an ICJ advisory opinion on the legality of admitting "Palestine." The UN General Assembly, acting under UN Charter Article 96(2), has authorized the specialized agencies to request ICJ advisory opinions on legal questions within the scope of their activities.

⁴³ See Willem Riphagen's Sixth Report on State Responsibility, [1985] 2 Y.B. INT'L L. COMM'N, pt. 1 at 3, 11, UN Doc. A/CN.4/SER.A/1985/Add.1 (pt. 1). See also Naulilaa Incident Arbitration (Port./Ger.), 2 R. Int'l Arb. Awards 1012 (1928), summarized in 6 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 154-55 (1943).

⁴⁴ A. CASSESE, INTERNATIONAL LAW IN A DIVIDED WORLD 244 (paperback ed. 1988).

⁴⁵ Air Service Agreement Award (U.S.-Fr.), 18 R. Int'l Arb. Awards 417, 443-44 (1978), 54 ILR 304, 338 (1979). See Schachter, *International Law in Theory and Practice*, 178 RECUEIL DES COURS 9, 178-79 (1982 V).

go very far toward defeating accomplishment of the organization's goals. The impact of a zero payment by the United States would not seem to correspond with the effect within the organization of the irregular or unlawful act admitting "Palestine" to membership, even if we allow some leeway for deterrence against similar acts by other organizations.

If admission of "Palestine" to membership is a breach of the constituent instrument but is not a material breach within the meaning of Vienna Convention Article 60, the law of state responsibility would apply wholly apart from the law of treaties.⁴⁶ The principal issue would be rough proportionality, as discussed above.⁴⁷ The argument against full withholding would be equally strong.

Customary International Law and Recognition of States

It is necessary at this point to consider yet another line of argument. If there is a duty under customary international law to refrain from ascribing the status of a state to entities that do not qualify as states, if that duty applies to international organizations, and if an organization violates it by explicitly or implicitly recognizing "Palestine" as a state,⁴⁸ the reprisal/proportionality argument would not necessarily be the same as has been outlined above. The analysis might no longer consider only the rough proportionality of full withholding as against the impact of the breach within an organizational structure; that is, the proportionality analysis would not necessarily be limited to relations within a regime created by a single treaty—the organization's constituent instrument—or within a series of similar regimes established by the constituent instruments of all organizations that might admit "Palestine." Instead, the analysis might weigh full withholding of dues against the impact that recognizing a Palestinian state would have on world order, or at least on the maintenance of order in the Middle East.

Such an analysis would be exceedingly difficult to make in a way that would convince parties on both sides of the Palestine conflict. Fortunately, it is not necessary to make it. The reason is that there appears to be no duty under customary international law to refrain from treating a nonstate political entity as though it were a state. If there is no such duty, a right of reprisal does not arise.

⁴⁶ See Vienna Convention on the Law of Treaties, *supra* note 17, Art. 73; Schachter, *supra* note 45, at 175; Kirgis, *supra* note 36, at 571–72.

⁴⁷ On the question whether the United States would be an aggrieved state, the analysis would be somewhat different when it does not deal with Vienna Convention Article 60. When there is a material breach of a multilateral treaty, Vienna Convention Article 60(2)(b) and (c) would circumscribe the universe of aggrieved states. When the breach is not material, the law of reprisal recognizes, without clearly defining, some norms whose violation is *erga omnes*. Cf. Schachter, *supra* note 45, at 182–83. The violation of a norm limiting membership in an organization to "states" could be in a sense *erga omnes*, defining the universe of aggrieved states as all members of the organization that did not vote for admission of the nonstate.

⁴⁸ The mere admission of "Palestine," even in an organization limited to "states," would not necessarily imply recognition of a Palestinian state under general international law. See text at note 17 *supra*.

The leading work on the attributes of the state in international law treats as a nonissue the recognition of nonstate entities as states.⁴⁹ This passage appears in the context of recognition among states, not recognition by an international organization. But the only relevant difference as regards an international organization would be that it is constrained legally by a treaty—its constituent instrument. This Comment has already disposed of the questions raised by violation by an organization of its constituent instrument. That brings us back to nontreaty law, where there is no reason to transform a nonissue for states into an issue for international organizations.⁵⁰

Moreover, there is some practice by international organizations of admitting nonstates despite "state" requirements in their constituent instruments. I have already mentioned the Namibia example, involving some of the specialized agencies.⁵¹ But the leading example, of course, is the United Nations itself. The UN Charter clearly restricts membership to "states."⁵² Six of its original members were not fully independent states in 1945.⁵³ Of these, Byelorussia and the Ukraine were not even putative states. It is arguable that some members admitted later were not yet states, as a matter of customary international law, when they were admitted.⁵⁴ Nevertheless, there has been no serious assertion that the United Nations or the specialized agencies violated customary international law by admitting any of these entities.

It is arguable, also, that an international organization of states does not recognize state status simply by admitting an entity to membership, even if the traditional concept of that status is the relevant condition for membership. The argument has been made regarding admission to the United Nations, though at least one prominent commentator disagrees.⁵⁵ Of course, admission to the United Nations means that the applicant has avoided a veto by any of the five permanent members of the Security Council. The veto, as a check against precipitate General Assembly action, gives admission to the United Nations particular significance. If, then, admission to the United Nations does not imply recognition as a state, even less

⁴⁹ J. CRAWFORD, *supra* note 15, at 35.

⁵⁰ The one context in which recognition as a state may raise an issue under customary international law is this: "A state has an obligation not to recognize or treat as a state an entity that has attained the qualifications for statehood as a result of a threat or use of armed force in violation of the United Nations Charter." RESTATEMENT (THIRD), *supra* note 12, §202(2). This obligation could apply also to an international organization. Although the PLO may well have used force on a number of occasions in violation of principles of peaceful dispute settlement contained in the Charter, those efforts have had limited success. Of course, it is a premise of this Comment that "Palestine" might be admitted to an international organization even though it has not attained the qualifications of a state.

⁵¹ See text at note 22 *supra*.

⁵² UN CHARTER Arts. 3 and 4.

⁵³ Byelorussia, the Ukraine, India, the Philippines, Lebanon and Syria. See J. DUGARD, *RECOGNITION AND THE UNITED NATIONS* 53 (1987).

⁵⁴ See *id.* at 60–74.

⁵⁵ See *id.* at 41–80. Dugard concludes after an examination of UN practice that "admission to the United Nations constitutes or confirms the existence of a State." *Id.* at 79. See also M. TANDON, *PUBLIC INTERNATIONAL LAW* 168 (10th ed. 1965).

would admission to a specialized agency where no veto applies. And even if admission to the United Nations does imply recognition as a state, it would not follow that admission to a specialized agency has the same effect.⁵⁶

The Inherent Power Argument

Finally, it is necessary to consider whether a member has a power inherent in the law of international institutions to withhold dues when a plenary body, acting in violation of the institution's constituent instrument, admits a nonstate as a new member. It has been argued that there is an inherent, or implied, power to withhold payment of assessments, but only when it is indispensable to ensure strict compliance with the organization's undertaking to observe the original intent of its charter.⁵⁷ There has been no authoritative decision upholding such a power.⁵⁸ If it exists, it is a power that would be triggered, of course, by a subjective judgment about the lawfulness of the plenary body's decision. A dispassionate third-party adjudicator might not always agree with that judgment. Moreover, even when the judgment is correct, the power it bestows would be effective only in the hands of the powerful. If international law is to serve as an equalizing instrument rather than simply as a tool of the mighty, we should be slow to find powers, not supported by express agreement or by state practice, that can effectively be wielded only by the well endowed.

Let us nevertheless assume that this power exists. I have already argued that admission of "Palestine" under current circumstances would be inconsistent with most or all specialized agencies' constituent instruments. Arguably, some form of withholding would then be indispensable—or at least highly effective—in ensuring that these agencies uphold the intent of their charters (since lesser countermeasures, such as refusing to deal with the PLO within the agency, would be ineffective). Even so, such an inherent power would be limited. Since the reason for the power would be quite similar to the reason for allowing interstate reprisals, one would expect limits on the power much like those on reprisals. This means that rough proportionality would be required. To exercise an inherent power in a way that would bring an organization to its knees—as would happen if 25 percent of the budget were withheld from an organization using its money efficiently and in accordance with its purposes—surely would exceed the limits of rough proportionality under the circumstances considered in this Comment.

⁵⁶ See text at note 17 *supra*. This would be so, a fortiori, if the applicant need only be a "country," or even a "sovereign country," under the specialized agency's constituent instrument.

⁵⁷ Zoller, *supra* note 32, at 632.

⁵⁸ Perhaps the closest thing to an authoritative decision on this point would be Judge Sir Gerald Fitzmaurice's individual opinion in *Certain Expenses of the United Nations*, 1962 ICJ REP. 151, 203–05 (Advisory Opinion of July 20). But he was referring to a right to withhold payment of expenses assessed in violation of the constituent instrument. That is not the case at hand.

misconceptions, in particular the assertion that Poland has "not consented to any adjudication by the International Court of Justice."

Regarding Poland's attitude to the international judiciary, it is interesting to note that while in the interwar period it did not formally accept the compulsory jurisdiction of the Permanent Court of International Justice—since its Declaration of January 24, 1931, remained unratified—it was, strangely enough, the Court's most frequent "client," participating in 20 proceedings. This was the result of Poland's having accepted the jurisdiction of the Court in other international instruments. This is almost forgotten, yet it proves that compulsory jurisdiction is not the only way to the Court. As for postwar Poland, while it has not made a Declaration accepting the compulsory jurisdiction of the Court, it has submitted itself to the jurisdiction of the ICJ by becoming a party to several statutes or constitutions of international organizations and by accepting that jurisdiction in ten multilateral treaties concluded after 1945 without reservations—while it is true that reservations were made to other treaties. Moreover, Poland has remained a party to several treaties accepting the jurisdiction of the Permanent Court of International Justice. These facts speak for themselves; thus, the claim made in the *Conclusion* of the book mentioned above is in obvious conflict with reality. A very special illustration of Poland's positive attitude can be recalled, not in my own words, but by quoting former officials of another state directly involved.

They described it as "a remarkable Polish initiative."

In October 1958, Mr. Diefenbaker in his first major statement before the General Assembly strongly urged member-states to make greater use of the International Court of Justice. Manfred Lachs, at the time legal adviser to the Polish Ministry of Foreign Affairs and subsequently a judge of the International Court, listened carefully to that speech. The communist members of the United Nations mistrusted the Court, and none had ever sought recourse to it. Nevertheless, Lachs . . . persuaded the Polish government to respond to Diefenbaker's appeal and to invite the Canadian government to submit the case of the Polish Treasures to the Court. This seemed like an ideal solution, for Premier Duplessis, in whose hands the Treasures were actually lodged, had always insisted that he would release them on the orders of a competent court. Once the Polish government was persuaded, Lachs approached the Canadian government . . . Sad to say, in spite of the strong support of the Department of External Affairs, which saw in this initiative an ideal way to terminate an embarrassing and intractable international problem, and incidentally a magnificent way to promote Mr. Diefenbaker's proposal, the Prime Minister declined to respond and the initiative died.³

Needless to say, if the dispute in question had been brought before the Court, it would have represented not only a breakthrough in terms of the solution of a dispute between Poland and Canada, but also an important precedent for other countries. If there was a certain reluctance towards the use of the Court, who tried to overcome it (a "Warsaw Pact country") and who refused (a "NATO country")? The initiative reflected my attitude towards international adjudication as Legal Adviser 30 years ago and much

³ Dobell & Willmot, *John Holmes*, 33 INT'L J. 104, 105-06 (1977-78).

earlier, one I held long before my election to the Court. This was only one of several episodes in which my positive approach was manifested. That is the truth.

I hope that these clarifications will put an end to a campaign of misconceptions and distortions which have bedeviled the issues involved. Readers of the 1987 publication (referred to earlier) who study the statistical tables appended to it will, I am sure, soon discover not only that such figures lend little credibility to fears that some judges may imbalance the Court's decisions by voting on predetermined lines according to the political alignment of their countries of origin, but also that prediction based upon guesswork is no proper guide (*cf.* particularly p. 131; moreover there is an error on p. 130, one of my votes being wrongly described. I maintained the view that Iran had an obligation to make reparations). The case in question proves it beyond any doubt. During my service on the Court I voted in favor of 19 of 20 judgments delivered by it. A record that has not been surpassed.

MANFRED LACHS

TO THE EDITOR IN CHIEF:

June 29, 1989

I am writing in reference to the recent Contemporary Practice entry, "Peaceful Settlement of Disputes: United States-Chile: Invocation of Disputes Treaty" (83 AJIL 352 (1989)). Although I am reluctant to engage in a point-by-point discussion of the entry, I must correct several errors for the record.

The Republic of Chile has, for over 10 years, cooperated fully with the United States' efforts to prosecute the killers of Ambassador Orlando Letelier and Ms. Ronni Moffitt, and continues to cooperate today. In contrast, one of the United States' first actions in this affair was to assert jurisdiction over Chile in the civil suit *Letelier v. Republic of Chile* (488 F.Supp. 665 (D.D.C. 1980)), despite Chile's objections and in contravention of international law.

Chile has consistently maintained that the U.S. assertion of civil jurisdiction over Chile in the *Letelier* case was illegal and in violation of Chile's sovereignty. It has been Chile's longstanding position that the jurisdictional issue must be resolved by international adjudication. To that end, Chile has repeatedly proposed that the United States and Chile submit the issue to an international forum to determine whether the United States' assertion of jurisdiction in the civil suit was indeed illegal.

Yet the Contemporary Practice entry makes absolutely no mention of the jurisdictional dispute or of Chile's efforts to submit it to international adjudication. Rather, the entry declares that "having exhausted diplomatic means to obtain the cooperation of the Government of Chile," the United States invoked the so-called Bryan Treaty.

This omission is very unfortunate, particularly since Chile has proposed international adjudication by diplomatic note no less than eight times. In fact, Chile advanced such a proposal *before* the district court made its jurisdictional finding and therefore well before the court found the damages upon which the United States' espousal claim is primarily based. Given Chile's efforts to resolve the fundamental jurisdictional question, it is truly

unjust for the entry to imply that Chile has refused to cooperate. Nor on this record is it reasonable to maintain that all diplomatic means have been exhausted, especially when the United States has failed to respond to Chile's proposal on eight different occasions. In any event, there are other diplomatic means besides the mere exchange of notes.

Notwithstanding Chile's dismay over the U.S. assertion of civil jurisdiction in the *Letelier* suit, Chile has nonetheless made every effort to cooperate with the United States criminal prosecution of the killers. But the Contemporary Practice entry neglects to mention these efforts, thereby implying that Chile's cooperation in the U.S. criminal prosecution has been lacking.

The record reveals that this is most emphatically not the case. First, Chile took the extraordinary step of permitting U.S. prosecutors and FBI agents to enter Chile to carry out their investigation.

Second, the Contemporary Practice entry states that the United States "had sought since September 20, 1978, the extradition" of certain Chilean officials, thereby implying that those efforts were fruitless due to Chile's lack of cooperation. Again, this implication is unfair and inaccurate. The entry does not disclose that the Chilean Government immediately submitted the U.S. extradition request to the Supreme Court of Chile, the ultimate arbiter of such matters under Chilean law; the Chilean executive has no role in such matters. More importantly, Chilean law prohibits the use of plea-bargained testimony, upon which the U.S. extradition request was fundamentally based. Based on these binding legal considerations, the Chilean Supreme Court refused the U.S. request. The United States has not challenged the Court's conclusions.

Incidentally, it should be noted, even though the Chilean Supreme Court did not rely on this point, that the extradition treaty between the two nations does not require the extradition of nationals. In fact, in *Valentine v. United States ex rel. Neidecker* (299 U.S. 5 (1936)), the United States Supreme Court itself held in construing identical language that an extradition treaty will not support the extradition of U.S. nationals unless that power is expressly given. Here it was not.

Finally, the entry neglects to indicate that Chile cooperated to the extent permissible under Chilean law with the recent letters rogatory from the U.S. district court.

The Republic of Chile deplores the murders of Ambassador Letelier and Ms. Moffitt, and will continue—consistent with Chilean law—to cooperate with the United States in bringing their killers to justice. Indeed, given the very significant questions surrounding the Bryan Treaty, Chile has proposed to the State Department that Chile and the United States enter into a joint study of its availability as a dispute resolution mechanism.

OCTAVIO ERRÁZURIZ
Ambassador of Chile

TO THE EDITOR IN CHIEF:

August 11, 1989

In an Editorial Comment in the July 1989 issue of the *Journal* (pp. 519–27), Michael Reisman demonstrates quite convincingly that the United States violated its international obligations when it effectively prevented

Yasir Arafat from addressing the United Nations in New York in 1988. To complete the record, I would like to point out two relevant parts of the factual matrix in addition to those he stressed.

First, the legislative history to section 6 of Public Law 80-357, which contains the so-called security reservation to the UN Headquarters Agreement, suggests that the "reservation" applies even to transit to and from the UN headquarters district. As originally reported out of the Senate Foreign Relations Committee, section 6 did not mention "security," but did reserve the right "completely to control the entrance of aliens into any territory of the United States other than the headquarters district and its immediate vicinity."¹ The House Foreign Affairs Committee decided to go further, and to mention the right to safeguard the security of the United States. It said that its amendment "reserves the right of the United States to safeguard its own security along with the right to control entry of aliens into territory other than the headquarters area."²

This legislative history suggests that the House—and ultimately the full Congress—intended the "security reservation" to go further than the reservation dealing with territory other than the headquarters area. The only further place it could go would be the headquarters area itself.

Of course, this does not mean that the United States reserved the right arbitrarily to determine that any individual bound for the headquarters district is a security threat. Agreements, and reservations to agreements (if in fact this was a reservation), must be construed and applied in good faith. As Professor Reisman has pointed out, Yasir Arafat's planned visit to UN headquarters posed no threat to U.S. security under any stretch of the imagination. The "security reservation" simply did not apply to him.

This conclusion is buttressed by the second point I want to mention. Professor Reisman discusses a denial-of-visas incident in 1953, involving representatives of allegedly Communist-dominated organizations, and notes that a compromise was reached between the United States and the United Nations. He concludes that the incident did not provide a precedent for unilateral U.S. determinations regarding individuals who might pose a security threat. His conclusion is strengthened by a memorandum prepared at the time by Henry Cabot Lodge, then the U.S. representative to the United Nations. In it Mr. Lodge said that his own reading of the 1947 Senate and House Reports "leads me to the conclusion that, if this matter goes to the General Assembly as it will if we force this issue, a persuasive case can be made in support of the Secretary-General's position."³

FREDERIC L. KIRGIS, JR.
Board of Editors

TO THE EDITOR IN CHIEF:

August 14, 1989

The International Court's Merits Judgment in the *Nicaragua* case condemns as impermissible intervention the act of "financing and supplying

¹ See the Foreign Relations Committee's explanation in S. REP. NO. 559, 80th Cong., 1st Sess. 6 (1947).

² H.R. REP. NO. 1093, 80th Cong., 1st Sess. 11 (1947).

³ Memorandum of May 19, 1953, in 3 FOREIGN RELATIONS OF THE UNITED STATES 1952-1954, at 278.

the contra forces." It contains no exception or exemption for "nonlethal" support.

On the contrary, as Representative Jim Leach, a staunch and longstanding friend and supporter of the rule of law in international affairs, pointed out in an aptly chosen quotation from the Court's Judgment, "if the provision of 'humanitarian assistance' is to escape condemnation as an intervention in the internal affairs of Nicaragua, . . . it must . . ., above all, be given without discrimination to all in need in Nicaragua, not merely to the Contras and their dependents."¹

That Representative Leach fairly abstracted that quotation will be plain to any reader of paragraphs 239-243 of the Merits Judgment. Although debate on the new 1989 version of the Wright plan, which is all the current bipartisan finance and supply act is, confirmed it to be in law indistinguishable from the bill that Representative Leach thus condemned and then voted against, his words of 1988 were neither repeated nor remembered in 1989—by him or anyone else.

And so, on April 13, 1989, 535 members of Congress voted (with a scattering of dissents on noninternational law grounds) to enact a further violation of the 1986 Merits Judgment. They did not—even Representative Leach—expressly admit that they were participating in a breach of the treaty that violating Article 94 of the United Nations Charter is; nor did any of the media, so far as is known to the writer, at any point on the political spectrum, call attention to what they had done.

The omission, in an Editorial Comment² in the pages of a journal of international law; of any reference to that aspect of the accords that a speaker at our Annual Meeting called the result of a "Good Friday Spell," is to be regretted. If the Society is not alert to defend international law, and the obligations imposed or assumed in conformity with it, we can be sure that no one else will.

HOWARD N. MEYER

¹ 134 CONG. REC. H664 (daily ed. Mar. 3, 1988).

² Glennon, *The Good Friday Accords: Legislative Veto by Another Name?*, 83 AJIL 544 (1989).

CONTEMPORARY PRACTICE OF THE UNITED STATES RELATING TO INTERNATIONAL LAW

MARIAN NASH LEICH*

The material in this section is arranged according to the system employed in the annual *Digest of United States Practice in International Law*, published by the Department of State.

DIPLOMATIC RELATIONS

(U.S. *Digest*, Ch. 4, §1)

Federated States of Micronesia and Marshall Islands

By an exchange of notes between Secretary of State James A. Baker III and Jesse B. Marehalau, Representative of the Federated States of Micronesia, dated August 23 and 24, 1989, and between Secretary Baker and Wilfred I. Kendall, Representative of the Republic of the Marshall Islands, dated August 23 and September 6, 1989, the respective Governments agreed upon procedures to govern their diplomatic relations in accordance with the 1961 Vienna Convention on Diplomatic Relations. Agreements amending the governmental representation provisions of the Compact of Free Association¹ had been concluded between the United States and the Federated States of Micronesia on March 9, 1988, and between the United States and the Marshall Islands on March 18, 1988. Congress had approved the amendments on July 26, 1989 (Pub. L. No. 101-62, 103 Stat. 162).

The agreed procedures follow:

(1) The Government of the United States and the Government of (the Federated States of Micronesia/ the Republic of the Marshall Islands) will provide all necessary assistance for the establishment and performance of the functions of diplomatic missions in their respective capitals in accordance with international law and practice. Both governments will make arrangements pursuant to their respective legal and administrative procedures to commence and conduct diplomatic representation at the Ambassadorial level.

(2) Diplomatic relations between the United States and the (Federated States of Micronesia/ the Republic of the Marshall Islands) shall be governed by the 1961 Vienna Convention on Diplomatic Relations. Rules of customary international law shall govern questions not expressly regulated by the provisions of the Vienna Convention on Diplomatic Relations or the applicable provisions of the Compact of Free Association.

* Office of the Legal Adviser, Department of State.

¹ Compact of Free Association, Oct. 1, 1982, United States–Federated States of Micronesia, and June 25, 1983, United States–Republic of the Marshall Islands, *approved by* Pub. L. No. 99-239, 99 Stat. 1770 (1986) (entered into force Nov. 3, 1986, and Oct. 21, 1986, respectively). *See further* 81 AJIL 405 (1987).

(3) The two governments will facilitate, consistent with Article 21 of the Vienna Convention on Diplomatic Relations, the establishment and occupancy of mutually satisfactory Embassy premises and accommodations for Embassy personnel by the sending state in the national capital area of the receiving state. The two governments will consult further regarding the terms and conditions of any acquisition or construction of real property, taking account of applicable domestic legislation where appropriate.

(4) In accordance with Article 27(1) of the Vienna Convention on Diplomatic Relations, both governments consent to the installation and use of wireless transmitters by the respective diplomatic missions for the purposes of official communication, subject to compliance with the laws and regulations of the receiving state. Such laws and regulations shall, however, be applied so as to give full effect to the consent hereby recorded.

(5) The Government of the (Federated States of Micronesia/ Republic of the Marshall Islands) may establish offices in Hawaii, Guam, or, on the basis of mutual agreement with the Government of the United States, elsewhere in the United States, its territories and possessions, for the purpose of providing citizen services and performing governmental liaison functions. Any such offices and the personnel assigned thereto shall be accorded treatment by the United States consistent with the [1963] Vienna Convention on Consular Relations. Rules of customary international law shall govern questions not expressly covered by the provisions of the Vienna Convention on Consular Relations or the Compact of Free Association. The locations, number of personnel and other specific matters related to the establishment and operation of such offices shall be established by separate, mutual agreement. Any such offices in existence upon acceptance of these proposed procedures by the Government of the (Federated States of Micronesia/ Republic of the Marshall Islands) shall continue to operate in accordance herewith.

(6) The two governments do mutually agree, on a beneficial and practical basis, to implement the agreement between our two governments to amend the Governmental Representation Provisions of the Compact of Free Association pursuant to section 432 of the Compact, and the terms set forth above in accordance with the provisions of the international agreements between them, including the Compact of Free Association.²

The identical agreements of March 1988, referred to above, amended section 151 (under Article V, Representation) of the Compact of Free Association to read:

Section 151. Relations between the Government of the United States and the Governments of the Federated States of Micronesia and the Republic of the Marshall Islands shall be conducted in accordance with the Vienna Convention on Diplomatic Relations. In addition to diplomatic missions and representation, the Governments may establish and

² For the exchanges of notes, see Dept. of State File Nos. P89 0129-2003/2006 (Federated States of Micronesia) and P89 0129-2007/2010 (Republic of the Marshall Islands).

maintain other offices and designate other representatives on terms and in locations as may be mutually agreed.³

Sections 151 and 152 of the Compact of Free Association had originally provided for the conduct of diplomatic relations between the United States and the Federated States of Micronesia and the Republic of the Marshall Islands in terms that departed from those set forth in the 1961 Vienna Convention. The provisions had reportedly had an unintended (and negative) effect upon the willingness of other governments to recognize and to enter into full diplomatic relations with the Republic of the Marshall Islands and the Federated States of Micronesia, and had reportedly become a barrier to their conduct of full diplomatic relations at the ambassadorial level with other governments.

LAW OF THE SEA

(U.S. *Digest*, Ch. 7, §2)

Innocent Passage: U.S.-USSR Uniform Interpretation

On September 23, 1989, Secretary of State James A. Baker III and Soviet Foreign Minister Eduard A. Shevardnadze, meeting at Jackson Hole, Wyoming, issued on behalf of their respective Governments a Uniform Interpretation of the Rules of International Law Governing Innocent Passage, which sets out their common understanding of the legal regime for innocent passage by ships, including warships, through the territorial sea.¹ The text of the Uniform Interpretation follows:

1. The relevant rules of international law governing innocent passage of ships in the territorial sea are stated in the 1982 United Nations Convention on the Law of the Sea (Convention of 1982), particularly in Part II, Section 3.
2. All ships, including warships, regardless of cargo, armament or means of propulsion, enjoy the right of innocent passage through the

³ Agreement to Amend the Governmental Representation Provisions of the Compact of Free Association Pursuant to Section 432 of the Compact, Mar. 9, 1988, United States-Federated States of Micronesia, Dept. of State File No. P89 0129-2012; identical Agreement, United States-Republic of the Marshall Islands, Mar. 18, 1988, *id.*, No. P89 0129-2017.

Section 151 of the Compact had originally provided for the Governments to establish and maintain representative offices in each other's capital "for the purpose of maintaining close and regular consultations on matters arising in the course of the relationship of free association and conducting other government business." The 1988 amending agreements also deprived of effectiveness (i.e., superseded) §152 of the Compact (which detailed the privileges and immunities of the representative offices and the resident representatives); and they made necessary conforming changes in §461(g) of the Compact and in Article II, §7 of the agreement referred to in §462(e) thereof.

¹ Presidential Proclamation No. 5928, Dec. 27, 1988, extended the territorial sea of the United States to 12 nautical miles from the baselines of the United States, determined "in accordance with international law." It specifically affirmed that ships of all nations enjoy the right of innocent passage in U.S. territorial waters. 54 Fed. Reg. 777 (1989).

territorial sea in accordance with international law, for which neither prior notification nor authorization is required.

3. Article 19 of the Convention of 1982 sets out in paragraph 2 an exhaustive list of activities that would render passage not innocent. A ship passing through the territorial sea that does not engage in any of those activities is in innocent passage.

4. A coastal State which questions whether the particular passage of a ship through its territorial sea is innocent shall inform the ship of the reason why it questions the innocence of the passage, and provide the ship an opportunity to clarify its intentions or correct its conduct in a reasonably short period of time:

5. Ships exercising the right of innocent passage shall comply with all laws and regulations of the coastal State adopted in conformity with relevant rules of international law as reflected in Articles 21, 22, 23 and 25 of the Convention of 1982. These include the laws and regulations requiring ships exercising the right of innocent passage through its territorial sea to use such sea lanes and traffic separation schemes as it may prescribe where needed to protect safety of navigation. In areas where no such sea lanes or traffic separation schemes have been prescribed, ships nevertheless enjoy the right of innocent passage.

6. Such laws and regulations of the coastal State may not have the practical effect of denying or impairing the exercise of the right of innocent passage as set forth in Article 24 of the Convention of 1982.

7. If a warship engages in conduct which violates such laws or regulations or renders its passage not innocent and does not take corrective action upon request, the coastal State may require it to leave the territorial sea, as set forth in Article 30 of the Convention of 1982. In such case the warship shall do so immediately.

8. Without prejudice to the exercise of rights of coastal and flag States, all differences which may arise regarding a particular case of passage of ships through the territorial sea shall be settled through diplomatic channels or other agreed means.²

The Uniform Interpretation was attached to a joint statement, signed by Secretary Baker and Foreign Minister Shevardnadze, that read:

Since 1986, representatives of the United States of America and the Union of Soviet Socialist Republics have been conducting friendly and constructive discussions of certain international legal aspects of traditional uses of the oceans, in particular, navigation.

The Governments are guided by the provisions of the 1982 United Nations Convention on the Law of the Sea, which, with respect to traditional uses of the oceans, generally constitute international law and practice and balance fairly the interests of all States. They recognize the need to encourage all States to harmonize their internal laws, regulations and practices with those provisions.

² DEPT. ST. BULL., No. 2151, November 1989, at 25-26.

The Governments consider it useful to issue the attached Uniform Interpretation of the Rules of International Law Governing Innocent Passage. Both Governments have agreed to take the necessary steps to conform their internal laws, regulations and practices with this understanding of the rules.³

In February 1988, a "bumping incident" took place between U.S. and Soviet warships in the Black Sea.⁴ At that time, a Soviet "border regulation" purported to restrict the innocent passage of warships in Soviet territorial seas to specific sea lanes, none of which were in the Black Sea.⁵ The U.S. vessels were exercising innocent passage rights in the Soviet territorial sea in the Black Sea to demonstrate U.S. nonacceptance of attempted Soviet restrictions upon these rights. The Soviet regulation was afterwards modified to conform to the Uniform Interpretation of September 23, 1989, and no longer limits innocent passage of warships to designated sea lanes.

Press guidance prepared in connection with the joint statement and Uniform Interpretation stated: "Since the Soviet border regulations have been brought into conformity with the 1982 Convention on the Law of the Sea, we have assured the Soviet side that the United States has no reason to exercise in the Soviet territorial sea in the Black Sea its right of innocent passage under the U.S. Freedom of Navigation Program."⁶ The press guidance also noted:

³ *Id.* at 26. For the Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, see UNITED NATIONS, THE LAW OF THE SEA: OFFICIAL TEXT OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA WITH ANNEXES AND INDEX, UN Sales No. E.83.V.5 (1983).

⁴ See N.Y. Times, Feb. 13, 1988, at 1, col. 1 (late ed.); Wash. Post, Feb. 13, 1988, at A23, col. 1 (final ed.).

⁵ See Rules for Navigation and Sojourn of Foreign Warships in the Territorial and Internal Waters and Ports of the U.S.S.R., Art. 12, *translated in* 24 ILM 1715, 1717 (1985).

⁶ Dept. of State CIRCTEL [to all diplomatic posts] No. 311861 (Sept. 28, 1989).

In December 1988, the Department of State described the U.S. Freedom of Navigation Program in *GIST* (a "quick reference aid on U.S. foreign relations"), in part as follows:

Background: US interests span the world's oceans geopolitically and economically. US national security and commerce depend greatly upon the internationally recognized legal rights and freedoms of navigation and overflight of the seas. Since World War II, more than 75 coastal nations have asserted various maritime claims that threaten those rights and freedoms. These "objectionable claims" include unrecognized historic waters claims; improperly drawn baselines for measuring maritime claims; territorial sea claims greater than 12 nautical miles; and territorial sea claims that impose impermissible restrictions on the innocent passage of military and commercial vessels, as well as ships owned or operated by a state and used only on government noncommercial service.

US policy: The US is committed to protecting and promoting rights and freedoms of navigation and overflight guaranteed to all nations under international law. One way in which the US protects these maritime rights is through the US Freedom of Navigation Program. The program combines diplomatic action and operational assertion of our navigation and overflight rights by means of exercises to discourage state claims inconsistent with international law and to demonstrate US resolve to protect navigational freedoms. The Departments of State and Defense are jointly responsible for conducting the program.

The program started in 1979, and President Reagan again outlined our position in an ocean policy statement in March 1983:

The warships of either country, of course, retain the right to conduct innocent passage in the territorial sea of each other incident to normal navigation. The United States will continue to conduct routine operations in the Black Sea. . . . We retain our right to exercise innocent passage in any territorial sea in the world.⁷

(U.S. *Digest*, Ch. 7, §9)

U.S.-USSR Agreement on Pollution in Bering and Chukchi Seas

On May 11, 1989, Secretary of State James A. Baker III and Soviet Foreign Minister Eduard A. Shevardnadze signed at Moscow the Agreement between the Government of the United States of America and the Government of the Union of Soviet Socialist Republics Concerning Cooperation in Combatting Pollution in the Bering and Chukchi Seas in Emergency Situations, which entered into force on August 17, 1989.

. . . the United States will exercise and assert its navigation and overflight rights and freedoms on a worldwide basis in a manner that is consistent with the balance of interests reflected in the [1982 UN Convention on the Law of the Sea]. The United States will not, however, acquiesce in unilateral acts of other states designed to restrict the rights and freedoms of the international community in navigation and overflight and other related high seas uses.

The US considers that the customary rules of international law affecting maritime navigation and overflight freedoms are reflected and stated in the applicable provisions of the 1982 UN Convention on the Law of the Sea.

Nature of the program: The Freedom of Navigation Program is a peaceful exercise of the rights and freedoms recognized by international law and is not intended to be provocative. The program impartially rejects excessive maritime claims of allied, friendly, neutral, and unfriendly states alike. Its objective is to preserve and enhance navigational freedoms on behalf of all states.

Diplomatic action: Under the program, the US undertakes diplomatic action at several levels to preserve its rights under international law. It conducts bilateral consultations with many coastal states stressing the need for and obligation of all states to adhere to the international law customary rules and practices reflected in the 1982 convention. When appropriate, the Department of State files formal diplomatic protests addressing specific maritime claims that are inconsistent with international law. Since 1948, the US has filed more than 70 such protests, including more than 50 since the Freedom of Navigation Program began.

Operational assertions: Although diplomatic action provides a channel for presenting and preserving US rights, the operational assertion by US naval and air forces of internationally recognized navigational rights and freedoms complements diplomatic efforts. Operational assertions tangibly manifest the US determination not to acquiesce in excessive claims to maritime jurisdiction by other countries. Planning for these operations includes careful interagency review. Although some operations asserting US navigational rights receive intense public scrutiny (such as those that have occurred in the Black Sea and the Gulf of Sidra), most do not. Since 1979, US military ships and aircraft have exercised their rights and freedoms in all oceans against objectionable claims of more than 35 nations at the rate of some 30-40 per year.

Dept. of State File No. P89 0125-2147.

⁷ Dept. of State CIRCTEL, *supra* note 6.

Under Article I of the Agreement, the parties undertake to render assistance to each other in combating pollution incidents that may affect their respective areas of responsibility, regardless of where the incidents may occur. Assistance is to be rendered consistent with the provisions of the Agreement, and to that end, their competent authorities are to develop the Joint Contingency Plan against Pollution in the Bering and Chukchi Seas (the Plan), which shall enter into force upon their written agreement (not reproduced here).

Article II defines a "pollution incident" as

a discharge or an imminent threat of discharge of oil or other hazardous substance from any source of such a magnitude or significance as to require an immediate response to prevent such a discharge or to contain, clean up or dispose of the substance to eliminate the threat to or to minimize its harmful effects on living resources and marine life, public health or welfare.

The "competent authority" with respect to the United States is the U.S. Coast Guard, and with respect to the Union of Soviet Socialist Republics, the Marine Pollution Control and Salvage Administration attached to the Soviet Ministry of Merchant Marine. The "area of responsibility of a Party" is defined as

the waters within the Bering and Chukchi Seas which are the respective Party's internal waters or territorial sea, and the sea area beyond the territorial sea in which that Party exercises its sovereign rights and jurisdiction in accordance with international law. Areas of responsibility of the Parties where they are adjacent will be separated by the maritime boundary between the two countries.

Under Article III, the parties commit themselves, consistent with their means, to develop national systems permitting detection and prompt notification of the occurrence of pollution incidents, as well as to provide adequate means within their power to eliminate the threat posed by such incidents and to minimize adverse effects to the marine environment and to public health and welfare. Article IV provides that they shall routinely exchange up-to-date information, and shall consult to guarantee adequate cooperation between their competent authorities in regard to activities pertaining to the Agreement and to the Plan. Article V provides that implementation of the Plan shall be the primary responsibility of the parties' competent authorities, and of their other authorities to the extent of the latter's competence under applicable law. The competent authorities may amend the Plan from time to time, consistent with the Agreement and the procedures set forth in the Plan.

Article VI reads: "The competent authority of the Party in whose area of responsibility a pollution incident occurs, or whose area of responsibility is affected by such an incident, shall direct response operations within that area."

Under Article VII, the Plan may be invoked "whenever a pollution incident occurs that affects or threatens to affect the areas of responsibility of

both Parties or, although only directly affecting the area of responsibility of one Party, is of such a magnitude as to justify a request for the other Party's assistance." Under Article VIII, the joint response provided for in the Plan can only be undertaken upon agreement of the competent authorities of the parties, who will determine the appropriate response action required for each pollution incident.

Article IX concerns requests for assistance, which are to be communicated between the respective competent authorities; requests by telephone are to be confirmed by telex, telegraph or facsimile. Each party shall endeavor to provide requested assistance promptly to the extent of the availability of resources, such availability for a specific incident being dependent upon funding and the requirements of other missions. The requesting party must provide all possible support to the assisting party's response resources (defined in Article II as personnel, vessels, equipment and other means for combating pollution). Article X authorizes the assisting party to terminate assistance, either fully or in part, when necessary to do so, and requires the requesting party to inform the assisting party promptly when assistance is no longer needed.

Article XI provides for the parties periodically to conduct joint pollution response exercises and meetings in accordance with the provisions of the Plan, with the competent authorities alternating in supervising the exercises.

Article XII requires the requesting party to facilitate to the greatest possible extent the arrival and departure of response resources made available by the assisting party for response activities pertaining to the Agreement. Article XIII requires the requesting party to reimburse the assisting party's expenses associated with response resources.

Article XIV provides (1) that nothing in the Agreement shall affect the rights and obligations of either party resulting from other bilateral and multilateral international agreements; and (2) that the parties will implement the Agreement in accordance with rules and principles of general international law and their respective laws and regulations.

The Agreement is to remain in force unless terminated by either party upon 6 months' advance written notice to the other of intention to terminate. The Agreement may be amended by written agreement between the parties.¹

¹ For the text, see Dept. of State File No. P89 0135-1666/75.

A background statement pursuant to the Case Act, prepared in the Office of the Legal Adviser of the Department of State, was transmitted to the President of the Senate, the Chairman of the Senate Committee on Foreign Relations and the Speaker of the House of Representatives under date of Oct. 26, 1989 (the text of the Agreement had been transmitted under date of Aug. 31, 1989). It included the following information on the negotiation of the Agreement:

Negotiations were conducted with the Soviets over a 2½ year period by State Department and U.S. Coast Guard officials under the auspices of the U.S.-U.S.S.R. Agreement on Cooperation in the Field of Environmental Protection [May 23, 1972, TIAS No. 7345, 23 UST 845]. As a result of the potential for oil development in the Bering and Chukchi Seas, and tanker traffic associated with such development, the United States proposed the

TAX LAW

(U.S. Digest, Ch. 10, §4)

Council of Europe and OECD Treaty on Mutual Administrative Assistance

On October 24, 1989, Secretary of State James A. Baker III submitted to President George Bush for transmittal to the Senate for its advice and consent to ratification, the Convention on Mutual Administrative Assistance in Tax Matters, concluded by the member states of the Council of Europe and the member countries of the Organisation for Economic Co-operation and Development (OECD) at Strasbourg, January 25, 1988, and signed by the United States in Paris on June 28, 1989.

The Convention, the first multilateral tax treaty of its kind, is open to ratification, acceptance or approval by any of the member states of the Council of Europe or the OECD. It will enter into force 3 months after five states have expressed their consent to be bound by its provisions, which are consistent with those of the U.S. Model Tax Treaty and with other tax treaties currently in force for the United States.

The Secretary's report follows, in major part:

Under the Convention, the Parties will exchange information for the assessment, recovery, and enforcement of tax(es) and tax claims, and to assist in the prosecution of a taxpayer. Like information exchange under the U.S. Model Treaty, information exchange under the Convention is not limited to cases of suspected tax evasion.

The Convention applies, inter alia, to taxes on income or profits, taxes on capital gains, and taxes on net wealth imposed on behalf of a Party. Consistent with the U.S. Model Treaty, the United States will exchange information only on taxes imposed by the Federal government, and will not exchange information on state or local taxes.

The taxpayer protections available under the Convention are at least as extensive as those available under the U.S. Model Treaty. Information provided by the United States to another party may not be released to a third party without U.S. consent. Neither the OECD, the Council of Europe, nor any other international organization would have access to the taxpayer information.

Section II of the Convention provides for assistance in the recovery of taxes, but permits member States to reserve on these provisions. The United States intends to reserve on these provisions because the U.S.

establishment of a joint procedure to deal with marine pollution incidents in October 1986. As a first step, the two sides established points of contact for reporting pollution incidents. Subsequently, the two sides agreed to have the United States develop a draft outline. Negotiations on the draft were held in the Soviet Union, July 31–August 8, 1987, and in the United States from May 10–22, 1988. Negotiations were reviewed during the U.S.-U.S.S.R. summit meeting in May 1988, and negotiators were instructed in the Joint Statement following that meeting to accelerate efforts to achieve a mutually acceptable agreement. [See DEPT. ST. BULL., No. 2137, August 1988, at 25, 29.] Negotiators finalized the text of the Agreement in October 1988 and the Plan in January 1989.

competent tax authority has not made use of the broad collection assistance provisions in four existing tax treaties which contain them.

Section III of the Convention provides for assistance in service of documents, but again permits States to reserve on this provision. The United States intends to do so on assistance in service of documents, as documents may be and are generally served by mail in the United States. No assistance by the United States is needed. The United States will, however, not reserve on Paragraph Three of this Section, which affirms access by any Party to the postal system of any other Party for the service of documents.

A technical memorandum explaining in detail the provisions of the Convention is being prepared by the Department of the Treasury and will be submitted separately to the Senate Committee on Foreign Relations.

The Department of the Treasury, with the cooperation of the Department of State, was primarily responsible for the negotiation of the Convention.¹

President Bush transmitted the Convention to the Senate for its advice and consent to ratification on November 8, 1989.

(U.S. Digest, Ch. 10, §4)

U.S.-India Convention on Avoidance of Double Taxation

By a letter to President George Bush, dated October 24, 1989, Secretary of State James A. Baker III recommended transmittal to the Senate for its advice and consent to ratification the Convention between the Government of the United States of America and the Government of the Republic of India for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, together with a related Protocol, signed at New Delhi on September 12, 1989.

The Convention, the first tax treaty between the United States and India, follows in general the pattern of the United States model tax convention but differs in a number of respects to reflect the status of India as a developing country.

The Secretary's letter follows in major part:

The Convention provides maximum rates of tax at source on payments of dividends, interest and royalties which, in each case, are higher than the rates specified in the United States Model. Dividends from a subsidiary to a parent corporation are taxable at a maximum rate of 15 percent; other dividends may be taxable at source at a 25 percent rate. Interest is, in general, taxable at source at a maximum rate of 15 percent, although interest received by a financial institution is taxable at a maximum rate of 10 percent, and interest received by either of the two Governments, by certain governmental financial in-

¹ S. TREATY DOC. NO. 6, 101st Cong., 1st Sess., at (V)-(VI) (1989).

stitutions, and by residents of a Contracting State on certain Government approved loans, is exempt from tax at source.

The royalty provisions contain several significant departures from standard United States tax treaty policy. In general, industrial and copyright royalties are taxable at source at a maximum rate of 20 percent for the first five years, dropping to 15 percent thereafter. Where the payor of the royalty is one of the Governments, a political subdivision or a public sector corporation, tax will be imposed from the date of entry into force of the treaty at a maximum rate of 15 percent. Payments for the use of, or the right to use, industrial, commercial or scientific equipment are treated as royalties, rather than as business profits, and are subject to a maximum rate of tax at source of 10 percent. The most significant departure from past policy in the royalty article is the fact that certain service fees, referred to in the Convention as "fees for included services", are treated in the same manner as royalties, and not, as would normally be the case, as business profits. Included services are defined as technical consultancy services which either: (i) are ancillary and subsidiary to the licensing of an intangible or the rental of tangible personal property, both of which give rise to royalty payments, or, (ii) if not ancillary or subsidiary, make available to the payor of the service fee some technical knowledge, experience, skill, etc., or transfer to that person a technical plan or design. A detailed memorandum of understanding was developed by the negotiators to provide guidance as to the intended scope of the concept of "included services" and the effect of the memorandum is agreed to in an exchange of notes. These are included for information only. Fees for all other services are treated either as business profits or as independent personal services income. Although not reflected in the Convention, under Indian law, certain service fees related to defense contracts are exempt from Indian tax.

The Convention preserves for the United States the right to impose the branch profits tax. It preserves for both Contracting States their statutory taxing rights with respect to capital gains.

The Convention also contains rules for the taxation of business profits which, consistent with other United States tax treaties with developing countries, provide a broader range of circumstances under which one partner may tax the business profits of a resident of the other. The Convention defines a permanent establishment to include a construction site or a drilling rig where the site or activity continues for a period of 120 days in a year. This compares with a twelve-month threshold under the United States Model, and six months under the typical developing country tax treaty. In addition, the Convention contains reciprocal exemption at source for shipping and aircraft operating income, including income from the incidental leasing of ships, aircraft or containers (i.e., where the lessor is an operator of ships and aircraft). The Convention differs from the United States Model in that income from the non-incidental leasing of ships, aircraft or containers (i.e., where the lessor is not an operator of ships or aircraft) is not covered by the article. Income from such non-incidental leasing is treated as a royalty, taxable at source at a maximum rate of 10 percent.

The treatment under the Convention of various classes of personal service income is similar to that under other United States tax treaties with developing countries.

The Convention contains provisions designed to prevent third-country residents from treaty shopping, i.e., from taking unwarranted advantage of the Convention by routing income from one Contracting State through an entity created in the other. These provisions, consistent with recent tax legislation, identify treaty shopping in terms both of third-country ownership of an entity, and of the substantial use of the entity's income to meet liabilities to third-country persons. Notwithstanding the presence of these factors, however, treaty benefits will be allowed if the income is incidental to or earned in connection with the active conduct of a trade or business in the State of residence, if the shares of the company earning the income are traded on a recognized stock exchange, or if the competent authority of the source State so determines.

As with all United States tax treaties, the Convention prohibits tax discrimination, creates a dispute resolution mechanism and provides for the exchange of otherwise confidential tax information between the tax authorities of the parties. The Convention authorizes access by the General Accounting Office and the tax writing committees of Congress to certain information exchanged under the Convention which is relevant to the functions of these bodies in overseeing the administration of United States laws.

In an exchange of notes, the United States and India agree that, although the Convention does not contain a tax sparing credit, if United States policy changes in this regard, the Convention will be promptly amended to incorporate a tax sparing provision. These notes are also included for information only.¹

President Bush transmitted the Convention to the Senate for its advice and consent to ratification on October 31, 1989.

¹ S. TREATY DOC. NO. 5, 101st Cong., 1st Sess., at III-V (1989).

INTERNATIONAL DECISIONS

PETER D. TROOBOFF*

International Court of Justice—diplomatic protection—U.S.-Italian Treaty of Friendship, Commerce and Navigation

ELETTRONICA SICULA S.p.A. (ELSI) (UNITED STATES v. ITALY). 1989 ICJ Rep. 15, 28 ILM 1109 (1989).
International Court of Justice, July 20, 1989.

On February 6, 1987, the United States filed a unilateral application instituting proceedings against the Republic of Italy in the International Court of Justice. In its written and oral pleadings, the United States alleged that Italy had violated Articles III, V and VII of the bilateral Treaty of Friendship, Commerce and Navigation of 1948 (FCN Treaty),¹ and Articles I and V of the 1951 Supplement to the Treaty² by, inter alia, preventing two U.S. corporations, Raytheon and its wholly owned subsidiary, Machlett Laboratories (Raytheon), from liquidating the assets of their wholly owned Italian subsidiary, Elettronica Sicula S.p.A. (ELSI). Consequently, the United States charged, Italy was obligated to pay compensation to the United States in the amount of U.S. \$12,679,000, plus interest. Italy denied that it had violated the FCN Treaty but argued that even if a violation had occurred, no injury was caused that would justify the payment of damages. At the request of the United States, and with the agreement of Italy, the case was heard by a five-member Chamber of the Court.³ Rejecting a challenge to the admissibility of the claim raised by Italy, the Chamber unanimously *held* that Raytheon had sufficiently exhausted its local remedies for the claim to be admissible. On the merits, the Chamber *held* (4-1, Schwebel, J., dissenting) that no reparations were owed by Italy to the United States because Italy had not denied the right of Raytheon under the FCN Treaty to manage and control its former Italian subsidiary or its right to own immovable property in Italy; that Italy had not expropriated Raytheon's

* Mark P. Kindall of the District of Columbia Bar assisted the Editor in the preparation of the summaries in this issue.

¹ Feb. 2, 1948, 63 Stat. 2255, TIAS No. 1965, 79 UNTS 171.

² Sept. 26, 1951, 12 UST 131, TIAS No. 4685, 404 UNTS 326.

³ 1989 ICJ REP. 15, 18, para. 4. *See also* 24 ILM 1742 (1985) (U.S. Department of State's announcement of decision to refer the case to an ICJ Chamber). The Chamber was composed of Judge Ruda (President), and Judges Ago, Jennings, Oda and Schwebel. In its Order on its election of the Chamber, the Court stated that Judge Nagendra Singh, who was then President of the Court, had become President of the Chamber under Article 17, paragraph 2 of the Rules of Court. Elettronica Sicula S.p.A. (ELSI), Constitution of Chamber, 1987 ICJ REP. 3, 4, para. 4 (Order of Mar. 2). After the death of Judge Singh, Judge Ruda was elected President of the Court and succeeded as President of the Chamber. *See* ICJ Press Communiqué No. 89/1 (Jan. 12, 1989).

property in Italy without compensation; and, finally, that Italy had not acted arbitrarily or discriminatorily toward Raytheon.

Established by Raytheon in the mid-1950s, ELSI was located in Palermo, Sicily, where by 1967 it had a nine-hundred-person work force manufacturing electronic tubes and other electronic components. ELSI initially showed profits, but these never exceeded the company's debt burden and other liabilities. As a result, ELSI was never capable of operating without financial support from its parent company. Raytheon failed in its attempts to find ELSI a suitable Italian partner, which would have facilitated ELSI's access to the lucrative Italian government telecommunications market and to the industrial development benefits for the southern region of Italy, the Mezzogiorno.

By late 1967, ELSI's financial situation had become so precarious that a shutdown of the plant appeared inevitable unless Raytheon furnished additional capital or another source of funding materialized. Raytheon was not willing to provide further large-scale financial aid to ELSI or to guarantee further loans so as to maintain the Italian business operations. The U.S. parent decided to divest itself of ELSI by means of what was referred to during the proceedings as an "orderly liquidation process." Raytheon was prepared to underwrite this disposal of ELSI's assets and the discharge of its debts.

On March 16, 1968, ELSI's board of directors decided to cease operations immediately and to dismiss its employees, and this decision was promptly communicated to the work force and the shareholders. In the meantime, meetings continued with the Italian authorities, who vigorously opposed ELSI's decision to close down. These officials made clear to ELSI's management that if the company carried out its plan, the plant would be requisitioned by Italian public authorities. On March 29, the workers received official dismissal notices from ELSI's management and within 2 days the Mayor of Palermo issued an order requisitioning the plant for a period of 6 months. According to the United States, the requisitioning of the plant had prevented the orderly liquidation process from being carried out and had caused ELSI's bankruptcy, resulting in substantial losses to ELSI's creditors and shareholders. For its part, Italy argued that ELSI had been incapable of carrying out the liquidation plan prior to the requisition, and that the requisition had had no significant effect upon ELSI's financial position because the company was already insolvent.

Following the requisition of the plant, ELSI's management appealed this action to the Mayor of Palermo and, when that had no result, made a further appeal to the Prefect of Palermo. There was no action on that appeal for 16 months. In a meeting in April 1968 with the President of the Sicilian region, Raytheon officials were informed that the region's "single goal [was] to keep the workers employed" and that the plan to liquidate ELSI could not be carried out, because "[n]obody in Italy" would purchase the company, regardless of price, while the plant was closed—not IRI (an Italian public corporation that dominated the domestic electronics and tele-

communications market), not the Sicilian region, and not private enterprise.⁴

Raytheon, realizing the near-futility of its liquidation plan under the circumstances, decided to file a petition for voluntary bankruptcy. The Palermo District Court issued a decree of bankruptcy on May 16, 1968. Despite several attempts by the court to auction off ELSI's plant and stock, no bids were received. Negotiations among Raytheon's counsel in Italy, the major creditors and Italian government officials likewise failed to arrive at any settlement. Finally, in July 1969, over the protest of Raytheon, Industria Elettronica Telecomunicazioni (ELTEL), a subsidiary of IRI, purchased ELSI's plant, stock and equipment at auction for substantially less than the computed book value of the assets immediately prior to the requisition.

Shortly after this sale, the Prefect of Palermo ruled in favor of ELSI's administrative appeal against the Mayor's requisition order, which had been pending for 16 months. In a decision rendered in August 1969, the Prefect held that although the Mayor had legal authority to issue a requisition order, the order in this instance was unjustified under Italian law. The Mayor's appeal of the Prefect's ruling was held inadmissible by the Italian President.

In the meantime, the trustee in bankruptcy had brought an action in the Italian courts against the Italian Minister of the Interior and the Mayor of Palermo for damages due to the decrease in value of the plant and equipment and the loss of use of the plant after the requisition. The lower court's initial ruling denying any damages was partially reversed by the Court of Appeal of Palermo. The Corte de cassazione (Supreme Court) subsequently confirmed the decision of the court of appeal. However, the only damages awarded were for the loss of use of the plant and its facilities. The court awarded no damages for the decrease in value of the plant, by far the largest component of the losses claimed.

When the bankruptcy proceedings concluded in November 1985, the trustee reported having realized approximately two-thirds of the minimum liquidation value that ELSI's management had calculated prior to the requisition. As a result, while secured and preferred creditors were paid in full, ELSI's unsecured creditors received less than 1 percent of their claims. Raytheon received nothing for its equity investment.

Before adjudicating the merits, the ICJ Chamber had to rule on the exhaustion of local remedies, on which basis Italy had objected to the admissibility of the Application. Contrary to the U.S. position, the Chamber determined that the exhaustion rule had to be considered in the absence of explicit language to the contrary in the FCN Treaty. Italy had not maintained that Raytheon had failed to exhaust local remedies until the presenta-

⁴ 1989 ICJ REP. at 34, para. 34. For the facts leading up to the requisition of the plant and relating to ELSI's financial situation, see *id.* at 23-32, paras. 12-29. IRI is the Italian government-owned corporation, Istituto per la Ricostruzione Industriale.

tion of the written pleadings in the instant proceedings. The Court held that this silence, "in somewhat desultory diplomatic exchanges," did not constitute an estoppel, as the United States argued, and that the local remedies rule was therefore applicable to the case.⁵ The Chamber stated further that, "for an international claim to be admissible, it is sufficient if the essence of the claim has been brought before the competent tribunals and pursued as far as permitted by local law and procedures, and without success." Raytheon and ELSI had satisfied this standard and, in the unanimous view of the Chamber, Italy had not met its burden to show the "existence of a remedy which was open to the United States stockholders and which they failed to employ."⁶

The complex mix of factual and legal issues that made up the core of the U.S. claim is encapsulated in the following questions: was the requisitioning of the plant the determining factor, the principal cause for the bankruptcy of ELSI and the failure of Raytheon's orderly liquidation plan, as the United States maintained; and did the requisitioning constitute a violation of Raytheon's rights under the FCN Treaty to "control and manage" ELSI? The United States claimed that Italy had violated Articles III and VII of the FCN Treaty, by allegedly interfering with the rights of Raytheon both to "control and manage" its Italian subsidiary and to "acquire, own and dispose of its immovable property and interest therein." The United States based these claims on the alleged causal link between the requisitioning of the plant and ELSI's bankruptcy. The other U.S. claims were ancillary to this core issue.⁷

A closely related issue, however, involved the conduct of the Mayor of Palermo, his administrative superior, the Prefect of Palermo, and other Italian central government and regional officials and publicly owned agencies. According to the United States, their conduct constituted a violation of Italy's duty to provide protection and due process of law to U.S. national corporations and Italian national corporations owned and controlled by U.S. nationals, and to refrain from arbitrary and discriminatory acts, as provided in Article V of the FCN Treaty and in Article I of the 1951 Supplement to the Treaty. Although the United States did not actually allege the existence of a conspiracy by the Italian authorities to acquire ELSI for less than its market value, the United States did argue that the conduct of the Italian authorities had brought about this result, thereby violating the standards of protection and due process provided for in those instruments.

The Chamber began its analysis on the merits by considering the key issue of the feasibility of the orderly liquidation plan and its importance to whether Italy had violated Article III(2) of the FCN Treaty by interfering with Raytheon's right to control and manage ELSI and dispose of its assets. The Chamber noted first that the prospects for the plan's success required careful study, given the Prefect's ruling that the requisition order was an unlawful excess of power.

⁵ *Id.* at 44, para. 54.

⁶ *Id.* at 46 and 47, paras. 59 and 63.

⁷ *Id.* at 48-49, para. 66; *see also id.* at 55-56, paras. 83-85.

The Court proceeded to point out that the successful implementation of orderly liquidation was dependent upon at least five factors outside the control of ELSI's management. These included willingness of ELSI's creditors to grant the company the necessary time to sell off its product lines and earn sufficient funds to pay its debts, acceptance of the plan by the banks even though they would receive assurance of payment of only 50 percent of their claims, funding by Raytheon of the severance pay due to the dismissed staff, agreement by the banks to permit small creditors to be paid in full, and prompt sale of the assets despite difficulties in gaining access to the plant and the prospect of action by the local authorities that would have lawfully prevented the closure and dismissals. The Chamber found that in view of these many uncertainties, "the feasibility at 31 March 1968 of a plan of orderly liquidation, an essential link in the chain of reasoning upon which the United States claim rests, has not been sufficiently established."⁸ As a result, the Court refused to hold that the requisition order deprived ELSI of its control and management.

This conclusion was further strengthened, in the Chamber's view, by the real possibility that ELSI was in fact already in a state of insolvency under Italian bankruptcy law at the time the company was requisitioned. Even if the company was not actually required under Italian law to declare bankruptcy (a matter of contention between the parties that the Chamber did not rule on), ELSI had been in a severe financial crisis for some time prior to the requisition order by the Mayor of Palermo. ELSI's management had made no secret of this situation either at the material time or during the proceedings before the Chamber.⁹ If ELSI was insolvent prior to the requisition, the shareholders no longer had any right of control and management that could be protected under the Treaty.

This finding with respect to Article III(2) of the FCN Treaty in effect also disposed of the U.S. claims under Article VII of the Treaty. That complicated provision guarantees the nationals of each state party the right to acquire, own and dispose of immovable property or interests therein in the territory of the other party on no less favorable terms than those enjoyed under the first state's law by nationals of the other. Claimant showed that U.S. state law permits public authorities to take immovable property of Italian nationals for a public use only upon the payment of compensation. Italy did not dispute this point regarding U.S. law. However, the Court held that "what really deprived Raytheon and Machlett, as shareholders, of their right to dispose of ELSI's real property, was not the requisition but the precarious financial state of ELSI, ultimately leading inescapably to bankruptcy."¹⁰

⁸ *Id.* at 58, para. 92; *see also id.* at 62, para. 101.

⁹ *Id.* at 60, para. 97. For an indication of ELSI's financial situation in the period just prior to the requisition, as expressed during the proceedings, see *Compte Rendu* of the oral proceedings, Doc. C3/CR89/2, at 58 (Feb. 14, 1989), in which a former manager of ELSI, John D. Clare, responded to a question during cross-examination by counsel for Italy, Keith Highet, by stating that "[w]e were belly up just before the requisition."

¹⁰ 1989 ICJ REP. at 81, para. 135.

The Court turned next to Italy's alleged violations of Article V of the Treaty and Article I of the Supplement relating to standards of protection and due process and the duty to refrain from arbitrary or discriminatory conduct. The Chamber acknowledged that the Mayor's requisition of the plant had been followed by its occupation by the workers. The Court of Appeal of Palermo termed this occupation an "unlawful" act and the United States maintained that it had led to the deterioration of the plant and impeded the efforts of the bankruptcy trustee to dispose of it.

The essential question, in the Chamber's view, was "whether the local law, either in its terms or its application, has treated United States nationals less well than Italian nationals."¹¹ The Court found that ELSI's management was "very much aware that the closure of the plant and dismissal of the work-force could not be expected to pass without disturbance."¹² Also, the Court held, the evidence did not show that the occupation had caused the deterioration of the plant; the Italian authorities had kept it in operation to some extent. For these reasons, and despite the finding of the Palermo appellate court, the Court refused to hold that U.S. nationals had been treated less well than Italian nationals would have been.

Nor could the 16 months taken by the Prefect of Palermo to rule on ELSI's administrative appeal be reasonably termed a denial of the international standard for procedural justice. The Court called this claim "exaggerated" and seemed particularly influenced by the 6-month limit on requisition orders and the procedure that allowed Raytheon and, later, the trustee in bankruptcy to obtain a decision from the Prefect 120 days after the appeal. Moreover, the fact that the Mayor's action was subsequently determined to be "without juridical cause" did not signify that it was arbitrary in the sense of Article I of the 1951 Supplement to the FCN Treaty. Arbitrariness was not the same as illegality; it "is not so much something opposed to a rule of law, as something opposed to the rule of law," an idea the Court had expressed in the *Asylum* case. The Mayor's action had been taken on the basis of legal authority, which he possessed under local law, and in full knowledge of the existence of the possibility of appeal. Nothing in the Mayor's conduct constituted, the Court concluded, "a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety."¹³

As for Article V(2) of the FCN Treaty, the Court held that the requisition and subsequent sale of assets at below market value did not constitute a taking of property without proper compensation. The Chamber examined the U.S. allegations that the Italian authorities had interfered with the bankruptcy proceedings before the Italian courts by "boycotting" the auctions and discouraging potential private bidders. These actions, the United

¹¹ *Id.* at 65, para. 108. The Court considered the protected "property" under the Treaty to be ELSI itself and, thus, it turned aside the Italian contention that the protection included only the Raytheon shares. *Id.* at 64, para. 106.

¹² *Id.* at 65, para. 108.

¹³ *Id.* at 76, para. 128 (quoting *Asylum (Colom. v. Peru)*, 1950 ICJ REP. 266, 284 (Judgment of Nov. 20)).

States maintained, led directly to ELTEL's acquiring ELSI's assets at a price far below the fair market value. The Chamber expressly noted the U.S. disavowal of any allegation of a conspiracy by the Italian governmental agencies to obtain control of ELSI for less than market price. In view of ELSI's financial state at the time of the requisition ("so precarious . . . that bankruptcy was inevitable") and the consequent decision to close the plant, there was no need to determine whether the FCN Treaty provision applied to Raytheon's shareholders or whether the Italian actions constituted a "disguised expropriation" or a taking "amounting ultimately to expropriation." The Court determined that "it is simply not possible to say that the ultimate result was the consequence of the acts or omissions of the Italian authorities."¹⁴

In his separate opinion, Judge Oda concurred with the Chamber's decision but singled out one element of its reasoning as an incorrect interpretation of existing law and the FCN Treaty: the distinction between ELSI, a corporate entity of Italian nationality, and the stockholders, Raytheon and its subsidiary, Machlett. Citing certain provisions of the *Barcelona Traction* Judgment relating to the company/stockholder distinction, Judge Oda concluded that under general international law, "[s]hareholders' material rights remain confined to the area of participation in the disposal of company profits and, in the event of liquidation, sharing in the residuary property of the company."¹⁵ This fundamental principle, according to Judge Oda, is reflected in the company law of most civil law jurisdictions and cannot be altered by treaty, unless done clearly and unequivocally. In Judge Oda's opinion, those provisions of the Treaty that the United States alleged had been violated, and that the Chamber had almost exclusively relied upon in its Judgment, concerned only the rights of ELSI, an Italian corporation, which are not protected under the Treaty. Those provisions provide a basis for adjudicating claims to the indirect rights of shareholders in Raytheon's position. However, in Judge Oda's view, there were certain other "extraordinary provisions" in the FCN Treaty, echoed in other FCN Treaties to which the United States is party, that did extend certain protections to companies like ELSI that were locally incorporated and operating in Italy under the control of foreign nationals. Those provisions afforded the United States a legal basis for claims against Italy pertaining to ELSI's rights, especially claims on the grounds of denial of justice. However, the United States had failed, in Judge Oda's opinion, to establish that ELSI had been denied justice in the Italian courts. Specifically, Raytheon had not invoked the FCN Treaty in the Italian courts and there was no showing of discrimination against ELSI in comparison to Italian or third-country corporations.

In his dissenting opinion, Judge Schwebel expressed agreement with several important elements of the Chamber's Judgment, particularly the hold-

¹⁴ *Id.* at 71, para. 119; see also *id.* at 71-77, paras. 120-30.

¹⁵ *Id.* at 84 (Oda, J., sep. op.) (quoting *Barcelona Traction Light & Power Co.* (Second Phase), 1970 ICJ REP. 3, 34-37, paras. 41-50 (Judgment of Feb. 5)).

ing on the local remedies rule, the interpretation of key elements of the FCN Treaty and the scope of protection afforded by it to shareholders owning and controlling a local subsidiary in the host country. The Treaty had been "largely interpreted to give [it] effect rather than to deprive [it] of effect." The Chamber had rejected the U.S. claims not, Judge Schwebel emphasized, because the Court had "found against the United States on the law of the Treaty . . . [but] on the practical and legal significance to be attached to the facts of the case."¹⁶

Judge Schwebel joined issue with the Chamber over two points: whether ELSI's orderly liquidation plan was still feasible at the time of the requisition, and whether ELSI was insolvent by the time of the order and obliged to petition for bankruptcy. The core of his position was that, absent the requisition order, ELSI would have realized much more for its assets even if at some point (possibly much later) a bankruptcy declaration became necessary.

Judge Schwebel began by referring to the *travaux préparatoires* of the Treaty, which, in his view, had received insufficient attention from the Chamber. This history tended to dispel arguments, particularly those of Judge Oda, that the Treaty and its Supplement do not provide a wide scope of protection for foreign shareholders in a locally organized company with the nationality of the host state. The parliamentary records of Italy and the congressional records of the U.S. Senate, provided by the parties in their written pleadings, led Judge Schwebel to conclude that

in the entire, lengthy, detailed and repeated consideration of the ratification of the Treaty and its Supplementary Agreement by Italy, and its apparently effortless consideration by the United States, no trace of support may be found for the interpretation that the manifold rights so assured to an American investor in Italy and an Italian investor in the United States were conditioned upon investment being made in a corporation of the investor's nationality.¹⁷

Judge Schwebel then indicated why he disagreed with the Chamber's key finding regarding the feasibility of Raytheon's orderly liquidation plan. The most important of several reasons was the attitude and conduct of various Italian officials, including the Prime Minister of Italy, the President of Sicily and Italian cabinet ministers. Despite their knowledge of ELSI's financial condition and Italian law, they had not found that ELSI either was obliged to petition for bankruptcy or was no longer legally entitled to operate. Further, Judge Schwebel pointed to Raytheon's willingness to provide cash for the orderly liquidation and the interest of the parent company in preventing ELSI's bankruptcy. Consequently, Judge Schwebel concluded that ELSI was not insolvent at the time of the requisition and that had the requisition not intervened, the liquidation plan would have had at least a reasonable prospect of success.

¹⁶ 1989 ICJ REP. at 95 (Schwebel, J., dissenting).

¹⁷ *Id.* at 100.

Although this was the principal rationale for his dissent, being the key issue in the Chamber's decision, Judge Schwebel also disagreed with the Chamber's ruling on the arbitrary nature of the requisition order of the Mayor of Palermo. Judge Schwebel emphasized that the Court of Appeal of Palermo had attached importance to the Prefect's finding that the requisition order had been "severe" and was a "typical case of excess of power"; the order had been at least partially motivated by press criticism and was "mainly" intended to show the Mayor's "willingness to intervene 'in one way or another'."¹⁸ Rhetorically, Judge Schwebel asked, "If a 'typical case of excess of power' does not connote a classic case of an arbitrary act, what does?"¹⁹ That the Mayor's decision was subject to appeal did not "render a measure otherwise arbitrary non-arbitrary."²⁰ Judge Schwebel meticulously identified the seven grounds for his conclusion that the order was "unreasonable and capricious and hence arbitrary."²¹

* * * *

This is an important decision in what is ostensibly a relatively unimportant case. The interests of a financially shaky Italian subsidiary of a U.S. corporation and damages totaling a mere \$12,679,000, plus interest, do not appear at first sight to be of major significance. However, there was considerably more at stake than might appear from a cursory examination of the Judgment. The United States maintains a substantial network of bilateral relations based on FCN and investment protection treaties with similar or identical provisions to those in the FCN Treaty with Italy. The U.S. interest in the provisions of this Treaty that protect U.S. shareholders that own and control foreign subsidiaries in host countries extends considerably beyond the fate of ELSI. Italy has obvious interests in not having its judicial and administrative conduct and procedures declared "substandard" or its political and administrative officials found guilty of interrelated action (some unlawful even in the eyes of Italian courts) to acquire a foreign corporation by means of a disguised takeover.

The Chamber succeeded in essentially reconciling the interests of both parties by means of a judicious and carefully reasoned decision. As Judge Schwebel pointed out, the decision rendered the relevant provisions of the Treaty effective (and, by analogy, those of similar treaties with other states), without condemning the Italian authorities or that country's judicial and administrative processes. Particularly valuable for future investment disputes is the Chamber's interpretation of the clauses of this and similar treaties that make it possible for the United States (and other similarly situated governments) to extend diplomatic protection to shareholders that

¹⁸ *Id.* at 113.

¹⁹ *Id.* at 114.

²⁰ *Id.* at 115 (emphasis deleted). Judge Schwebel's analysis draws extensively on the International Law Commission's proposals for codification of the law of state responsibility and related Commentary.

²¹ *Id.*

control local corporations. Likewise, the Chamber's restatement of the rules pertaining to the exhaustion of local remedies and the standards of protection to which a foreign investor is entitled will probably meet with approval from both capital-investing and capital-receiving states.

Another equally important aspect of this decision relates to what Shabtai Rosenne has termed the Court's function as part of the machinery of diplomacy. In the controversy that followed the Court's decision on jurisdiction and admissibility in the *Nicaragua* case, the United States canceled its acceptance of the Court's "compulsory" jurisdiction but made clear that it was willing to resort to the Court in "appropriate" situations.²² The *ELSI* case was clearly brought before a Chamber in the context of this policy. The Chamber's decision contains nothing to discourage the United States from making use of the Court and could well contribute to the continued and increased commitment of the United States to the Court as an institution.

TERRY D. GILL

*Institute of Public International Law
University of Utrecht*

European Communities—New Commercial Policy Instrument—judicial review of Commission decision—alleged Argentine violation of GATT

FÉDÉRATION DE L'INDUSTRIE DE L'HUILERIE DE LA CEE (FEDIOL) v. COMMISSION DES COMMUNAUTÉS EUROPÉENNES. Case No. 70/87.*
Court of Justice of the European Communities, June 22, 1989.

Petitioner, a trade association representing European Economic Community (EC) producers of soybean oil, sought to annul a 1986 decision¹ by the Commission of the European Communities refusing to examine Argentinean trade practices asserted to violate EC Council Regulation 2641/84, generally called the New Commercial Policy Instrument (Instrument).² The European Court of Justice rejected the Commission's arguments concerning inadmissibility of the appeal, thereby establishing judicial review of certain Commission actions pursuant to the Instrument, and *held*: (1) that the General Agreement on Tariffs and Trade (GATT) may be interpreted and applied in the context of the Instrument to determine whether a non-EC country's trade practices are illicit; and (2) that the action on the merits should be dismissed because the Argentinean actions were not violations

²² This intention was stated in the U.S. State Department notice of cancellation of acceptance of the Court's compulsory jurisdiction and decision to refer *ELSI* to a Chamber of the Court, note 3 *supra*.

* The original language of this decision is German. At the time this summary was prepared, the slip opinion was available in French, and it is on the French translation that the summary is based.

¹ Commission Decision (EEC) No. 2506/86 (Dec. 22, 1986) (unpub.).

² Council Regulation (EEC) No. 2641/84 (Sept. 17, 1984), 27 O.J. EUR. COMM. (No. L 252) 1 (1984).

of the GATT and, hence, not illicit commercial practices under the Instrument.

The stated aims of the New Commercial Policy Instrument are to provide the Commission with procedures for "responding to any illicit commercial practice with a view to removing the injury resulting therefrom," and "ensuring full exercise of the Community's rights with regard to the commercial practices of third countries."³ To these ends, the Instrument establishes procedures for member states and certain parties within the Community to submit complaints to the Commission regarding alleged "illicit commercial practices." The Instrument defines the latter as "any international trade practices attributable to third countries which are incompatible with international law or with the generally accepted rules."⁴ The Instrument provides for the Commission to review these complaints on the basis of specified criteria. If the Commission finds that "there is sufficient evidence to justify initiating an examination procedure and that it is necessary in the *interest* of the Community," the Commission is to initiate such a procedure.⁵ The Instrument contains no provision governing judicial review of decisions taken by the Commission under this procedure.

Fediol sought to annul the Commission's decision to deny initiation of an examination of two Argentinean trade practices: first, a differential tax regime under which Argentinean soybean exports were taxed at a higher rate than exports of processed soy products; and, second, the alleged imposition of quantitative restrictions on Argentinean soybean exports through a registration scheme and also periodic suspensions of exports. Fediol argued before the Court that these practices violated international law (the GATT) and were thus illicit, and were injurious to the Community's soybean oil industry.⁶

The Commission argued that Fediol's appeal was inadmissible. The Commission submitted that the Court's jurisdiction with respect to the Instrument is limited to review of infringements under Article 173(1) of the Treaty of Rome for violation of essential procedural requirements, manifest violation of Community law or serious misuse of power. That provision does not, under the Commission's interpretation, permit review of the Commission's decisions that are based on the "interest" of the Community. The Commission contended that it has the sole authority to define the Community's interest and that the Instrument grants the Commission broad discretionary power in carrying out this authority. Moreover, the Commission

³ *Id.*, Art. 1(a) and (b).

⁴ *Id.*, Art. 2(1).

⁵ *Id.*, Art. 6(1) (emphasis added).

⁶ Case 70/87, French slip op. at 5-6, paras. 6-8. Article 3 of the Instrument requires a complaint to contain "sufficient evidence of the existence of illicit commercial practices and the injury resulting therefrom." Fediol submitted that the Argentinean practices injured the Community's soybean oil industry by discouraging Argentinean soybean exports, by increasing the sales of Argentinean soybeans to Argentinean oil producers below world market prices, and by lowering the price of Argentinean-produced oil to a level less than that demanded by the European industry.

asserted, the Instrument requires it to take into account political considerations that are not reviewable by the Court.

The Court avoided directly confronting the Commission's position on admissibility. The Court divided decision making under the Instrument into a sequence of orderly steps: determining whether the complaint contains sufficient evidence to establish the existence of the practice; finding whether the practice in question is illicit; assessing whether the practice harms or may harm the Community's production; and, finally, evaluating whether it is in the Community's interest to open an examination procedure. The Court held that the Commission's decision dealt only with whether the questioned Argentine tax practice violated the GATT. The Commission had made no finding on the interest of the Community or on whether injury or potential injury would result to its production. Thus, the Court did not have to address the admissibility of an appeal from such findings.

In its second argument on admissibility, the Commission maintained that the Court has jurisdiction to review the Commission's interpretation of alleged violations of international law such as the GATT only if the legal provisions in question directly confer rights on individuals. The Court had held in *International Fruit* and other cases⁷ that GATT rules are insufficiently precise to confer such rights. The Court did not overrule these prior holdings but, rather, rejected the Commission's interpretation of their significance in the context of a challenge under the Instrument. It found that because the rules of the GATT form part of international law referred to in Article 2 of the Instrument, those rules may be interpreted and applied in determining whether a nation's trade practices are illicit. The Court also held that it was not precluded from interpreting the GATT in view of the dispute settlement provisions in its Article XXIII.⁸

On the merits, the Court ruled in favor of the Commission. The Court found that the Argentinean tax scheme violated none of the four specific GATT provisions relied on by the petitioner. The Court did not analyze petitioner's point about quantitative restrictions because Fediol had presented no grounds for contesting the Commission's decision that the complaint lacked sufficient evidence to establish the existence of such restrictions.

* * * *

The practical effect of the *Fediol* decision is to permit parties with standing under the New Commercial Policy Instrument to rely on GATT rules in

⁷ Slip op. at 9-10, paras. 18-19 (citing Joined Cases 21-24/72, *International Fruit Co. N.V. v. Produktshap voor Groenten en Fruit*, 1972 ECR 1219; and citing in particular Joined Cases 267-269/81, *Amministrazione delle Finanze dello Stato v. Societe Petrolifera Italiana S.p.A. (SPI)* and *S.p.A. Michelin (SAMI)*, 1983 ECR 801).

⁸ *Id.* at 11-12, para. 21 (relying on the Court's decision regarding dispute settlement procedures under the EEC-Portugal Free Trade Agreement, Case 104/81, *Hauptzollamt Mainz v. C.A. Kupferberg & Cie.*, 1982 ECR 3641).

contesting the trade practices of non-EC members. This holding does not make GATT rules directly applicable, but for EC businesses the effect is similar—providing a potential means to compel the Community to investigate and remedy third-country GATT violations.⁹

Within the Community, this decision is politically significant. It is a step toward the resolution of a conflict between EC businesses and the Commission regarding the exercise of control over the New Commercial Policy Instrument. Had the Court sustained the Commission's position, these business interests would have lacked any effective means to challenge failure by the Commission to act on a petition based on the Instrument alleging violations of the GATT and other international trade rules. With the Court's resolution of the admissibility questions against the Commission, EC business interests are more likely to be able to compel the Commission to investigate allegedly illicit commercial practices. For third countries, the result is also significant. The increased potential for judicial scrutiny of whether the Commission should initiate an examination procedure may mean that the Community will respond more sympathetically under the Instrument to complaints based on alleged third-country GATT violations and other illicit trade practices.

In *Fediol* the Court began to clarify the extent to which Article 173 permits review of actions by the Commission pursuant to the New Commercial Policy Instrument. Without specifying the part of Article 173 that served as its authority, the Court found reviewable the Commission's interpretation and application of international law in determining whether a practice is illicit. Further, the Court left open the possibility that it would also review findings of the Commission regarding the sufficiency of evidence necessary to establish an illicit practice.

The failure of the Commission to gain complete control over the application of the Instrument does not mean that business interests can confidently rely upon access to its remedies or to the Court's review of action by the Commission under the regulation. The Court did not decide to what extent, if any, it will review the inherently political decision of what is in the Community's interest. While this question was not squarely before it, given the absence of a Commission finding on this point, and could therefore be sidestepped, the Court seemed reluctant to touch upon this political issue. It is too early to predict the emergence of a "political question doctrine" within the scope of the Instrument, but such an evolution in the Court's rulings is certainly conceivable. That approach seems particularly likely since the imposition of countermeasures to combat an illicit commercial practice, provided for in Article 10 of the Instrument, requires yet a second determination of the Community's interest. The Court may prefer to avoid

⁹ See Meessen, *Europe en Route to 1992: The Completion of the Internal Market and Its Impact on Non-Europeans*, 23 INT'L LAW. 359, 368-370 (1989), for an analysis of the New Commercial Policy Instrument as a weapon in the European Community's arsenal of trade policy measures to be used against third states.

reviewing either "interest" determination since the Commission's findings in this regard will inevitably depend so heavily on only nonjuridical, political criteria.

ARTHUR E. APPLETON

Of the Maryland and District of Columbia Bars

Jurisdiction—Foreign Sovereign Immunities Act—commercial activity exception

AMERICA WEST AIRLINES, INC. v. GPA GROUP, LTD. 877 F.2d 793.
U.S. Court of Appeals, 9th Cir., June 12, 1989.

RUSH-PRESBYTERIAN-ST. LUKE'S MEDICAL CENTER v. HELLENIC REPUBLIC. 877 F.2d 574.
U.S. Court of Appeals, 7th Cir., June 14, 1989.

In these cases based upon common law causes of action, two United States courts of appeals determined that the commercial activity exception to sovereign immunity provided for in the Foreign Sovereign Immunities Act of 1976 (28 U.S.C. §§1330, 1602-1611 (1982)) (FSIA or the Act)¹ applies only to transactions that cause direct, substantial and foreseeable effects in the United States. The *Rush-Presbyterian* case also considered the standards for determining whether an activity is "governmental" or "commercial."

In *America West*, plaintiff, America West Airlines, Inc. (AWA), brought a suit for damages that allegedly occurred as a result of faulty engine maintenance by two defendant corporations owned by the Republic of Ireland, Aerlinter Eireann Teoranta and Airmotive Ireland, Ltd., a subsidiary of Aer Lingus, PLC, as well as by several other nongovernmental defendants. The district court granted the motion by Aerlinter and Airmotive to dismiss based upon lack of subject matter jurisdiction under the Act. The U.S. Court of Appeals for the Ninth Circuit (per Fletcher, J.) affirmed the district court and held: (1) that there was no nexus between the activities of the Republic of Ireland that occurred in the United States and those upon which the lawsuit was based, as required under the first clause of 28 U.S.C. §1605(a)(2); and (2) that the maintenance activities of Airmotive in Ireland did not have a substantial and foreseeable effect in the United States, as required under the third clause of 28 U.S.C. §1605(a)(2).

¹ The commercial activity exception to sovereign immunity, as relevant to these two cases, states:

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

(2) in which the action is based [1] upon a commercial activity carried on in the United States by the foreign state; or [2] upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or [3] upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

28 U.S.C. §1605 (1982).

On July 18, 1984, AWA signed a contract with GPA Leasing (NA) N.V.² for the purchase of a Boeing 737 to be refit with two freshly overhauled engines. Before delivery of the aircraft to AWA, one of the engines was overhauled by Airmotive. In November 1984, apparently this same engine was placed on another aircraft owned by AWA. Three weeks later, the engine stalled and caught fire in Omaha, Nebraska, after a takeoff. AWA sued Airmotive, Aerlinte,³ GPA Group, Ltd., and GPA Corporation for damages in excess of \$500,000 for the loss of the engine. With the apparent exception of GPA Group, all the parties, in separate motions, moved to dismiss the case. All of the motions were granted and AWA appealed.

The court of appeals initially noted that the FSIA was the only basis for jurisdiction asserted by AWA against Aerlinte and Airmotive. It was undisputed that Aerlinte and Aer Lingus, Airmotive's parent, were both wholly owned by the Republic of Ireland and therefore within the definition of a "foreign state" under section 1603(a) of the FSIA. As a result, unless the suit fell within an exception under the statute, both entities were entitled to immunity from suit in courts of the United States.⁴

The court first considered whether the exception in the first clause of section 1605(a)(2), for actions "based upon a commercial activity carried on in the United States by the foreign state," applied to the activities of the Irish companies. The court explained that for the exception to apply, there had to be a nexus between the activity of the defendant within the United States and the grievance that gave rise to the cause of action. The court further noted that "[t]he focus must be solely upon 'those *specific* acts that form the basis of the suit.'"⁵ The court determined that the requisite nexus did not exist between Aerlinte's passenger airline operations in the United States and the specific act of Airmotive's maintenance operations in Ireland that formed the basis for the suit; therefore, this exception to immunity did not apply.

² The court noted that the identities of the parties were in dispute. It specifically explained that AWA's contract was signed with GPA Leasing, a Netherlands Antilles corporation, but that AWA insisted that it had negotiated with GPA Corp., a Connecticut corporation. See 877 F.2d 793, 795 & n.1. The link between the two entities was that the person that signed the contract for GPA Leasing was also the President of GPA Corp. The court found no evidence that GPA Corp. was a party to the contract. Additionally, the court failed to explain the relationship between GPA Leasing and GPA Group, Ltd.

³ In another dispute over the identity of the parties, AWA alleged that both Airmotive and Aerlinte were subsidiaries of Aer Lingus, the national airline of Ireland. Airmotive, however, contended that Aerlinte is a completely separate entity from Aer Lingus. The court apparently accepted Airmotive's allegations as to this relationship. In any event, the court did not cite any facts that would explain Aerlinte's inclusion in the suit.

⁴ Section 1603(a) of the FSIA provides: "A 'foreign state', except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b)." Subsection (b) of that section includes within its scope foreign corporations wholly owned by the country in which they are incorporated. 28 U.S.C. §1603(a) and (b) (1982).

⁵ 877 F.2d at 797 (quoting *Joseph v. Office of the Consulate General*, 830 F.2d 1018, 1023 (9th Cir. 1987) (emphasis in original) (foreign government lease of building for consulate general is commercial activity), *cert. denied*, 108 S.Ct. 1077 (1988)).

The court then considered whether Aerlinte or Airmotive had engaged in commercial activities abroad that, in the words of the third clause of section 1605(a)(2), had caused a "direct effect" in the United States so as to divest the defendants of sovereign immunity. AWA had argued that the court should apply the test adopted by the Second Circuit in *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*,⁶ which had held that a direct financial loss suffered by a plaintiff U.S. corporation was sufficient to meet the "direct effect" test. AWA argued further that the financial loss standard had been approved by the Ninth Circuit in *Meadows v. Dominican Republic*.⁷ On the basis of these decisions, AWA asserted, the determinative fact should be that AWA had suffered financial injury as a direct result of the allegedly faulty maintenance performed by Airmotive.

The Ninth Circuit rejected AWA's arguments. In doing so, the court looked to the House Report⁸ on the FSIA to determine the meaning of "direct effect." With respect to the third clause, the Report stated that the exception would operate consistently with the principles found in section 18 of the *Restatement (Second) of the Foreign Relations Law of the United States* (1965). That section provides that jurisdiction could exist where:

(b)(i) the conduct and its effect are constituent elements of activity to which the rule applies; (ii) the effect within the territory is substantial; (iii) it occurs as a *direct and foreseeable result* of the conduct outside the territory; and (iv) the rule is not inconsistent with the principles of justice generally recognized by states that have reasonably developed legal systems.⁹

The court then stated that its review of the other case law that looked to the House Report and section 18 of the *Restatement* found that most courts have determined that the legislative intent was for "this clause to reach only conduct causing an effect that is 'substantial' and 'direct and foreseeable.'" ¹⁰ The court noted that the Second Circuit, in *Texas Trading*, had found the reference to section 18 in the House Report to be a non sequitur because the section discusses application of substantive American law abroad. By contrast, the FSIA, and section 1605(a)(2) in particular, establish

⁶ 647 F.2d 300 (2d Cir. 1981) (direct effect found where refusal to pay letters of credit issued by a U.S. bank and letters payable in United States), *cert. denied*, 454 U.S. 1148 (1982).

⁷ 817 F.2d 517 (9th Cir.) (direct effect found in breach of contract claim where plaintiffs, U.S. residents, could specify place of payment), *cert. denied*, 108 S.Ct. 486 (1987).

⁸ HOUSE COMM. ON THE JUDICIARY, JURISDICTION OF THE UNITED STATES COURTS IN SUITS AGAINST FOREIGN STATES, H.R. REP. NO. 1487, 94th Cong., 2d Sess. 19 (1976), reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS 6604, 6618.

⁹ 877 F.2d at 798 (quoting RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §18 (1965) (emphasis added by court)).

¹⁰ *Id.* (citing, inter alia, Gould, Inc. v. Pechiney Ugine Kuhlmann, 853 F.2d 445, 452-53 (6th Cir. 1988) (financial injury to U.S. corporation must be foreseeable, not merely fortuitous); Zernicek v. Brown & Root, Inc., 826 F.2d 415, 417-18 (5th Cir. 1987) (personal injury to U.S. citizen abroad, where citizen returns to United States, is not sufficiently direct), *cert. denied*, 108 S.Ct. 775 (1988); Transamerican S.S. Corp. v. Somali Democratic Republic, 767 F.2d 998, 1004 (D.C. Cir. 1985) (foreign detention of ship owned by U.S. national and bank transfers in United States meet direct effect test)).

principles of extraterritorial jurisdiction. This was determined to be the basis for the Second Circuit's rejection of the "substantial" and "foreseeable" requirements found in section 18 of the *Restatement*.¹¹

The court then addressed AWA's argument that, in the *Meadows* case, the Ninth Circuit explicitly or implicitly had adopted the *Texas Trading* reasoning. The court explained that, while the *Meadows* case unquestionably relied upon *Texas Trading*, it did not clearly reject the relevance of the House Report and its reference to section 18 of the *Restatement (Second)*. Judge Fletcher concluded that there were sufficient facts in the *Meadows* case (actual payment in the United States and foreseeability of such payment) to find that the effect in that case was "substantial" and "foreseeable" and the holding relied expressly on those facts.¹²

Applying a "substantial" and "foreseeable" effects test to the facts of this case, the Ninth Circuit found that there was no "direct effect." The court observed that it was not foreseeable for Airmotive that its maintenance activities within the Republic of Ireland, on an engine owned by GPA Group, would have an effect in the United States. Airmotive had submitted evidence, which AWA had not rebutted, to show that it was unaware, at the time of performing the services, that the engine would be used in the United States. Because the contacts in the United States were "purely fortuitous," the court found that the effect was not sufficiently direct as to deprive Airmotive of its sovereign immunity.¹³ The court therefore affirmed the district court's determination that there was no subject matter jurisdiction with respect to Aerlinte and Airmotive under 28 U.S.C. §1330(a).

In the second case, plaintiff, Rush-Presbyterian-St. Luke's Medical Center (Rush), brought suit against defendant, the Hellenic Republic, for monies allegedly owed plaintiff for kidney transplants performed on Greek nationals in plaintiff's hospital. The defendant had allegedly agreed to reimburse the hospital for these expenses. The U.S. District Court for the Northern District of Illinois denied defendant's motion to dismiss for lack of subject matter jurisdiction under the FSIA. The Court of Appeals for the Seventh Circuit (per Cudahy, J.) affirmed and *held*: (1) that the agreement by which the Hellenic Republic agreed to pay for the kidney transplants constituted commercial activity within the meaning of the FSIA, notwithstanding the preexisting constitutional duty of the Greek Government to provide medical services to its nationals; and (2) that the suit was "based upon" this commercial activity, which had a "direct effect" within the United States sufficient to vest the U.S. district court with subject matter jurisdiction over this cause of action under the FSIA.

¹¹ *Id.* (citing *Texas Trading*, 647 F.2d at 311 & n.32).

¹² The court cited two other cases that relied on the "substantial" and "foreseeable" effects test: *Zedan v. Kingdom of Saudi Arabia*, 849 F.2d 1511, 1515 (D.C. Cir. 1988) (effect is fortuitous where plaintiff, a U.S. citizen, works abroad, is unpaid, and returns to United States to sue), summarized in 82 AJIL 828 (1988); and *Berkovitz v. Islamic Republic of Iran*, 735 F.2d 329 (9th Cir.), cert. denied, 469 U.S. 1035 (1984).

¹³ 877 F.2d at 800.

In December 1983, the Hellenic Republic entered into a contract with Dr. Frederick Merkel, June Bajor and the Chicago Regional Organ and Tissue Bank under which the parties agreed that the Greek Government would send Greek nationals in need of kidney transplants to Chicago for such services. The agreement, negotiated in Greece and signed in the United States, included a nonbinding cost estimate and specified that the bills were to be submitted to the Greek consulate in Chicago. The Greek Government agreed to maintain a Chicago bank account from which it would pay for the services provided under the contract.

Rush performed several kidney transplants governed by the contract and submitted the bills for payment through the organ bank. The Greek Government underpaid the bills, alleging that they substantially exceeded the anticipated costs and were not properly documented. Rush sued for the difference under contract and *quantum meruit* theories.¹⁴

In denying the Greek Government's motion to dismiss the complaint, the district court found that the making of the contract constituted "commercial activity" and that there was a sufficient connection to the United States to support both personal and subject matter jurisdiction. The district court therefore held that jurisdiction was proper under the FSIA.¹⁵

On appeal, the Seventh Circuit first considered whether the activity that formed the basis of the suit constituted "commercial activity" within the meaning of the FSIA. To make that determination, the court looked to the FSIA for a definition of commercial activity.¹⁶ The court found the definition itself "not especially helpful, and . . . in fact somewhat circular." However, it did obtain some guidance from the second sentence, which directs courts to look to the "nature" of the subject transaction rather than its "purpose." The court accepted that it may be difficult to separate the two, but noted that the FSIA required courts to "confine any consideration of purpose as closely as we can, considering that purpose *only so far as is absolutely necessary* to define the nature of the act in question."¹⁷

The court also noted that another important test used to determine the nature of a foreign state's action is whether a private person could engage in similar action. If so, the action is presumptively commercial activity and should be so regarded, absent special facts showing the activity to be nonetheless governmental. If not, the action would be regarded as governmental and the foreign state would retain its sovereign immunity.

¹⁴ The hospital joined Dr. Merkel, Bajor and the organ bank as involuntary parties-plaintiff. Another hospital, South Chicago Community Hospital, intervened, asserting the same causes of action.

¹⁵ 690 F.Supp. 682 (N.D. Ill. 1988).

¹⁶ That definition states: "A 'commercial activity' means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 877 F.2d 574, 577 (quoting 28 U.S.C. §1603(d)).

¹⁷ *Id.* at 577-78 (quoting *Segni v. Commercial Office of Spain*, 835 F.2d 160, 164 (7th Cir. 1987) (emphasis added by *Rush-Presbyterian* court)).

Applying these standards to the facts alleged by the parties, the Seventh Circuit found that the argument of the Greek Government—that the agreement was simply a small part of its “sovereign and legal obligation to provide medical and health care benefits to its citizens”—concerned the purpose of the agreement, rather than its nature.¹⁸ The court instead characterized the issue as whether private parties with a preexisting duty to provide health care for third parties enter into agreements to reimburse health care providers for such services. The court found that such agreements regularly exist and that the basis of the obligation was irrelevant for the purpose of determining the nature of the agreement.

The court also dismissed other arguments put forth by the Greek Government. First, it was not persuaded that the absence of a profit motive prevented the transaction from being considered commercial; and it rejected the argument that only the Government, and no private insurer, could afford to insure an entire nation. In this connection, the court stated its determination that the focus should be on the nature of the transaction, rather than its scope.¹⁹ The nature of this transaction was simply the reimbursement of a health care provider for services to a third party.

Finally, the court rejected the Greek Government’s argument that no private insurer could levy taxes on an entire population to finance such an insurance scheme or enforce an exclusive administrative remedy to resolve disputes arising under the scheme. The court stated that the source of the funds used to pay for a transaction is irrelevant to its nature. Also, the administrative requirements of the insurance scheme were considered to be ancillary to the transaction at issue in the case.

The court then turned to the second part of its analysis: whether the suit was “‘based upon’ commercial activity bearing a substantial relationship to the United States.”²⁰ The court did not address whether the cause of action was based upon commercial activity that took place in the United States, as provided under the first clause of section 1605(a)(2). Instead, the court analyzed the issue under the third clause of section 1605(a)(2), as “commercial activity” that caused a “direct effect” in the United States.

The court briefly explained that the test it would apply was whether the effects in the United States were substantial, direct and foreseeable. In doing so, the court pointed out that the effects should not be “purely fortuitous” and that financial injury alone might not be sufficient to divest a foreign state of its sovereign immunity, absent some “legally significant act” in the United States.²¹

¹⁸ *Id.* at 580 (quoting, presumably, Brief of the Hellenic Republic).

¹⁹ For example, the court noted that a government order for “a million pairs of army boots, or a million tons of cement,” is simply an order for boots or cement. The size of the transaction does not affect its nature. *Id.*

²⁰ *Id.* at 581.

²¹ *Id.* at 582 (citing, *inter alia*, *Gregorian v. Izvestia*, 871 F.2d 1515, 1527 (9th Cir. 1989) (contract negotiation in United States and agreement that payments to be made in United States would satisfy legally significant act requirement); *Zedan*, *supra* note 12; *Gould*, *supra* note 10; and *Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1111 (5th Cir. 1985) (long-term course of business with American sufficient to make effect in United States foreseeable)).

The court then noted some of the relevant facts alleged by the parties: (1) the contract was executed in the United States; (2) financial injury was caused to American persons; (3) the services contracted for (kidney transplant operations) were performed in the United States; (4) claims for reimbursement were to be submitted to a Greek consulate in the United States; and (5) payment was to be made from an account kept in the United States specifically for purposes of the contract. The court found that, in the aggregate, these factors were sufficient to support subject matter jurisdiction under the third clause of section 1605(a)(2).

Finally, the court addressed the Greek Government's argument that Rush's *quantum meruit* claims were not "based upon" the contract that formed the basis of the commercial activity. The court noted that *quantum meruit* relief may be available without reference to an underlying contract. In this case, the Seventh Circuit determined that the *quantum meruit* claims were sufficiently related to the execution and performance of the contract to satisfy the nexus requirement and support jurisdiction under the FSIA.

* * * *

In both *America West* and *Rush-Presbyterian*, the courts addressed issues regarding the application of the third clause of FSIA section 1605(a)(2), providing an exception to sovereign immunity for causes of action "based upon" "commercial activity" outside of the United States with a "direct effect" within the United States. In so doing, they touched upon three important standards that, if satisfied, result in denial of the sovereign immunity otherwise accorded by the FSIA.

First, there must be "commercial activity." *Rush-Presbyterian* applied as a basic test for "commercial activity" whether a private person could perform a similar transaction. In making that determination, the court noted that it is necessary to examine the *nature* of the transaction rather than its purpose or scope. Interestingly, the court determined the nature of the transaction by looking at U.S. practice regarding similar transactions. The court rejected the argument that reimbursement of a health care provider for services to a third party may be an inherently governmental function in Greece because of a different political, social or economic system; this point, in the court's view, was relevant solely to the "purpose" of the transaction.

Second, assuming that there is "commercial activity," the cause of action will satisfy the third clause of section 1605(a)(2) only if it is "based upon" this activity. To be "based upon" such activity, the pending cause of action should have a logical nexus to the "commercial activity" involved. *America West* explained that one should look to the "specific acts" that formed the basis of the "commercial activity" and the cause of action to determine whether the required nexus exists.²² *Rush-Presbyterian* provided an example of where such a nexus existed in its discussion of the *quantum meruit* claims. There, the court noted that those claims, even though not relying on the contract per se, were sufficiently related to the execution and performance of the contract to satisfy the nexus requirement.

²² 877 F.2d at 797 (citation omitted).

legislation infringed various rights accorded to them by the EEC Treaty¹ that are enforceable in national courts. These included the right not to be discriminated against on grounds of nationality (Article 7), the right of establishment (Article 52) and the right to invest in companies organized in other EEC states (Article 221). After referring these substantive questions to the Court of Justice of the European Communities (ECJ) under Article 177 of the EEC Treaty, the divisional court considered the appellants' request for interim relief to protect their disputed Community rights during the expected 2-year wait for an ECJ decision. Appellants maintained that they would suffer irreparable damage from the application of the British law and regulations while awaiting the ruling. The divisional court granted an interim injunction suspending the operation of the 1988 Act and the regulations, but the Court of Appeal reversed and the House of Lords (per Bridge, L.J.) affirmed unanimously and *held*: (1) that English law does not enable courts to grant interim relief that would result in suspending the operation of a clear English statute on the ground that the legislation allegedly infringes Community law rights; (2) that, in any event, English law does not permit English courts to issue interim injunctions against the Crown; and (3) that, in light of earlier ECJ case law, it was not open to the House of Lords to determine whether Community law either empowered or obliged an English court to grant interim relief to protect the appellants, and that the House should therefore seek a further preliminary ruling from the ECJ on this point.

Appellants are companies incorporated under the law of the United Kingdom, together with their directors and shareholders, who are mostly Spanish nationals. The appellants own 95 fishing vessels that had been registered as British fishing vessels under the Merchant Shipping Act 1894. Some of these vessels were originally of Spanish registry and had been registered in the United Kingdom since 1980; others were always of UK registry and were acquired by appellants in the period prior to Spain's entry into the EEC in 1986. The Merchant Shipping Act 1988 introduced a registry for which fishing vessels were eligible only if owned by UK companies that could show both beneficial ownership of 75 percent of their shares by British citizens resident and domiciled in the United Kingdom and management, direction and control of the vessel from the United Kingdom. Appellants were unable to comply with these requirements and were therefore not permitted, after the new Act became fully effective, to keep the British flag or to fish against the United Kingdom's quota of stock under the EEC Common Fisheries Policy. Nor could the vessels resume the Spanish flag and fish against the Spanish EEC quota. As a result, appellants risked having to keep their vessels inactive and to release their employees while the ECJ considered the reference under Article 177.²

¹ Treaty Establishing the European Economic Community, Mar. 25, 1957, 1973 Gr. Brit. TS No. 1, pt. II (Cmd. 5179 II), 298 UNTS 11 [hereinafter EEC Treaty].

² Neither side appealed from the reference to the ECJ of the consistency of this UK legislation with overriding EEC law.

The House of Lords noted that no English court had ever entertained a claim for an interim order suspending the application of an Act of Parliament in the circumstances in which appellants sought, and the divisional court had granted, such relief. Appellants observed that in other interlocutory proceedings English courts had refrained from enforcing disputed English legislation when a party before them claimed to have had arguable Community rights.³

The House of Lords did not accept this argument and found that here the terms of the Merchant Shipping Act were clear and required no assistance from the Court for their enforcement. The Court distinguished the prior interim relief cases, which had concerned British legislation whose meaning was ambiguous or involved disputed factual issues relating to the applicability of the statute.⁴ The House of Lords held that if the disputed UK statute is clear and self-executing, as was the 1988 Act, English law binds the courts to observe the presumption that an Act of Parliament is compatible with Community law until declared invalid.

Second, the Court upheld the contention of the respondent that, in any event, no English court could issue an interim injunction against the Crown. The appellants contended that the House of Lords should follow a purposive approach when construing section 31 of the Supreme Court Act 1981, so as to derive from that legislation a power to grant interim relief against the Crown in the special circumstances of this case relating to compliance with the EEC Treaty.⁵ However, the Court adopted a literal reading of section 31 and, in addition, relied heavily on the historical development of remedies against the Crown to conclude that English law did not permit an interim injunction to be granted against the Crown.

Finally, the House of Lords considered whether Community law required national courts to give effect to disputed Community rights by granting interim relief in the present circumstances. In considering this question, the Court highlighted two important considerations. First, the procedure in the national courts of EEC member states is governed by national law in the absence of any Community rules.⁶ Second, national law should not infringe

³ *Polydor Ltd. v. Harlequin Record Shops Ltd.*, [1980] 2 Common Mkt. L.R. 413, 426 (C.A.).

⁴ Lord Bridge devoted considerable attention to the case of *Hoffmann-La Roche v. Secretary of State for Trade & Industry*, 1975 App. Cas. 295. Although the House of Lords in *Hoffmann-La Roche* had determined that the lower court had properly granted an injunction enforcing a statutory order before a challenge to the validity of the order was decided, the opinions of several Law Lords had stressed that courts need not in all circumstances grant interim enforcement orders while the validity of the underlying legislation is in dispute. Lord Bridge accepted this proposition but found it inapplicable to the situation in *Factortame*.

⁵ Section 31 of the Superior Court Act of 1981 had been construed in a prior Court of Appeal case to permit injunctions against the Crown in proceedings on an application for judicial review. *Reg. v. Licensing Authority Established under Medicines Act 1968, Ex parte Smith Kline & French Laboratories Ltd.* (No. 2), [1989] 2 W.L.R. 378, [1989] 2 All E.R. 113.

⁶ See Bridge, *Procedural Aspects of the Enforcement of European Community Law through the Legal Systems of the Member States*, 9 EUR. L. REV. 28 (1984) ("While the Community constitutes a new and independent legal order, it is also in a sense a dependent legal order in that it relies for its enforcement on the legal orders of the Member States").

upon the Community law principle of effectiveness, i.e., national law cannot make it "impossible in practice to exercise rights which the national courts have a duty to protect."⁷

Appellants contended that there was no justification for withholding interim relief in circumstances where final relief would indisputably be available if their position were upheld. They pointed out that directly effective Community rights are accorded to citizens of member states by the EEC Treaty and thus are created by the Treaty rather than by a declaration by the ECJ that such rights exist. Interim relief by its nature should protect rights that exist even if they have not yet been definitively declared by a court. Accordingly, national courts should not decline to protect disputed Community rights merely because an individual's claim to such rights may subsequently be declared unfounded.

Respondents replied that the authorities on which the appellants relied had all dealt with Community rights that the ECJ had already declared. In a 1979 decision, that Court had held that Community law included a presumption that Community legislation is valid until declared invalid by the ECJ.⁸ By analogy, the presumption that UK legislation should be assumed to be valid until declared invalid by the UK courts would not appear to be inconsistent with Community law. By contrast, in a 1988 ruling, the ECJ had stated in dictum that for the purpose of acting on a request for interim relief, a national court may have to consider Community acts invalid so as to protect an applicant's Community rights.⁹

The House of Lords concluded that in light of the conflicting precedents, it could not itself resolve the issue of interim relief, as it was obliged by Article 177 of the EEC Treaty to seek a preliminary ruling from the ECJ on the question. It therefore asked the Court whether in the circumstances of this case, Community law obliged or empowered national courts to grant interim relief to protect disputed Community rights. Further, assuming that the national courts could grant such a remedy but had no obligation to do so, the ECJ was requested to specify the criteria to be applied in deciding whether to allow such interim protection.

On October 10, 1989, the ECJ, acting upon an application by the European Commission, issued an interim order to the United Kingdom to suspend the British nationality requirements of the 1988 Act pending an ECJ ruling on the consistency of those provisions with the EEC Treaty.¹⁰ The Commission did not ask the ECJ to provide interim relief concerning the residence and domicile provisions of the statute. Moreover, the ECJ's interim ruling referred to the latter requirements as "sufficient to ensure the existence of . . . a [genuine] link" between the United Kingdom and vessels

⁷ Rewe-Zentralfinanz e.G. v. Landwirtschaftskammer für das Saarland, Case 33/76, 1976 ECR 1989; Comet B.V. v. Produktschap voor Siergewassen, Case 45/76, 1976 ECR 2043. See also North, *Enforcing Community Rights in the English Courts*, 50 MOD. L. REV. 881 (1987).

⁸ Granaria B.V. v. Hoofdproduktschap voor Akkerbouwprodukten, Case 101/78, 1979 ECR 623.

⁹ Foto-Frost (Firma) v. Hauptzollamt Lübeck-Ost, Case 314/85, [1988] 3 Common Mkt. L.R. 57.

¹⁰ E.C. Commission v. United Kingdom, Case 246/89, slip op. (ECJ Oct. 10, 1989).

fishing under the British quota.¹¹ According to press reports, the ECJ's interim ruling will have the effect of permitting approximately ten of the Spanish-owned British-registered vessels to recommence fishing immediately.¹²

* * * *

The principal significance of the decision lies in the readiness of the House of Lords not only to reaffirm that it must defer to Community law if the ECJ holds the substantive UK law to be inconsistent with it,¹³ but also to defer to the ECJ to determine the appropriate English interim remedies. The House of Lords acknowledged that it had to ask the ECJ whether English courts are obliged as a matter of overriding Community law to grant or, at least, consider granting interim injunctions against the implementation of statutes of Parliament. This action may have been prompted in part by the recent decision of the Court of Appeal in *Bourgoin S.A. v. Minister of Agriculture*,¹⁴ which highlighted that in the absence of an alleged abuse of power by a minister, it is virtually impossible for an individual to claim damages against a UK government department for any loss due to infringement of directly effective Community rights.

Their Lordships in *Factortame* would have appreciated the urgent need for the law on interim relief to be clarified. So long as *Bourgoin* remains the leading authority, litigants in the same situation as the appellants will find that their Community rights are not protected and will be unable to claim damages for any loss suffered. Moreover, as they will be denied interim protection, a declaration by the ECJ, 2 years after a reference under Article 177 is made, that their Community rights exist may well amount to a nullity for them if they were forced to declare themselves insolvent months before.

¹¹ *Id.*, para. 39.

¹² *Fin. Times* (London), Oct. 12, 1989, at 40, col. 1.

¹³ The judges in the lower courts also reaffirmed this principle. Neill, L.J., stated in the divisional ruling that "the High Court now has a duty to take account of and give effect to EEC law and where there is a conflict to prefer the Community to national law." [1989] 2 Common Mkt. L.R. 353, 373.

In the Court of Appeal, Bingham, L.J., explained that if the answer given by the ECJ on the first preliminary ruling is favorable to the appellants, the divisional court will be obliged to uphold the Community rights "even though the 1988 Act had not been repealed and even though its decision involves dispensing with (or disapplying) express provisions of the statute." *Id.* at 396.

Lord Donaldson, M.R., expressed annoyance at the difficult position he often found himself in and said that "it would render a service to the nation if Parliament moved slightly more in the direction of Community law." *Id.*

¹⁴ 1986 Q.B. 716, [1985] 3 All E.R. 585 (denying French turkey producers the right to claim damages for losses allegedly suffered as a result of the Minister of Agriculture's refusal to grant an import licence in time to permit shipment of turkeys to the United Kingdom for the Christmas market). According to press reports, the Government ultimately settled the case for approximately £3 million. There was a strong dissent by Lord Justice Oliver, who argued that Article 30 accorded each person the individual right to carry on the business of importing goods free from quantitative restrictions. Furthermore, Lord Justice Oliver concluded that since Community law requires that individual Community rights be protected to the same extent as domestic rights of a similar nature, infringement of Article 30 should enable individuals to claim damages.

Indeed, this seems to be the position of the appellants who are unable to fish (i.e., those not benefiting from the ECJ's interim relief).

As to the issue now pending before the ECJ—whether Community law requires UK courts to grant or consider granting interim relief in the circumstances of this case—several features of Community law will be crucial to the outcome. First, Articles 185 and 186 of the EEC Treaty enable individuals to obtain interim relief from the ECJ, but only if they are a party to the case before it.¹⁵ Individuals cannot challenge the legality of the acts of member states before the ECJ; they are restricted to using national courts and national rules of procedure (in the absence of any relevant Community rules) when seeking final judgments against a member state. It would therefore seem appropriate for Community law to require the courts of member states to entertain requests for interim, as well as final, judgments against statutes in the *Factortame* situation.

Second, Article 177 obliges only the highest court of a member state to request a preliminary ruling from the ECJ on a question of Community law when it is unclear. All other national courts can choose whether to refer or not. If they choose not to refer, then they are entitled to make a final ruling for their court on the point of Community law. If they can make such a final ruling on Community law, it seems reasonable to ensure that these same courts are under a duty to consider whether to make an interim ruling pending an authoritative ECJ ruling on the point at issue.

Finally, as mentioned, UK courts will be incapable of giving effective protection to some Community rights if interim relief is not available to plaintiffs when litigation is often the only means to establish or preserve their rights. Thus, on occasion, the final determination of the ECJ may be a nullity as far as individual appellants are concerned because of the time spent waiting for it. Such an outcome cannot be readily reconciled with the comity-based principle of abstention that is implicit in placing obligations on all courts of final jurisdiction to refer disputed questions of Community law to the ECJ.

CLAIRE FRANCIS
Kings College
University of London

GATT DISPUTE SETTLEMENT PANEL

International trade—national treatment—application of GATT to quasi-judicial procedures—exception for necessary enforcement measures

UNITED STATES—SECTION 337 OF THE TARIFF ACT OF 1930.
No. L/6439.

GATT dispute settlement panel report, Jan. 16, 1989.

The European Economic Community (EEC) requested that the Council of the General Agreement on Tariffs and Trade (GATT) establish a panel

¹⁵ See Cripps, *European "Rights", Invalid Actions and Denial of Damages*, 1986 CAMBRIDGE L.J. 165. See also *Garden Cottage Foods Ltd. v. Milk Marketing Board*, [1983] 2 All E.R. 770, 1984 App. Cas. 130, *rev'd on other grounds*, [1983] 2 All E.R. 770.

under GATT Article XXIII(2) to consider the application of section 337 of the United States Tariff Act of 1930 (19 U.S.C. §1337 (1982 & Supp. V 1988)).¹ The Community sought a finding that the procedures applied under section 337 in patent-based cases² were inconsistent with the GATT obligation to accord national treatment to imported goods and thus constituted *prima facie* nullification or impairment of benefits accruing to the Community under the GATT. The panel established under the authority of the Council *found*: (1) that certain aspects of section 337 procedure accord less favorable treatment to imported goods than is accorded to goods of domestic origin by the comparable procedures of patent litigation in the federal district courts, and are therefore inconsistent with the national treatment obligation of GATT Article III(4); and (2) that these instances of less favorable treatment cannot in many respects be justified as "necessary" under the exception for enforcement measures in GATT Article XX(d). The panel recommended that the GATT contracting parties ask the United States to bring its procedures into conformity with the General Agreement.

This dispute grew out of a section 337 proceeding before the U.S. International Trade Commission (ITC), in which E. I. du Pont de Nemours and Company (Du Pont) sought an order excluding from importation into the United States certain aramid fibers produced abroad by Akzo N.V. (Akzo) by means of a process for which Du Pont had received a U.S. patent. The ITC held in 1985 that Du Pont's process patent was valid and infringed and that the other criteria for relief under section 337 were satisfied. It issued a limited exclusion order, prohibiting the importation of fibers manufactured by Akzo and related entities by means of the patented process during the remaining life of the patent.³ The order was not disapproved by the President under section 337 and was upheld in the courts.⁴

Akzo then sought the intervention of the EEC under its New Commercial Policy Instrument, adopted in 1984.⁵ Following consultations with the United States, the Community requested the establishment of a GATT panel in July 1987. The United States initially objected to the request, but in October 1987, with U.S. acquiescence, the Council agreed to constitute a panel to examine the EEC complaint "in light of the relevant GATT provisions." Ironically, in the course of the panel's deliberations, Du Pont and Akzo settled their private dispute. The Community accordingly withdrew

¹ In addition to §337 itself, the panel considered the related §337a, 19 U.S.C. §1337a (1982), *repealed by* Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, §1342, 102 Stat. 1215, which extended the application of §337 to imported products produced abroad by means of a process patented in the United States. References below to §337 should be understood to include §337a. Section 337 was extensively amended by the 1988 Act, *supra*, §§1214(h)(3), 1342, 102 Stat. 1157, 1212. The findings of the panel, however, are limited to §337 as it stood in October 1987, the date the panel was established.

² The Community expressly refrained from challenging the application of §337 procedures in nonpatent investigations.

³ In the Matter of Certain Aramid Fiber, No. 337-TA-194, U.S. ITC Pub. No. 1824, March 1986, 50 Fed. Reg. 30,246 (final determination), 49,776 (exclusion order) (1985).

⁴ *Akzo N.V. v. International Trade Comm'n*, 808 F.2d 1471 (Fed. Cir. 1986), *cert. denied*, 107 S.Ct. 2490 (1987).

⁵ Council Regulation (EEC) No. 2641/84, 27 O.J. EUR. COMM. (No. L 252) 1 (1984).

its request that the panel consider the specific application of section 337 to Akzo, and the panel thereafter considered the application of section 337 in general.

The first phase of the case concerned the application of the national treatment standard set out in GATT Article III(4). The panel initially ruled that the procedures of section 337 could be examined for consistency with Article III(4). The United States had argued that, as measures designed to enforce substantive patent law, section 337 procedures should be subject to review only under Article XX(d), which excepts such enforcement measures from all other GATT obligations provided the conditions of the exception are met. The panel reasoned; however, that as an exceptions provision, Article XX(d) logically applies only to measures that are inconsistent with another provision of the General Agreement. Section 337 should therefore be examined first under Article III(4); if any inconsistencies were found, the panel would consider their justification under Article XX(d).

The panel also rejected the U.S. argument that only substantive laws, not adjudicative procedures or enforcement measures, could be considered as laws "affecting" the sale of imported goods for purposes of Article III(4). It found no support for that position in the text or its drafting history; it did find support for its broader reading in a 1958 panel decision.⁶ The panel also reasoned that the U.S. position would permit a state to escape the national treatment standard by implementing facially nondiscriminatory laws through discriminatory enforcement procedures, which would defeat the overall purpose of Article III: to prevent the use of internal measures as protectionist devices.

The panel next set out its understanding of the crucial standard in Article III(4)—that a contracting party must accord imported products "treatment no less favorable" than that accorded domestic products in the application of internal law. This standard calls for "effective equality of opportunities." The mere fact that the same or different legal provisions are applied is not conclusive; the inquiry must be whether the procedures in question result in less favorable treatment for imports. The panel faced a sharp conflict between the parties, however, over the nature of that inquiry.

The United States argued that the inquiry could only be meaningful if the panel looked at section 337 as an integrated system, weighing section 337 procedures that disadvantaged respondents (discussed below), as well as those that favored respondents. (Examples of advantages not available to defendants in patent infringement cases in federal court are the requirement that complainants demonstrate substantial injury to an efficiently and economically operated industry, the absence of monetary damages and the possibility that ITC orders can be modified by the President on public interest grounds.) This overall inquiry could only be accomplished, the United States maintained, by looking at the pattern of outcomes in past section 337 proceedings. The EEC took the position that each individual

⁶ Italian Discrimination Against Imported Agricultural Machinery, GATT, BASIC INSTRUMENTS AND SELECTED DOCUMENTS, 7th Supp. 60 (1958).

rule or procedure must accord imported products no less favorable treatment, and that there was no basis for balancing different procedures against one another. On this important issue, the panel sided with the Community. It ruled that the Article III inquiry should focus on "Section 337 in itself" and its potential impact, not on the outcome of past cases. Further, elements of more favorable treatment would only be relevant if they operated in an individual case to offset elements of less favorable treatment for the same imported product.

After disposing of these threshold issues, the panel examined the specific section 337 procedures alleged by the EEC to treat imports less favorably than domestic goods. Most fundamentally, the panel found an inconsistency with Article III(4) in the availability of a choice for U.S. patent holders faced with allegedly infringing imports between the differing procedures of section 337 and litigation in federal court, while patent holders faced with allegedly infringing domestic products have recourse only to litigation. The patent holder can select section 337 when those elements of its procedure less favorable to imports are likely to be significant, and litigation when those more favorable to imports are likely to play a role. Similarly, the panel found the possibility, however small, that both proceedings might be pursued simultaneously to be inherently inconsistent with Article III(4). The panel also concluded that the following elements of section 337 procedure, compared to the equivalent procedures in federal court, accorded less favorable treatment to imports: the short and fixed time limits for various stages of the section 337 proceeding, which could prevent respondents from adequately preparing their cases; the inadmissibility of related or unrelated counterclaims; the availability of general *in rem* ITC exclusion orders applicable to products produced by persons not party to the proceeding; and the automatic enforcement of both general and limited *in rem* exclusion orders by the U.S. Customs Service.

In the second phase of the case, the panel considered the U.S. argument that any inconsistencies between section 337 procedures and Article III were justified under GATT Article XX(d), a "general exception" from the rules of the General Agreement for measures designed to enforce the substantive laws of a contracting party, including its patent laws. Three conditions must be met to qualify for the Article XX(d) exception: (1) the underlying substantive law must not be inconsistent with the General Agreement; (2) the measures must be "necessary to secure compliance" with the underlying law; and (3) the measures must not be a means of unjustifiable discrimination or a disguised restriction on international trade. The Community stipulated to the first condition, and did not make a serious argument as to the third. This phase of the case therefore turned on whether the offending section 337 procedures could be seen as "necessary."

The parties asserted fundamentally different views on the meaning of this standard. The EEC argued that an element of less favorable treatment should only be seen as "necessary" if there are objective reasons that identical treatment is not possible and if the measure in question discriminates against imports to the smallest degree possible. The United States took the

position that such a narrower test was inconsistent with the purpose of Article XX(d) broadly to exempt enforcement measures and would lead to constant disputes over degrees of trade restrictiveness. The United States argued for a broader test: whether a measure served to prevent circumvention of the underlying substantive law, taking into account the need for flexibility in the design of enforcement measures.

The panel ruled, in line with the EEC position, that a measure inconsistent with another GATT rule cannot be considered "necessary" for purposes of Article XX(d) if a GATT-consistent measure is available and a contracting party could reasonably be expected to employ it. Even if no GATT-consistent measure is available, a contracting party must choose among the reasonably available measures the one that is least inconsistent with other GATT rules. The panel took care to note that this ruling implied nothing about the level of intellectual property protection or law enforcement a contracting party might choose, merely that the level of enforcement selected must be secured with as little inconsistency with GATT as reasonably possible. The panel also rejected the U.S. argument, similar to that asserted as to Article III, that the test of necessity should be applied to section 337 as a whole, not to individual elements of procedure. It reasoned that such an approach would permit the adoption of unnecessary GATT-inconsistent measures as part of a scheme with some necessary features.

The panel finally considered the necessity of the specific aspects of section 337 procedure previously held to be inconsistent with Article III, clearly placing the burden of persuasion on the United States as the party invoking the Article XX(d) exception. The panel ruled that three of those elements of procedure, in at least some situations, could be justified as necessary substitutes for the comparable domestic procedure:

(1) *in rem* exclusion orders limited to products produced abroad by respondents in section 337 proceedings may be necessary substitutes for judicial injunctions addressed to domestic manufacturers: judicial orders addressed to foreign manufacturers are problematic, and injunctions addressed to importers may be unsatisfactory when there are large numbers of current and potential importers;

(2) general *in rem* exclusion orders may sometimes be justified, for example, in cases where it is extremely difficult to identify the foreign sources of infringing products, although in general there is little justification for restricting such orders to section 337 proceedings when the problems that call for their use, widespread infringement and the likely entry of new producers, also exist in domestic settings; and

(3) automatic enforcement of exclusion orders by the U.S. Customs Service is necessary because foreign producers have weaker incentives to comply with judicial injunctions enforced by individual contempt proceedings.

The panel ruled, however, that none of the other U.S. arguments for necessity—that the procedures in section 337 cases were necessary to permit presidential review, deal with problems in the service of process, and provide expeditious prospective relief, and that section 337 (before its amend-

ment in 1988) was the only regime applicable to imported products infringing process patents—justified the remaining features of section 337 procedure found to be inconsistent with Article III(4).

* * * *

This ruling is unusual in several respects. The involvement of the Community resulted from the first use of the New Commercial Policy Instrument, the analogue in EEC law of section 301 of the U.S. Trade Act of 1974. The makeup of the panel varied significantly from standard GATT practice:⁷ two of its members, Professor Andreas Lowenfeld of the New York University School of Law and Mr. Pierre Pescatore, former judge of the European Court of Justice, were citizens of the parties to the dispute, and neither was a governmental trade official. The panel report is one of the lengthiest and most detailed in the history of GATT dispute settlement, containing a wealth of detail on section 337 procedures and an elaborate compilation of arguments by the parties.

The ruling is also highly controversial. Canada, Japan, Korea and Switzerland made presentations to the panel critical of section 337, and numerous countries spoke in the GATT Council urging adoption of the report. The United States, however, repeatedly blocked the adoption of the report by the Council and criticized the reasoning of the panel. The United States finally withdrew its opposition to the adoption of the report in November 1989.⁸ It announced at that time, however, that the President would only seek legislation to modify section 337 in line with the findings of the panel if a satisfactory agreement on trade-related aspects of intellectual property were reached in the Uruguay Round, and that in the interim the President would not use his power of review under section 337 to modify the application of the provision.

The U.S. response to the panel report has not strengthened the GATT dispute settlement process. The United States seemingly interpreted the report as an effort to weaken the protection that it affords to intellectual property, even as other GATT members resist the negotiation of agreements to strengthen such protection abroad. In fact, though, only a few specific differences in procedure between section 337 proceedings and patent litigation were found both to disadvantage imports and to be unnecessary under Article XX(d), and most of these differences could be removed without a substantial diminution in intellectual property protection.

Realistically, neither of the two proceedings compared by the panel could be totally eliminated. Section 337 is seen by U.S. industry as an important protection for intellectual property in an era of growing international trade in infringing products; indeed, the provision was amended in 1988 to make relief significantly easier to obtain. Section 337 is also used to “test the

⁷ See Understanding regarding Notification, Consultation, Dispute Settlement and Surveillance, Decision Adopted by the Contracting Parties Nov. 28, 1979, *id.*, 26th Supp. 210 (1980).

⁸ Statement of the U.S. Representative to the GATT, Ambassador Rufus Yerxa, on the Section 337 Panel Report at the GATT Council Meeting (Nov. 7–8, 1989).

waters" on issues of patent validity without risking a final judicial determination. Its repeal would be politically very difficult. By the same token, U.S. patent holders could hardly be denied the right to sue in federal court.

To retain both avenues of relief, simultaneous proceedings would have to be prohibited, and the differences in procedure held to violate GATT would have to be eliminated. In some cases, it might be necessary to modify section 337 procedures to make them more favorable to foreign respondents or producers. In other cases, however, it might be possible to modify elements of patent litigation procedure to make them more favorable to plaintiffs, providing patent holders greater procedural protection against all potential infringers. This approach was as much as suggested by the panel report in connection with general *in rem* remedies. Finally, it might also be possible to harmonize some differing procedures at intermediate levels. Certain of these revisions, like tightening the criteria for general exclusion orders under section 337 or creating a similar *in rem* remedy in federal court proceedings, could have complex ramifications and would require extensive study. A particularly difficult issue is the treatment of counterclaims: counterclaims should not be prohibited in federal court patent litigation, but it does not seem desirable, even if there were no legal or constitutional obstacles, to grant the ITC general jurisdiction over unrelated counterclaims. These issues warrant deliberation in implementing the panel report. They do not, however, go to the heart of U.S. intellectual property protection.

The more general rulings of the panel on such issues as the review of adjudicatory procedures and enforcement measures under Article III, the offsetting of elements of more and less favorable treatment, and the use of the least GATT-inconsistent measure under Article XX(d) are likely to be of significance in future disputes if a consensus forms around them. For the most part, the panel's reasoning on these issues is persuasive. The U.S. argument turned primarily on two points: that measures like section 337 should only be reviewed under Article XX(d) and that Article XX(d) should be interpreted to recognize the need for great flexibility on the part of contracting parties. GATT panels have not in the past been receptive to arguments that seek to limit the application of explicit GATT rules in the interest of an overriding need for flexibility, and the present panel was no exception. The logical consequence of the report, however, may be to expose to GATT scrutiny a significant body of procedures and enforcement measures maintained by many contracting parties. Many states that are pleased with the panel's treatment of section 337 may be less anxious to have their own procedures subject to similar scrutiny. The report's broader implications, like the necessary revisions of U.S. law, are likely to be worked out in the more political context of the Uruguay Round.

KENNETH W. ABBOTT

Northwestern University School of Law

CURRENT DEVELOPMENTS

WILSONIANISM REDUX: INADVERTENT PUBLICATION OF SECRET PROTOCOL, HUNGARIAN–EAST GERMAN AGREEMENT ON VISA REQUIREMENTS

This treaty between the (East) German Democratic Republic and Hungary concerning visa requirements was deposited with the United Nations in accordance with Article 102 of the UN Charter.¹ When the Government of Hungary decided to permit East Germans visiting Hungary to emigrate to the Federal Republic of Germany (West), the authorities in Budapest informed the East German authorities that the treaty had become inoperative. Among the reasons cited was its inconsistency with the Convention Relating to the Status of Refugees,² to which Hungary had acceded on March 14, 1989.

It is of interest to note that the *UN Treaty Series* publishes not only the East German–Hungarian Agreement, but also the Protocol. This is the part of the treaty relevant to the status of those in the GDR seeking not to be repatriated. It is also notable that the text states: "This Protocol shall not be published."

Woodrow Wilson's ghost must have been delighted.

T. M. F.

AGREEMENT BETWEEN THE GOVERNMENT OF THE HUNGARIAN PEOPLE'S REPUBLIC AND THE GOVERNMENT OF THE GERMAN DEMOCRATIC REPUBLIC CONCERNING EXEMPTION FROM THE VISA REQUIREMENT FOR PURPOSES OF CROSSING THE FRONTIER³

The Government of the Hungarian People's Republic and the Government of the German Democratic Republic,

Having regard to the Treaty of friendship, co-operation and mutual assistance between the Hungarian People's Republic and the German Democratic Republic signed at Budapest on 18 May 1967,

Desiring to strengthen and develop further the friendly relations existing between the two States, to create the most favourable possible conditions for nationals of each State to become acquainted with the successes achieved in socialist construction in the other State and to facilitate travel by nationals of the two States,

¹ Agreement concerning Exemption from the Visa Requirement for Purposes of Crossing the Frontier, with Protocol, June 20, 1969, Hungary–German Democratic Republic, 286 UNTS 46.

² Convention Relating to the Status of Refugees, July 28, 1951, 189 UNTS 150.

³ The Agreement and Protocol are reprinted from the translation in 286 UNTS 50–53 (Arts. 8–12, an annex and UNTS footnotes are omitted).

Have decided to conclude this Agreement and have for that purpose appointed as their plenipotentiaries:

The Government of the Hungarian People's Republic: Dr. Lajos Nagy, Ambassador Extraordinary and Plenipotentiary to the German Democratic Republic;

The Government of the German Democratic Republic: Oskar Fischer, Deputy Minister for Foreign Affairs,

who, having exchanged their full powers, found in good and due form, have agreed as follows:

Article 1. Nationals of the two States shall be exempt from the visa requirement for purposes of crossing the frontier to the extent and under the conditions laid down in this Agreement.

Article 2. (1) Nationals of the two States domiciled in the territory of their own State or of a third socialist State who are in possession of documents (hereinafter referred to as "travel documents") entitling them to cross the frontier shall be exempt from the visa requirement when entering the territory of the other State for the purpose of staying there temporarily and when travelling in transit through the said territory.

(2) Nationals of the two States domiciled in the territory of a State other than those referred to in paragraph 1 shall not require transit visas when travelling to or returning from their own State through the territory of the other State.

Article 3. The provisions of this Agreement shall not apply to nationals of one State who wish to establish their domicile in the territory of the other State.

Article 4. (1) Travel documents issued to nationals of the two States in accordance with domestic law shall be valid for purposes of crossing the frontier.

(2) Children not in possession of travel documents of their own who are travelling in the company of adults must be included in the travel documents of the latter.

(3) The Contracting Parties shall exchange through the diplomatic channel specimens of the travel documents referred to in paragraph 1. Notice of the issue of new travel documents or of modifications in valid travel documents shall be given to the other Contracting Party through the same channel, and specimens shall be transmitted to it not later than 30 days before the date on which the documents in question may be used.

Article 5. Crossing of the frontier shall take place at established frontier crossing points.

Article 6. (1) Nationals of one State may normally stay in the territory of the other State for a period of up to 30 days.

(2) In justified cases, the competent authorities of the other Contracting Party may, subject to the validity of the travel document held, extend for a further period of 30 days the stay specified by the authorities which issued the document. Any further extension of the stay may be granted only with the prior consent of the diplomatic or consular mission of the other Contracting Party.

(3) Nationals of one State who enter the territory of the other State on official business shall be entitled to stay in the said territory for the duration of their mission. This provision shall also apply to members of the families of such nationals.

Article 7. Nationals of one State domiciled in the territory of the other State shall, for the purposes of exit and return, require visas of the State in which they are domiciled. Visas shall be issued free of charge.

. . . .

Article 13. This Agreement is concluded for an indefinite period of time. It shall cease to have effect three months after the date on which written notice of denunciation by one of the Contracting Parties is received.

DONE at Berlin on 20 June 1969, in duplicate in the Hungarian and German languages, both texts being equally authentic.

For the Government
of the Hungarian People's
Republic:
[LAJOS NAGY]

For the Government
of the German Democratic
Republic:
[OSKAR FISCHER]

PROTOCOL

TO THE AGREEMENT BETWEEN THE GOVERNMENT OF THE HUNGARIAN PEOPLE'S REPUBLIC AND THE GOVERNMENT OF THE GERMAN DEMOCRATIC REPUBLIC CONCERNING EXEMPTION FROM THE VISA REQUIREMENT FOR PURPOSES OF CROSSING THE FRONTIER

It has been agreed as follows:

1. The competent authorities of the two Contracting Parties shall ensure that nationals of the other State do not proceed to third States for which their travel documents are not valid.

2. The competent authorities of the two States shall communicate to each other the particulars of persons whose presence in their territories is deemed undesirable. Travel documents for entry into the territory of the other State shall not be issued to such persons.

3. The Contracting Parties shall mutually waive the imposition of any visa charges.

The Protocol shall form an integral part of the Agreement concerning exemption from the visa requirement for purposes of crossing the frontier.

The provisions of the Protocol may be amended by means of an exchange of notes.

This Protocol shall not be published.

DONE at Berlin on 20 June 1969, in duplicate in the Hungarian and German languages, both texts being equally authentic.

For the Government
of the Hungarian People's
Republic:
[LAJOS NAGY]

For the Government
of the German Democratic
Republic:
[OSKAR FISCHER]

THE COUNCIL FOR MUTUAL ECONOMIC ASSISTANCE
AND THE EUROPEAN COMMUNITY

After nearly 15 years of official and unofficial contacts and negotiations, on June 25, 1988, representatives of the European Community (EC) and the Council for Mutual Economic Assistance (CMEA or COMECON), meeting in Luxembourg, signed a Declaration establishing official relations between the two parties so as to "develop cooperation in areas which fall within their respective spheres of competence, and where there is common interest."¹

Ostensibly, this act is one of those developments, within the framework of the Helsinki Final Act (1975), which envisaged closer integration of the Eastern European socialist countries (including the Soviet Union) into the world economic system. The provisions of the Declaration in themselves are not of major importance. Eastern Europe's socialist countries, including the Soviet Union, have previously sought economic cooperation with the industrialized West, even when the CMEA and the Soviet leadership were pursuing a program of parallel world economic systems, one socialist and one imperialist, in a competition in which the socialist order was historically destined to win.

The idea of two economic systems was a *novum* in Soviet (and Russian) policy. Since the time of Peter the Great, Russia has regarded the western world as a model of technological progress and a source of know-how, managerial skill, equipment and investment. Cooperation with the industrial West has varied, depending on Russian interests, but it has been a continuing aspect of Russian history. Even in the postrevolutionary period, Lenin returned to a policy of cooperation. World War II changed the perspectives of Soviet interests in this regard. American efforts to reestablish the economic unity of Europe (through the Marshall Plan) were frustrated within the Soviet sphere of influence. The Warsaw Pact and CMEA were political products of that period.² The Third Program of the Communist Party of the Soviet Union, adopted in 1961, acknowledged that the international organizations of the capitalist and socialist systems had fundamentally identical purposes. Their function was to bring about closer international economic cooperation between various countries. Nevertheless, the international organizations of the capitalist system were unable to achieve this purpose:

¹ 32 J.O. COMM. EUR. (No. L 137) 34 (1988); *id.* at 35.

² In the first years of the CMEA's existence, the general purpose of the economic regime imposed by the Communist governments was a general reversal of traditional trade patterns. Before World War II, Eastern Europe traded with the West. Soviet trade with future members of the CMEA was insignificant. When the war ended, the old trade pattern began to reassert itself. After the Communist Parties assumed control of national affairs, the Soviet Union took practically all exports and supplied all the needs of its dependencies. ECONOMIC COMMISSION FOR EUROPE, ECONOMIC SURVEY OF EUROPE IN 1949, at 146, table 84. *Cf.* VT FOREIGN TRADE, No. 6, 1949, at 6 (in Russian). *See generally* MID-EUROPEAN LAW PROJECT, ECONOMIC TREATIES AND AGREEMENTS OF THE SOVIET BLOC IN EASTERN EUROPE, at xxxv-vi (2d ed. 1952).

The basic contradiction of the contemporary world, that between socialism and imperialism, does not eliminate the deep contradictions rending the capitalist world. The aggressive military blocs founded under the aegis of the U.S.A. are time and again faced with crises. The international state monopoly organizations springing up under the motto of "integration," the mitigation of market problems, are in reality new forms of the redivision of the world capitalist market and are becoming seats of acute strain and conflict.

By contrast, the program stated:

The world socialist system is a new type of economic and political relationship between countries The distinctive features of the relations existing between the countries of the socialist community are complete equality, mutual respect for independence and sovereignty and fraternal mutual assistance and cooperation.

The establishment of the Union of Soviet Socialist Republics and later, of the world socialist system, is the commencement of the historical process of the global association of peoples. With the disappearance of class antagonism in the fraternal family of socialist countries, national antagonisms also disappear.

In the second edition of the Soviet *Handbook on International Economic Organizations*, the European Community is described as a "governmental-monopolistic union organized to establish a Common Market . . . to conduct a joint economic and social policy to create a military-economic foundation for the aggressive North Atlantic Treaty Organization."³

After Stalin's demise, Khrushchev advanced the idea of an international division of labor within the system of CMEA countries.⁴ The Conference of Communist Parties (June 1962), which adopted the Principles of the Division of Labor, stated:

The world socialist system is a social, economic, and political commonwealth of free sovereign peoples following the path of socialism and communism, united by a community of interests and goals and the indestructible ties of international socialist solidarity.

Each socialist state works out its own national plan for economic development, proceeding from the specific conditions of the country and the political and economic tasks posed by the Communist and Workers' parties, and taking into account the needs and potentialities of all the socialist countries. The new socialist system permits the organic combination of the development and strengthening of the world economic system of socialism as a whole. The success of the entire world socialist system depends on the contribution of each country.⁵

* * * *

Nearly 10 years later (1971), as the integration plans had had little success, the CMEA adopted a comprehensive program for economic integra-

³ HANDBOOK ON INTERNATIONAL ECONOMIC ORGANIZATIONS 240 (2d ed. 1962) (in Russian).

⁴ See KOMMUNIST, No. 12, 1962, at 5.

⁵ Pravda, June 7, 1962.

Council of Ministers through the German Embassy in Moscow. In response, Fadeev invited the President of the Commission to Moscow. Other contacts followed, including a meeting between representatives of the CMEA's International Investment Bank with representatives of the European Investment Bank in Luxembourg. At the beginning of 1975, the Chairman of the Commission, Edmund Wellenstein, went to Moscow to discuss areas of mutual interest in which cooperation would be possible. However, this visit failed, the difficulty being, in the Commission's view, that while the Community was a supranational organization, the CMEA was merely an inter-governmental agency. In response to a question asked by a Dutch deputy in the European Parliament, a representative of the Commission stated:

In contrast with the EEC, Comecon members do not surrender any sovereignty to the organization Recommendations and decisions are adopted only with the consent of the member countries involved Since the creation of the Comecon, there has been a constant tension between the principle of national sovereignty and the desire on the part of the Soviet Union to maintain economic and political hegemony over the organization. For example, in 1962 Premier Khrushchev called for the creation within the Comecon of a supranational planning authority with power to issue binding decisions to the appropriate planning agencies of the member countries. The proposal was vigorously opposed and defeated by the other members of the Comecon, led by Rumania.

Another aspect of national sovereignty of member countries in the decision-making process is that COMECON has no treaty-making power. The lack of authority of CMEA institutions legally to bind its members effectively hinders institutional cooperation between the EEC and COMECON. Finally, there is no institution in COMECON with responsibilities similar to those of the EEC Commission. Implementation of the recommendations and decisions made by the various COMECON institutions is carried out through the normal legislative and executive processes of each country.¹² This pattern of collective action has been maintained since the adoption of the Complex Program of Integration in 1971. A special committee was created consisting of the chairmen of the planning agencies of the member countries. Point 25 of chapter IV of the Complex Program states: "Joint planning does not affect the independent character of the national plan."¹³

Negotiations have been complicated by several factors. Above all, some CMEA members—but not the Soviet Union—have pressed for direct negotiations with the Common Market and, in the past (1965–1969), concluded various technical agreements with it, mostly regarding agricultural exports. These agreements were scheduled to expire by the end of 1974 and had to be replaced by new arrangements negotiated by the Common Market, not its individual members.¹⁴

¹² 1 ENCYCLOPEDIA OF EUROPEAN COMMUNITY LAW, *supra* note 10, at 22, 1042.

¹³ Cf. Grzybowski, *Comecon*, in EAST-WEST BUSINESS TRANSACTIONS 117, 124 (R. Starr ed. 1974).

¹⁴ KEESING'S, *supra* note 11, at 27,570.

To move things ahead, the EC Council drafted a model for future trade agreements with CMEA members and transmitted it to those countries. At the same time, authorization to continue existing agreements with CMEA countries was extended.¹⁵

In February 1976 (over a year later), the Executive Committee of the CMEA took up the matter in a different context (the Helsinki Final Act) and submitted a draft of an agreement with the Common Market providing for direct relations between the two partners, and direct trade relations between the Common Market and CMEA countries. The organizations themselves would encourage liberalization of terms of trade, investigate new possibilities for cooperation and establish a commission consisting of representatives of both sides, including the member countries; the commission was to resolve concrete difficulties in their mutual relations and guarantee a general system of preferences to CMEA members and other privileges and concessions.¹⁶

This proposal produced a counteroffer (November 18, 1976), which insisted that cooperation between the two parties must take account of the juristic, political and economic realities that determined the competence of the partners; it proposed restricting interaction between the two bodies to consultations and mutual information, leaving the matter of trade transactions to direct relations between CMEA countries and Community organs.¹⁷

Thus, negotiations between the two organizations reached a stalemate, which was broken when Vyacheslav Sychev replaced Fadeev as Executive Secretary of the CMEA. Exploratory talks were held in Geneva (September 22-24, 1986) in response to the Community's initiative. In this initiative, Community Commissioner for External Relations and Trade de Clercq proposed that bilateral diplomatic relations be established between the Community and individual CMEA countries, and that official relations between the organizations be confined to specific areas.¹⁸

Another session in Geneva was needed to resolve a further point of disagreement between the two sides. The Community insisted that West Berlin be regarded as an integral part of the EC, as was usual in its trade agreements. Here the CMEA proved hard to convince, and on November 5, 1987, Commissioner de Clercq declared in the European Parliament that no further talks would take place until the CMEA made this concession.¹⁹ This difficulty was resolved in a final session of May 1988.²⁰

On June 25, 1988, the Joint Declaration on the Establishment of Official Relations between the Community and the CMEA was formally signed.²¹

¹⁵ *Id.*; A. USCHAKOV, *INTEGRATION IN RGW (COMECON) DOKUMENTE* 977 (2d ed. 1983).

¹⁶ A. USCHAKOV, *supra* note 15, at 982.

¹⁷ *Id.*

¹⁸ KEESING'S, *supra* note 11, at 34,206, 34,206 (A), 34,910.

¹⁹ *Id.* at 35,806.

²⁰ BULL. EUR. COMM. (COMMISSION), No. 6, 1988, at 13-14; 32 J.O. COMM. EUR. (No. L 137) 35 (1988) (text of Declaration).

²¹ See note 1 *supra*.

The Declaration provides for mutual recognition and formal diplomatic relations between the two parties, joint cooperation in their respective areas of competence in pursuance of common interests, and future cooperation. As the communiqué issued on this occasion explained, the text of the Declaration was agreed upon in parallel negotiations between the two organizations and CMEA member countries. In effect, therefore, diplomatic relations were established not only between the organizations themselves, but also between the Community and CMEA Eastern European member countries.²²

The course of EC-CMEA negotiations, which started under Brezhnev and were concluded in the regime of Gorbachev, have reflected a significant change in the goals and techniques of Soviet foreign policy. As a report on the signing of the Declaration explained:

Normalization of relations opens the way to increased trade and greater contact with a group of countries which had long chosen to ignore the existence of the Community. This development is part of the broader process of improving East-West relations witnessed in recent years, reflecting a more open and more realistic external policy on the part of the Eastern European countries and real efforts to reform their economic management system.²³

The Declaration signed on June 25, 1988, recognized the equal status of CMEA countries in their relations with the European Community as regards trade and economic relations. The Community refused to lend itself to upholding Soviet hegemony in Eastern Europe. Another aspect of the concessions won from the Soviet side was the territorial clause, which placed West Berlin within the framework of the CCP and recognized (informally, however) that West Berlin is part of the Federal German Republic. Point 5 of the Declaration stated: "As regards the application of this Declaration to the Community, it shall apply to the territories in which the Treaty establishing the European Economic Community is applied and under conditions laid down in that Treaty."

* * * *

Under the regime established by the Joint Declaration, the parties agreed to develop cooperation in their respective spheres of competence and where there is common interest. They also agreed to hold meetings and conferences and to determine new areas, forms and methods of cooperation (points 2, 3 and 4).

The first such 2-day conference was held in Brussels (November 16-17, 1988). The representatives discussed transportation, the environment, exchanges of information and economic forecasts.²⁴

As regards trade and economic cooperation, prior to the formal signing of the Declaration, the EC Commission had already engaged in formal trade

²² BULL. EUR. COMM., *supra* note 20, at 13-14.

²³ *Id.*

²⁴ N.Y. Times, Nov. 18, 1988, at A1.

negotiations with the Eastern European CMEA countries. As the bulletin reporting on the signing of the Declaration explained, on June 30, 1988, a trade, commercial and economic cooperation agreement had been initiated with Hungary. The renewal and enlargement of a 1980 agreement with Romania was discussed. At the same time, talks on trade and cooperation were in progress with other Eastern European CMEA countries.

In its relations with Eastern European CMEA countries, the EC Commission has urged a more open foreign policy and reform of economic management systems. Among other things, it was explained, new trade agreements may not always lift quota restrictions on Eastern European countries, as in the Hungarian agreement. Hungary was given this concession because of its liberalized economic system, under which export prices more closely reflect the true cost of a product than those of other Eastern European countries. It was clear, however, that this concession was also meant as a prize and encouragement for Hungary, which set an example for economic and political reforms.²⁵

In the following months, the end of 1988 and the beginning of 1989, the EC Trade Commissioner energetically pursued the Community's policy of broadening relations with Eastern Europe. In December 1988, he headed the EC delegation participating in an EC-Hungarian Commission session dealing with conditions of economic cooperation.²⁶ The session discussed the need to modernize Hungarian industries and arranged for visits to Hungary by EC businessmen, as well as plans for investment in Hungary.²⁷

Visits by the Trade Commissioner to Czechoslovakia and East Germany followed the signing of trade and economic cooperation agreements and the creation of joint commissions, with the discussions centering on closer political, as well as economic, cooperation within a united Europe.²⁸

In the year and a half since the signing of the Joint Declaration, the EC has initiated direct talks with the rest of the CMEA countries, including the Soviet Union, to negotiate trade agreements, establish joint trade commissions on the Hungarian model, and enter into direct diplomatic relations.²⁹ It must be added that, since 1980, Romania has been a party to a similar arrangement. On the CMEA side, it is hoped that under the new terms of trade, EC imports from Eastern Europe will increase considerably. At the same time, the EC Commission is pressing for the elimination of discriminatory practices limiting imports from Western Europe; it is also pressing for improvement in the conditions hampering the operation of EC firms in Eastern Europe, especially restrictions on the repatriation of profits, by demanding countertrade to the West. The Community is particularly concerned about the protection of intellectual property. One of the problems that still plagues EC-CMEA economic cooperation is the practice of conclud-

²⁵ Foreign Broadcast Information Service, EEU-89-001 (Jan. 3, 1989).

²⁶ *Id.*, EEU-88-239 (Dec. 11, 1988).

²⁷ *Cf. id.*, EEU-88-230, 88-232, 88-239.

²⁸ *Id.*, EEU-89-001 (Jan. 3, 1989).

²⁹ On Dec. 19, 1988, a trade agreement was signed with Czechoslovakia. *Id.*

ing annual foreign trade protocols, a practice that is diminishing as planning, also in foreign trade, is taken less seriously in Eastern Europe.³⁰

The significance of these developments for Eastern European economies cannot be overestimated. The Community is Eastern Europe's most important trade partner in the world. In 1988 the trade turnover between the CMEA and the Community was about \$50 billion, while in the same period trade between the CMEA and Japan and the United States amounted to \$7 billion and \$6 billion, respectively.

The Community's importance in the general picture of East-West economic cooperation is further underscored by the development of the Common Market Financial Market Integration Plan, to be completed in 1992, which will make the European Investment Bank and its credit operations even more effective in the future.³¹

While East-West economic cooperation is assuming new forms, the CMEA integration plans outlined in 1971³² are also making progress. They emphasize the establishment of direct production, and scientific and technical ties, between Soviet and Eastern European enterprises. As a result of the CMEA Council meeting of November 1986, the Soviet Union concluded a series of agreements with Hungary, Bulgaria, East Germany and Czechoslovakia on the establishment of joint enterprises, international associations and other organizations.³³

In June 1988, the CMEA Council announced a plan to create a unified market (1991–2005) embracing all CMEA countries. It provides for multilateral, rather than bilateral, trade among enterprises instead of states. It calls for the gradual deregulation of domestic prices, the creation of transnational associations and the movement of capital across national frontiers. It also provides for limited convertibility of Eastern European currencies and free interaction of Eastern European enterprises both within the CMEA and with Western, i.e., foreign, firms.³⁴

At the present moment, the European Community and the COMECON complex are involved in a movement toward economic and political integration. The Soviet plan to establish a unified market is clearly modeled after the economic consolidation of the European Community, and will lead eventually to a new era for the East-West economic, political and security systems. Both movements may eventually contribute to the systematic implementation of the Helsinki Accords.

KAZIMIERZ GRZYBOWSKI*

³⁰ INT'L ECON. REV., *supra* note 6, at 6–7.

Economic restructuring in the COMECON countries—including the Soviet Union—gradually multiplies the number of enterprises authorized to trade abroad. Foreign trade operations are restricted by a shortage of hard currencies, particularly in East-West relations. Hence the need for annual allocation of available funds. Cf. Grzybowski, *Capitalist Investment in the Soviet Union—Past and Present*, OSTEUROPA RECHT, No. 1, 1989, at 24–29.

³¹ EUROPEAN INVESTMENT BANK, EIB PAPERS, No. 8, March 1989, at 22–24.

³² Cf. note 6 *supra*.

³³ KEESING'S, *supra* note 11, at 33,910; see also note 6 *supra*.

³⁴ INT'L ECON. REV., *supra* note 6, at 6–7.

* Professor of Law, Duke University.

BOOK REVIEWS AND NOTES

EDITED BY DETLEV VAGTS

The International Court of Justice at a Crossroads. Edited by Lori Fisler Damrosch. Published under the auspices of the American Society of International Law. Dobbs Ferry: Transnational Publishers, Inc., 1987. Pp. xxviii, 511. Index. \$67.50.

It all started in April 1984. Pending the forthcoming application of Nicaragua to the International Court of Justice (ICJ), the U.S. Government tried immediately to exclude the competence of the Court regarding Central American matters. Shortly thereafter, at its business meeting on April 12, the American Society of International Law adopted a resolution stating that it "deplores, and strongly favors rescission of, the recent action of the United States Government."¹ Speaking at a luncheon during the same Annual Meeting, a government representative made extremely unfriendly comments about the United Nations and its organs.² Among the members of the Society and guests present at the meeting, opinions on the World Court were divided, but the aforementioned resolution was adopted by a large majority. The events that followed are well-known. The ICJ decided in favor of its jurisdiction at the outset of the *Nicaragua* case; the U.S. Government thereupon resolved not to take part in the proceedings and later withdrew its Declaration under Article 36(2) of the Court's Statute. The Judgment of the Court on the merits, of June 27, 1986, found mainly against the United States. Both decisions drew harsh criticism from the U.S. Government and prominent American scholars, but there were always other opinions even more critical of the Government than of the Court.

The book under review must be seen in the context outlined above. The volume presents the results of the work of a "Study Panel on International Adjudication and the Jurisdiction of the International Court of Justice," established by the American Society of International Law. In general, the book is most useful and it deserves a positive assessment. It includes many informative and interesting articles, and exhibits the deep and continuing interest of American legal scholars in the judicial settlement of international disputes. The majority of the contributors are sympathetic toward the World Court even if some of its decisions, especially in the *Nicaragua* case, do not meet with their enthusiasm or approval.

In addition to a valuable introduction by the editor and several lists and annexes, the book comprises four parts. The first part deals with "The System of Compulsory Jurisdiction: Expectations, Objectives, Patterns"; the

¹ See 78 ASIL PROC. 137 (1984).

² *Id.* at 59.

second part discusses "The Suitability of Certain Kinds of Disputes for Resolution by the International Court"; the third part covers "Special Problems of International Adjudication"; and, finally, the fourth part discusses certain aspects of the relationship between the United States and the ICJ. There is some overlap in the articles and between different parts of the book, but this is even useful since it gives a more comprehensive picture of the relevant problems than would otherwise have occurred. It would be unfair to exclude any of the articles from this review. Therefore, at least a few remarks must be devoted to each.

The book starts with an excellent essay by Thomas M. Franck and Jerome M. Lehrman entitled "Messianism and Chauvinism in America's Commitment to Peace Through Law." In condensed form, the article describes American attitudes toward international adjudication by courts in general and the World Court in particular, from the end of the last century until the mid-1980s. Its title indicates its conclusion: there have been contradictory currents and positions—enthusiastic support for international courts has been counterbalanced by tendencies toward isolationism and a great-power mentality. (The 1946 Declaration made under Article 36(2) of the Statute, as qualified by the Connally reservation, is a clear indication of this inherent contradiction.) All in all, the book could hardly make a better start, particularly in view of the authors' many historical annotations and insights.

Leo Gross, an outstanding expert on the ICJ, contributed "Compulsory Jurisdiction Under the Optional Clause: History and Practice." The content of this article is very informative, but the reviewer must confess that he has difficulties with certain conclusions. For instance, it does not seem practicable to accept Gross's suggestion that the election of judges to the Court should take into account whether the candidate's home state has accepted the Court's compulsory jurisdiction. As other articles properly point out, jurisdiction under treaty clauses is more important in practice than jurisdiction under optional clauses; why, then, should the latter be of primary importance in the selection of judges? What about judges coming from states that denounce their declarations of acceptance soon after one of their nationals is elected to the Court? What about the relevance of far-reaching reservations under the optional clause? In this article, as in some others, lists and tables in which the names, the persons and the arguments of individual judges often disappear behind their nationality are not of much help without a clear and competent interpretation. I have the strongest reservations concerning one of the author's last sentences: "It appears to be self-evident that the judgment on jurisdiction in the *Nicaragua* case was largely the product of the 'geographically balanced' composition of the Court" (p. 48). There are obviously different opinions about what is self-evident.

The next article, by Fred L. Morrison, discusses "Treaties as a Source of Jurisdiction, Especially in U.S. Practice." The article contains a useful description of U.S. practice and a list of relevant texts. This reviewer does not agree with some remarks on the burden of proof as regards jurisdiction; according to the practice of the Court and prevailing opinion, the existence of jurisdiction is not primarily a matter of facts and evidence, but falls under the maxim *jura novit curia*. The author's comments on the nonbinding

character of advisory opinions (p. 67) are correct in principle, but they do not reflect the special provisions in the statutes of some international administrative tribunals.

The next article, by Edith Brown Weiss, on "Reciprocity and the Optional Clause," provides an excellent account of the reciprocity problem under the Statute of the Court. The author correctly states that the ICJ in the *Nicaragua* case followed its prior position and pronouncements. The extension of the reciprocity requirement to elements of the denunciation of declarations under the optional clause would depart from settled jurisprudence (and from an adequate understanding of reciprocity). Whether declarations under the optional clause must be seen as an element of a treaty remains doubtful, but there are certainly reasonable arguments for this position.

Monroe Leigh and Stephen D. Ramsey contributed "Confidence in the Court: It Need Not Be a 'Hollow Chamber.'" The authors favor acceptance of the Court's jurisdiction with the proviso that only decisions by Chambers be accepted. It remains to be seen whether the American Government will follow such a proposal. In principle, the institution of Chambers has gained understandable support in recent World Court practice.

Edith Brown Weiss also contributed "Judicial Independence and Impartiality: A Preliminary Inquiry," which contains a survey of the judges' voting behavior. While this may be useful, I have doubts, as already mentioned, about the value of statistics in this field and the general identification of the judges with the states of which they are nationals.

Richard B. Bilder's well-balanced article, "International Dispute Settlement and the Role of Adjudication," discusses the judicial settlement of international disputes in general, describing the chances and risks, as well as the advantages and disadvantages. The author is in favor of renewed U.S. recognition of the Court's jurisdiction.

The second part of the book starts with an article by Edward Gordon on "Legal Disputes under Article 36(2) of the Statute." This article concentrates on whether there are inherent limitations on the jurisdiction of the ICJ—a question that has been widely discussed in recent cases and may be further discussed in the near future. I have some doubt whether the notions of nonjusticiable disputes and judicial propriety permit clear answers or results; whether the Court can (and, given its competence, must) decide a matter depends upon the legal basis and arguments in each case. The article comes back to the standpoint that vital interests should be excluded from international adjudication and it also discusses the possibility of limiting the World Court's jurisdiction by an express enumeration of "justiciable" disputes. Also in this respect, it remains to be seen whether the U.S. Government will adopt such an approach in the future.

Oscar Schachter discusses "Disputes Involving the Use of Force." He provides an excellent survey of the cases before the ICJ in which the use of force was at issue. In 8 of the 13 cases examined, the U.S. Government took the initiative and sought to persuade the Court to take jurisdiction. The author rightly adopts the view that neither the fact that in a given case use of

force is involved nor the fact that the Security Council may have (or may actually be exercising) jurisdiction should exclude the competence of the Court. The article by this able author concludes: "It is also my premise that the International Court of Justice is composed in the main of qualified and respected jurists whose record over the past four decades demonstrates competence, integrity and adherence to the standards laid down in [the] Statute and generally expected of a judicial body" (p. 241). Similar statements, obviously founded on careful scrutiny of the Court's practice, can be found in other articles, such as that by Professor Bilder (p. 168 n.40).

Domingo E. Acevedo deals with another topic that was discussed in the *Nicaragua* case, namely "Disputes Under Consideration by the U.N. Security Council or Regional Bodies." The notion of international legal disputes is again analyzed in a most competent manner. This author also concludes that neither the involvement of the Security Council nor that of regional agencies in principle excludes the competence of the Court.

In the following article, Eugene V. Rostow focuses on "Disputes Involving the Inherent Right of Self-Defense." This reviewer must confess that he disagrees with a great number of statements in this renowned author's essay. Leaving aside whether such strong words as "absurd" and "scandalous treatment of facts" in connection with the *Nicaragua* decision of the ICJ are an adequate substitute for strong and carefully developed arguments, it is at least legally incorrect to say that the Judgments of the Court are not final since they cannot be enforced. The treatment of the *Corfu Channel* case (p. 275) is at best misleading. The remarks on the permissible use of force up to 1945 (p. 283) are in my view unacceptable. In essence, the author is of the opinion that only the Security Council can act in cases of (alleged) self-defense, and that, when the Council is blocked by the veto, the great powers, at least, have unlimited freedom to act according to their interests or what they consider to be their interests. In any case, it must be admitted that a vehement condemnation of the Court's pronouncements in the *Nicaragua* case constitutes an essential part of an open discussion, as undertaken in the present volume.

Jonathan I. Charney contributed "Disputes Implicating the Institutional Credibility of the Court: Problems of Non-Appearance, Non-Participation, and Non-Performance." The author recommends that the Court consider more carefully possible opposition to its activities by taking into account "the international environment" and refraining from dealing with difficult cases. Even if there might be good political reasons for such proposals, their acceptance would unavoidably transform the Court into a politicized body. The tables appended to the article (p. 310) concerning nonappearance and noncompliance in cases before the ICJ are helpful.

In the much shorter third part of the book, Bernard H. Oxman's article on "Jurisdiction and the Power to Indicate Provisional Measures" contains a very good explanation of the problems involved in this area, and includes some considerations on dispute settlement under the 1982 Law of the Sea Convention.

In his article on "Evidence and Proof of Facts," Keith Highet deals with the evidence available and submitted to the Court in the *Nicaragua* case.

The article contains a well-balanced evaluation of the consequences of the absence of the United States during the phase of the case that involved a judgment on the merits. The author also discusses the argument that the Court is not equipped to decide on matters in which ongoing military activities play a role.

The editor, Lori Fisler Damrosch, wrote about "Multilateral Disputes." This article accurately surveys those cases in which third parties have sought to intervene under Articles 63 and 62 of the ICJ Statute, and correctly indicates a very narrow interpretation and application of these provisions by the Court. The author supports the adoption of an *amicus curiae* rule and deals also with the question of "indispensable parties" to a dispute. This article should also be relevant to any further discussion of reforms in the procedure of the Court.

In the fourth part of the book, Anthony D'Amato and Mary Ellen O'Connell describe the "United States Experience at the International Court of Justice." The authors rightly observe that the experience of the United States was rather positive—until the *Nicaragua* case. They consider the decision of the Court on its jurisdiction to be debatable, but not untenable, and express some moderate criticism of the decision on the merits.

The next article, by Goler Teal Butcher on "The Consonance of U.S. Positions with the International Court's Advisory Opinions," also finds that in practice the official position of the U.S. Government has largely conformed with the arguments presented, and the results reached by, the Court in its advisory proceedings.

The final article, by Michael J. Glennon, is on "Constitutional Issues in Terminating U.S. Acceptance of Compulsory Jurisdiction." The author concludes that the President of the United States may terminate acceptance of the Court's jurisdiction in the manner done in connection with the *Nicaragua* case.

The closing remarks by John R. Stevenson state what many hope and what recent practice confirms: the United States will not withdraw entirely from the World Court.

This rather extensive description of the contents of the book should underscore the reviewer's opinion that the work may serve as a milestone in the discussion of past experience with the ICJ and what one hopes are its promising prospects.

RUDOLF BERNHARDT

*Max Planck Institute for Comparative Public Law
and International Law, Heidelberg*

Reservations and Interpretative Declarations to Multilateral Treaties. By Frank Horn. Amsterdam, New York, Oxford, Tokyo: North-Holland, 1988. Pp. xxix, 514. Index. Distributed by Elsevier Science Publishing Company.

This is a very ambitious book addressing a topic of growing importance. Dr. Horn's goal is "to approach the question of reservations, describing how

the phenomenon of reservations has developed into a problem of international law which has resulted in the need to elaborate a satisfactory regulation of the subject-matter" (p. 2).

The work is organized into three principal parts, dealing with reservations (chs. 2-23), interpretative declarations (chs. 24-27) and functions of depositaries (ch. 28). There is a clear logic to this organizational structure, i.e., it corresponds to the two main modes by which states "clarify" their positions vis-à-vis multilateral treaties and includes a discussion of the way the League of Nations and the United Nations have handled their depositary functions. However, the organization may be confusing because it lacks balance (the reservations part is two-thirds of the book) and may create the impression that distinctions between reservations and declarations are easily drawn.

I shall first discuss the "main" section of the book, i.e., the part dealing with reservations. Horn's scholarship is thorough. He discusses virtually every aspect of reservations, inter alia, their history, the unanimity rule, the various positions taken by the 1969 Vienna Convention on the Law of Treaties, objections to reservations and the withdrawal of reservations. One could hardly pose a question about reservations, be it legal, logical, philosophical or empirical, that is omitted. I especially like his discussion of borderline cases where one has to make the important determination whether a statement constitutes a reservation: "There are no clear and undisputed criteria that would allow for a clear-cut classification of various statements into those that constitute proper reservations and those that constitute other categories of declarations" (p. 98). Horn is meticulous in his examination of myriad possibilities; he assigns certain statements to the reservations category and concludes that others are declarations.

Another strength of the section is the extensive use of examples. Horn realizes that it is impractical, if not impossible, to deal with all reservations and the reactions they evoke. But he provides the reader with enough examples to give a sense of the range and diversity of reservations. Horn adopts some innovative approaches to illustrating the vast amount of information. For example, he lists treaties according to the ratio of objections to reservations to the number of reservations. This gives one an overview of which multilateral treaties have been the most controversial. The 1958 Geneva Convention on the High Seas heads the list with a 14:14 ratio, i.e., all 14 reservations were objected to by one or more parties (p. 187).

Horn also includes an interesting discussion of states that are "active in objecting or protesting" to reservations and those whose reservations have most frequently been the target of objections from other states. We discover that the states most active in objecting are the United Kingdom (107), the Netherlands (67), the Federal Republic of Germany (49), Australia (47), Denmark (47), the United States (39), Fiji (34), Tonga (33), Thailand (32) and Canada (27) (p. 197). The reader will find this interesting, but also somewhat confusing. The absolute numbers given can be deceptive. The United Kingdom, as the most prolific multilateral-treaty maker in the world, would be expected to have a high number of objections. Thus, the

figure of 33 objections for Tonga probably indicates a greater proclivity to make objections than does the 107 figure for the United Kingdom.

Part two deals with interpretative declarations. Horn traces legal doctrines about interpretative declarations in roughly chronological order from the Harvard Draft of 1935, to the early deliberations of the ILC and, finally, the Vienna Conference itself. Horn finds the resulting norms less than satisfactory:

The drafting history of the Vienna Convention shows that even if there had been some support for the view that statements regarding the interpretation of a treaty should be assimilated with reservations, the majority was not in favour of such a categorical attitude. . . . A statement must have an "excluding" or a "varying" effect on the provisions of a treaty. However, there was not much guidance as to how these effects could be established.

To sum up, legal doctrine has not succeeded in doing away with the uncertainty from which the notion of interpretative declarations suffered throughout all the deliberations of the ILC and the Vienna Conference [pp. 234-35].

Horn follows the approach used with reservations: after discussing the legal background, he examines state practice. Thus, one is able to see examples of statements from many different states responding to the provisions of numerous multilateral conventions. Horn selects a number of important treaties, e.g., the Vienna Convention on Diplomatic Relations (p. 279), the Convention on the Punishment and Prevention of the Crime of Genocide (p. 283), the International Coffee Agreement (p. 311) and the 1958 Geneva Convention on the Continental Shelf (p. 315), to cite 4 of 14 conventions covered. For each of these treaties, Horn thoroughly explains and analyzes all important statements and reactions to them. In the process, one gains fascinating insights into the legal-political give-and-take.

Illustrative is the 1966 International Covenant on Economic, Social and Cultural Rights. Its Article 1 stipulates that "[a]ll peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development" (p. 288). India offered an interpretative declaration to the effect that the right of self-determination applies "only to peoples under foreign domination and that these words do not apply to sovereign independent States or to a section of a people or nation" (p. 288). Both France and the Federal Republic of Germany reacted strongly to the Indian declaration. Germany's reaction was more sharply worded:

The right of self-determination as enshrined [*sic*] in the Charter of the United Nations and as embodied in the Covenants applies to all peoples and not only to those under foreign domination. . . . The Federal Government cannot consider as valid any *interpretation* of the right of self-determination which is contrary to the clear language of the provision in question. It moreover considers that any limitation of their applicability to all nations is *incompatible with the object and purpose* of the Covenants [p. 288].

Obviously, space does not permit me to comment on all, or even most, aspects of Horn's fine book. Its greatest strength lies in the rigorous, scholarly approach to a very complex subject. In his concluding chapter, Horn writes that "reservations contra-regulate the relevant subject-matter whereas objections deregulate it" (p. 370). That gives an indication of the dynamics involved in the subject matter.

My greatest concern about the book is that it may not get the attention it deserves. In many ways, Horn has penned (or word processed) both a treatise and a reference work; thus, it runs the risk of being neither fish nor fowl. I tried to imagine a practitioner dealing with a complex case of reservations, objections, interpretative declarations and so forth, to a commercial treaty. I fear such a person would have to invest an inordinate amount of time to obtain the needed guidance. On the other hand, a law teacher wishing to enliven and update a lecture on international agreements might turn to this work. There is much in Horn's book that would add insight and sensitivity to such a lecture. But in order to find it, one has to get through symbolic logic, statistics, linguistic theory and deontology. I suspect that, often, this will be too high a price to pay, and Horn's work will be underappreciated.

JOHN KING GAMBLE, JR.
Pennsylvania State University

The Procedure of the UN Security Council (2d ed.). By Sydney D. Bailey. Oxford: Clarendon Press, 1988. Pp. xii, 499. Index. \$85.

The first edition of this now-standard work on Security Council procedure was published in 1975.¹ It was then, and the second edition still is, a rather amorphous blend in its focus and in its technique. The result is a readable, semischolarly book in which the author takes some detours from his path through procedural matters in the Security Council. For example, he devotes chapter 6 to interactions—not all of them strictly procedural—between the Security Council and other UN organs. His style is straightforward, sometimes anecdotal, sometimes judgmental, but never pedantic.

Within the scope of the book's title, the author covers topics ranging from the nuts and bolts of arranging Security Council meetings, to parliamentary procedure, to voting rules and practices. His final chapter, as in the first edition, ponders the need for new Security Council rules.

Too often—though not invariably—Bailey has retained information from the first edition that is now of minor historical interest. For example, chapter 4 ("Diplomacy and Debate") deals largely with procedural wrangles that occupied the Security Council in its early years, but are not of much significance today. Several pages in chapter 7 ("Subsidiary Organs") are devoted to bodies dissolved or effectively abandoned decades ago, without

¹ See note by Leland Goodrich, in 72 AJIL 698 (1978).

having accomplished anything significant. On the other hand, the second edition benefits from the elimination of a rather long, nonscholarly section that described the personal characteristics of the people who represented the five permanent members during the early years.²

The second edition, like the first, is a disappointment to anyone looking for an analytical discussion of the procedural issues that have arisen in the Security Council. Much of it is descriptive. When the author does attempt legal analysis, it tends to be highly conclusory.

Some of Bailey's conclusions are questionable. For example, in the second edition (p. 239) he relies on the ICJ's Advisory Opinion on Namibia³ for the proposition that the Security Council "can invoke Article 25 [of the Charter] when taking decisions under Chapter VI." The Security Council resolution⁴ held binding in that case did not expressly invoke Article 25. Moreover, the Court treated the resolution as a decision under Article 24, not under chapter VI.⁵

Another trap for the unwary appears where the author says that in the *Anglo-Iranian Oil Company* case,⁶ the United Kingdom "implicitly invoked Article 94(2) of the Charter as well as Article 41(2) of the Statute of the Court" (p. 286). Article 94(2) empowers the Security Council to make recommendations or decide upon measures to give effect to an ICJ judgment. Article 41(2) of the Statute provides that notice of provisional measures of protection shall be given to the parties and to the Security Council. After the Court suggested provisional measures in the *Anglo-Iranian Oil Company* case and Iran responded by expelling the remaining staff of the company, the United Kingdom did refer the matter to the Security Council. But it is misleading to say that this was an attempt to use Article 94(2), without pointing out the controversy about whether or not provisional measures can be considered binding "judgments" for purposes of that article.⁷ Bailey gives the reader no guidance on this point.

In at least one instance, an important matter seems to have fallen between the cracks from the first to the second editions. Bailey asserts in the second edition that "[i]n no case has the Council discussed or recommended . . . the expulsion of any Member for persistently violating Charter principles" (p. 267). But in 1974—after the first edition went to press—the Security

² See first edition, pp. 107–33. The omission of this section renders rather inaccurate a chapter heading ("The People") retained in the second edition.

³ Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 ICJ REP. 16 (Advisory Opinion of June 21).

⁴ SC Res. 276, 25 UN SCOR Res. & Dec. at 1, UN Doc. S/INF/25 (1970).

⁵ 1971 ICJ REP. at 52.

⁶ *Anglo-Iranian Oil Co. Case (UK v. Iran)*, 1951 ICJ REP. 89 (Interim Protection Order of July 5).

⁷ It is not clear that the United Kingdom was in fact attempting to use Article 94(2). The United Kingdom proposed three draft resolutions. One, S/2358 (1951), would have called upon Iran to act in conformity with the provisional measures, without expressly invoking Article 94(2). The other two, S/2358/Revs. 1 & 2 (1951), would have called upon Iran to resume negotiations.

Council did consider the expulsion of South Africa for persistently violating Charter principles. The resolution was vetoed.⁸

Most of Bailey's research seems to have been confined to UN documents, along with some personal contacts. Within those limits, it provides a useful record of sources for other researchers. The analysis would have been aided, though, by consideration of a wider variety of scholarly sources than the author apparently consulted.

To take one example, Bailey's treatment of the relationship between the Security Council and the Secretary-General chronicles the few occasions on which Secretaries-General have invoked UN Charter Article 99 (empowering the Secretary-General to bring to the attention of the Security Council any matter he thinks may threaten international peace and security). Bailey brings out the fact that this is potentially a much broader authority than might be apparent, but he does not take account of the very enlightening studies of the office of Secretary-General by such scholars as Gordenker, Franck and Rovine.⁹ Nor does he do justice to the noteworthy accomplishments of the incumbent, Javier Pérez de Cuéllar.

Despite these criticisms, the second edition has its strong points. Among them is a new chapter 5 on voting in the Security Council. It is an expanded version of the last two sections of chapter 4 in the first edition. It begins with a look at the Yalta formula that led to Article 27 of the Charter, and ends with an attempt to determine when the Council's decisions are binding. As in other parts of the book, some conclusions are debatable, but on the whole the chapter is a welcome addition.

The book's real strength, in both editions, is as a reference work that introduces many of the issues confronting the Security Council. Along with this, the book leads one to the relevant UN documents. For example, the second edition includes 27 tables—some updated or repeated from the first edition, others new—listing recurring events and chronologies, such as vetoes, invitations to participate in Security Council meetings, subsidiary organs established over the years and so forth. Where appropriate, the tables include documentary references. Other source materials appear in footnotes to the text. These, regrettably, are consolidated at the back of the book instead of appearing on the relevant text pages. Also at the back are a highly selective bibliography and seven appendixes. Among the appendixes

⁸ See *Repertoire of the Practice of the Security Council Supp.* (1972–1974) at 78, UN Doc. ST/PSCA/1/Add.7 (1979).

⁹ See L. GORDENKER, *THE UN SECRETARY-GENERAL AND THE MAINTENANCE OF PEACE* (1967); T. FRANCK, *NATION AGAINST NATION* 117–33 (1985); Franck, *The Good Offices Function of the UN Secretary-General*, in UNITED NATIONS, *DIVIDED WORLD* 79 (A. Roberts & B. Kingsbury eds. 1988); Franck, *The Role and Future Prospects of the Secretary-General*, in *THE ADAPTATION OF STRUCTURES AND METHODS AT THE UNITED NATIONS* 81 (Hague Academy Workshop, 1986); Franck, *Finding a Voice: How the Secretary-General Makes Himself Heard in the Councils of Nations*, in *ESSAYS IN HONOUR OF JUDGE MANFRED LACHS* 481 (J. Makarczyk ed. 1984); A. ROVINE, *THE FIRST FIFTY YEARS: THE SECRETARY-GENERAL IN WORLD POLITICS 1920–1970* (1970). Bailey himself has written previously on the UN Secretariat. See S. BAILEY, *THE SECRETARIAT OF THE UNITED NATIONS* (rev. ed. 1964).

are relevant excerpts from the UN Charter and the ICJ Statute, as well as the Provisional Rules of Procedure of the Security Council, as amended in December 1982.

This is a flawed book that should nevertheless be high on the acquisition list of libraries that maintain a UN collection, and high on the reading list of persons interested in the workings of the Security Council. It combines readability with wide coverage and good documentation of UN sources. Those attributes, alone, make it worth having.

FREDERIC L. KIRGIS, JR.
Board of Editors

Soviet Year-Book of International Law, 1987. Moscow: Publishing House "Nauka," 1988. Pp. 382. 6 rubles, 80 kopeks.

Gorbachev's "new thinking" in international affairs has at last reached the *Year-Book* of the Soviet Association of International Law. V. S. Vereshchetin and R. A. Mullerson, who initiated legal analysis of the applicability of the doctrine to international law in early 1988,¹ have contributed to this edition of the *Year-Book*. Although it reached the United States only in late spring 1989, it went to press in August 1988.

What is their message? Vereshchetin says "new thinking" has roots in the past: it is but an extension of the Soviet Government's effort to "realize the ideals of socialism—a world without war and weaponry." Priority is now to be given to mankind's welfare, although not to the extent of recognizing mankind's legal personality. "New thinking" goes beyond G. I. Tunkin's well-known "coordination of wills" explanation of the genesis of international law to espouse a new approach. "Preliminary standards" must be recognized as determining the will of states. Evidently, he does not have in mind espousal of natural law standards for state conduct, but rather recognition that world public opinion, as formulated by social movements and the media, influences statesmen. They now have to appreciate that mankind has an all-consuming need to create security.

Human rights must be brought to center stage so as to confirm socialist values, although the author does not say that individuals may present them before international tribunals. The task of international law is to mobilize institutions capable of guaranteeing peace and security; it must establish control mechanisms, including on-site inspections, and models to guarantee peace and stability. Although introducing much that will be "new," the law must be based on already accepted principles. Even long-established concepts of sovereignty must be reviewed: voluntary self-restriction of some sovereign rights must be encouraged. The guiding slogan must be "the primacy of law in politics."

¹ Vereshchetin & Mullerson, *Novoe myshlenie i mezhdunarodnoe pravo / New thinking and international law*, SOVETSKOE GOSUDARSTVO I PRAVO, No. 3, 1988, at 3.

Mullerson's contribution is an analysis of *Nicaragua v. United States*. Generally, he takes a conservative view of the UN Charter as interpreted in the Judgment. He criticizes the analysis of facts, rejecting the Court's finding that the conflict between the Sandinistas and the contras is no more than an internal conflict, a civil war. He interprets the U.S. support of the contras as more than interference in internal affairs. It is "use of force" in violation of the Charter. He expects no effective control over use of force to be instituted until there is codification and progressive development of law on the subject. He rejects the view that the Court had become anti-American or anti-Western in this Judgment; rather, he finds that it resolved all doubts in favor of the United States. Generally, he finds the Judgment to be a contribution to the development of law, an enhancement of the prestige of the Court among states and scholars previously hostile to it. Indeed, its decision will encourage judicial resolution of disputes and advancement of the primacy of law in international politics. In all probability, the author knew that the Soviet Government was moving toward acceptance of the Court's compulsory jurisdiction in some situations, as was subsequently made clear by a decree of February 10, 1989, rescinding reservations to ICJ jurisdiction over the disputed interpretation and application of conventions on genocide, women's political rights, racial discrimination, gender discrimination and torture.²

In a related article on the domestic jurisdiction of states, G. G. Shinkaretskaya and H. Wünsche-Pietzka trace the history of this issue and conclude that a new emphasis upon mankind's world concerns and international regulation of state activity vitiates arguments that the norm against interference in domestic jurisdiction prevents outside criticism of states for violating voluntarily assumed obligations to limit armaments. V. A. Kartashkin, a former member of the UN Secretariat, develops his view that, with the multiplication of human rights conventions, human rights law is no longer a matter of domestic jurisdiction, although he adheres to his often-expressed opinion that a state cannot be required to respond unless it has voluntarily accepted the specific obligation concerned. Evidently, he would not go as far as President Jimmy Carter did in his address to the United Nations on the extent to which the internationalization of human rights concerns negates domestic jurisdiction arguments against outside complaints based on human rights policies.

This latter theme is developed by B. I. Nefedov, who restates the long-held Soviet position that without a treaty basis the internal affairs of states remain closed to outsiders. In his view, no treaty can alter Soviet municipal law automatically. Treaties are self-executing only if their provisions correspond to existing municipal law or regulate previously unregulated relations. He finds human rights conventions often so general that Soviet courts could not apply them directly to Soviet citizens or foreigners without having at hand implementing legislation.

² Ved. Verkh. Sov. SSSR, No. 11, 1989, item 79.

If there is a conflict between municipal law and conventional norms, Soviet courts cannot but apply the municipal law, although one may presume that it will soon be brought into conformity. If this is not accomplished, the author proposes that the conflict be resolved by application of the established Soviet norms on conflict of laws, i.e., that a subsequently enacted law replaces a prior inconsistent law, or that a special law has priority over a general law. He rejects the view that international law has priority over municipal law as a matter of principle.

Much more is in the *Year-Book*, including a bibliography of Soviet and Eastern European articles and books on international law. In the years since the first edition of 1958, which benefited from G. I. Tunkin's support for an international law of "peaceful coexistence," the *Year-Books* have marked the steady progression of Soviet jurists away from Stalin's negative attitude toward the discipline. There is not yet a convergence of views between scholars in East and West, but the continuing impact of East and West upon each other cannot be denied.

JOHN N. HAZARD
Board of Editors

War, Aggression and Self-Defence. By Yoram Dinstein. Cambridge, England: Grotius Publications Ltd., 1988. Pp. xxx, 292. Indexes. £52; \$95.

The past decade has seen numerous instances in which the conduct of states has given rise to the use of force in self-defense, aggression and war itself. While commentators differ as to which states have engaged in permitted conduct, and which in prohibited activity—whether it be the Iran-Iraq War, Grenada, the Gulf of Sidra or Afghanistan, to cite but a few examples—these events have precipitated a renewed interest in the legal norms that apply to the use of force on the international level. The contemporary need for a fresh and comprehensive presentation of the legal aspects of this fundamentally important subject has been evident for some time. Yoram Dinstein, professor of international law at Tel Aviv University, has risen to the occasion with this distinguished volume of admirable clarity and incisiveness.

In an unusual, but welcome, departure from tradition, Dinstein's study is not presented as a mere aspect of a broader overview of the entire law of war. Rather, the work is a self-contained and free-standing study in which the author focuses his considerable analytical skills on three broad areas: the legal nature of war; the illegality of war, including the contemporary prohibition of the use of interstate force and the criminality of wars of aggression; and exceptions to the prohibition of the use of interstate force, such as individual and collective self-defense.

Among the author's many contributions are a solid review of Charter Articles 2(4) and 51, in which the numerous aspects of their interrelationship are explored, including the possibility—accepted by some, denied by the author—that 2(4) contains an implied exception for humanitarian in-

tervention. Yet he does recognize the right of a state to protect its nationals abroad, under the cloak of Article 51, where certain conditions are met, as he argues was the case in the Entebbe raid (pp. 212–15). Calling upon standards elaborated by Sir Humphrey Waldock in 1952 (i.e., imminent threat of injury to the nationals, a failure or inability of the territorial sovereign to protect them and measures of protection strictly confined to the object of protecting them against injury), the author finds that the U.S. intervention in Grenada failed to meet the third part of this test, since U.S. forces remained for several months after the evacuation of U.S. nationals was completed. This suggests to Dinstein that their presence was originally undertaken for an additional, prohibited reason. It might have been interesting had the author considered why, in a case such as Grenada, a post hoc request by the local constitutional authorities for the U.S. forces to remain until order was restored could not be valid.

In another noteworthy section, Dinstein provides a useful treatment of modern practice with regard to armistices, with special attention to the relationship between Iraq and Israel—Israel's legal justification for its 1981 raid on a nuclear reactor under construction in Iraq was that the raid was conducted by one belligerent against another. Were it not for the existence of a state of war between the two, argues Dinstein, such a raid would have had no plausible legal justification (p. 48).

An interesting theoretical subject to come under Dinstein's scrutiny is whether war in the formal sense can exist today. The author identifies the need for "adaptation of the law to the present status of inter-State force" (p. 140), and argues that the negation of a state of war, even when hostilities are actually raging, would amount to no more than a hollow semantic gesture. In his view, the Treaty of Peace concluded between Egypt and Israel in 1979 provides convincing evidence that a state of war in modern practice persists beyond the de facto cessation of hostilities until it is explicitly ended by the consent of the belligerents (p. 142). Of associated interest is his treatment of neutrality, including that form of qualified neutrality sometimes described as nonbelligerency, a term that most aptly describes the status and policy of a number of states during the recent Iran-Iraq War. Not everyone would agree, however, with the author's observation that a "belligerent suffering from adverse treatment by a neutral State is not likely to bow to that State's subjective determination of who the aggressor is . . . chances are that the neutral State will not find it easy to stay out of the war for long" (p. 157). In point of fact, during the Gulf war, the conduct of a number of Western states exceeded that permitted to orthodox neutrals and was of a sort best described as "nonbelligerency." Yet these states did avoid being drawn into the war, which suggests that they, as well as Iran and Iraq, may have shared the view that expanding the number of declared belligerents was in no one's interest.

With regard to the perennial question whether anticipatory self-defense is permitted under Article 51, Dinstein offers a useful distinction between "anticipatory" self-defense, which he says is not permitted, and "interceptive" self-defense, which he believes is. His standard is that actions in self-

defense are permitted "after the other side has committed itself to an armed attack in an ostensibly irrevocable way" (p. 180). Further, he argues persuasively that this standard conforms with Article 2 of the UN General Assembly's 1974 Consensus Definition of Aggression.¹ His comparison of this definition with the Charter requirements is itself a valuable component of his work. Thus, the U.S. quarantine of Cuba in 1962 was impermissible in his view as was the U.S. reaction to the seizure of the *Mayaguez* (apparently because it was not in response to an action covered by the consensus definition of aggression, rather than the requirements of Article 51 itself). He notes, however, that the ICJ in the *Hostages* case used the term "armed attack" in discussing the takeover of the U.S. Embassy in Tehran by Iranian militants in 1979 and the seizure of Embassy staff as hostages. And, had the United States been sufficiently aware in December of 1941 to intercept the Japanese carrier strike force en route to its attack on Pearl Harbor, he writes, it would have been legally justified as "interceptive" self-defense for it to have attacked the Japanese force "prior to reaching its destination and before a single Japanese aircraft got anywhere near Hawaii" (p. 179). This section of the book should prove of special interest to students of both international law and international institutions.

Perhaps the most compelling aspect of the work is Dinstein's commentary on critical aspects of the decisions by the International Court of Justice in the several phases of the recent *Nicaragua v. United States* litigation. He forthrightly describes the conclusions reached by the Court on self-defense issues as "very baffling" (p. 183). Yet his painstaking analysis repays careful study, and in fact raises considerable doubt about the clarity, if not the underlying soundness, of several important aspects of the reasoning upon which the Court's majority based its decision. For example, he points out that the Judgment of the Court mentioned "measures which do not constitute an armed attack but may nevertheless involve a use of force" and distinguished between an armed attack and "a mere frontier incident," inasmuch as an armed attack must have some "scale and effects" (p. 181). But the author reminds us that numerous distinguished commentators writing over a period of many years have supported a contrary position, i.e., that Article 51 rights are in no way limited in terms of the scale or effect of the armed attack. On another important matter, Dinstein illustrates how the Court has in fact constructed an artificial "quadruple structure" involving the evaluation of self-defense versus armed attack, and countermeasures short of self-defense versus forcible measures short of armed attack, even though this structure is not reflected in customary international law and is not reconcilable with the provisions of the Charter (p. 183). Equally persuasive, moreover, is Dinstein's evaluation of the much-discussed views of the Court concerning the requirement of Article 51 that a report be made to the Security Council by the state employing measures of self-defense. The author takes issue with the Court's implication that failure to report pre-

¹ GA Res. 3314, 29 UN GAOR Supp. (No. 19) at 142, UN Doc. A/9619 and Corr.1 (1974), reprinted in 13 ILM 710 (1974).

cludes a state from invoking the right of self-defense, concluding that the failure by a state resorting to force to invoke self-defense should not be fatal, providing that the substantive conditions for invoking the right are met (p. 199).

Finally, Dinstein's treatment of "defensive armed reprisals" should be widely welcomed, since this is perhaps the most controversial aspect of the contemporary debate concerning the legality of the international use of force. Dinstein makes the essential point that any assertion that all armed reprisals are unlawful is actually incompatible with the Charter's regulation of the use of force between states. After observing that armed reprisals would not qualify as legitimate measures of self-defense if impelled by purely punitive, nondefensive motives, Dinstein states a reasonable rule: "To be defensive, and therefore lawful, armed reprisals must be future-oriented, and not limited to a desire to punish past transgressions" (p. 208). His cogent support for the principle that force may be used in self-defense for deterrent purposes is an important contribution to the current debate on this subject.

In sum, Dinstein has provided a splendid *tour d'horizon* of the salient issues in this significant area of the law. Practitioners and academics alike owe a debt of gratitude to this erudite and skillful scholar for having made available, in an extremely useful format, an inclusive and up-to-date review of the field that is most deserving of a wide readership.

JOHN H. MCNEILL*
U.S. Department of Defense

Le Procès de Nuremberg: Conséquences et actualisation. Centre de droit international de l'Institut de Sociologie de l'Université Libre de Bruxelles. Brussels: Editions Bruylant, Editions de l'Université de Bruxelles, 1988. Pp. 181.

It is quite remarkable that the 1946 judgment of the International Military Tribunal at Nuremberg continues to excite attention and to have an impact on the development of human morals and international law. In March 1987, a colloquium at the Free University of Brussels—with a dozen participants from Belgium, France and Germany—sought to assess the consequences of the Nuremberg trial.

Many of the papers published here are too brief to add much to existing knowledge. Professor Maurice Goldstein, President of the International Auschwitz Committee, hails the Nuremberg judgment and its condemnation of crimes against peace and crimes against humanity as a warning against racism. Michael Pollak of Paris appeals for more tolerance. Professor Norman Paech of Hamburg sees Nuremberg as innovative law that proved unable to prevent the recurrence of similar crimes by others. He

* These views are those of the author and not necessarily those of the United States Government.

calls upon statesmen to address the principal problem of our age—the prevention of war itself.

Pierre Mertens, who has written extensively on the subject, summarizes the work done to eliminate the statute of limitations for war crimes and crimes against humanity. Eric David makes the most comprehensive (pp. 89–176) analysis of the topic. He considers the Tokyo trial, IMT and the 12 subsequent Nuremberg proceedings as he traces the development of international criminal law. He addresses the judgments of Nuremberg as *ex post facto* law and their role as precedent for evolving humanitarian law. He considers the impact of the Nuremberg principles on such contemporary trials as the *Barbie* case in France and the *Eichmann* and *Demjanjuk* prosecutions in Israel. Nuremberg is seen as established law that now holds a sword of Damocles over the head of every tyrant. Whether the precedents can be brought out of hibernation is more a political problem than a legal one, but is one that, he correctly says, concerns us all.

In summation, Professor Jean Salmon concludes that the positive far outweighs the negative. The fairness of the procedures at both Nuremberg and Tokyo demonstrates that the trials were not examples of vengeance wearing the mask of justice. Nuremberg reflects norms that have become part of accepted international law. It is the foundation stone for the codification of international penal law and work now being done by the International Law Commission on a draft code of crimes against peace and security. It eliminates the defense of superior orders and defines the limits of legitimate self-defense.

Among the inadequacies, Salmon notes that many criminals managed to escape justice; some were employed in the service of Allies that themselves engaged in unlawful actions. He mentions Hiroshima, Vietnam, Stalin's gulag, Afghanistan, Pol Pot's mass murders and the genocidal threats posed by nuclear superpowers. Deploing the contrast between theory and practice, he notes that there exists no international criminal court today.

Nuremberg sought the establishment of a more humane and peaceful world through the rule of law. This book challenges the international lawyer to make the precedent of Nuremberg a legal reality of our time.

BENJAMIN B. FERENCZ

Pace Peace Center, Pace University School of Law

The Right to Food. Edited by P. Alston and K. Tomaševski. Published under the auspices of the Netherlands Institute of Human Rights. The Hague: Martinus Nijhoff Publishers, 1984. Pp. 228. Index.

The Right to Food: Guide Through Applicable International Law. Edited by Katarina Tomaševski. Dordrecht, Boston, Lancaster: Martinus Nijhoff Publishers, 1987. Pp. xix, 387. Index. Dfl.165; \$75.50; £56.75.

As the titles of these companion volumes suggest, the books examine the concept of the right to food through articles contributed by the editors and

other authors and through relevant international instruments. *The Right to Food (Essays)* contains 10 articles written from various points of view, emphasizing legal and human rights approaches to realization of a right to food as the most fundamental of social and economic rights. *Essays* is a result of both the Right to Food project begun by the Netherlands Institute of Human Rights (SIM) in November 1983 and an international conference in Utrecht in June 1984 entitled "The Right to Food from Soft to Hard Law." Publication of *Essays* was timed to coincide with the 10th anniversary of the Universal Declaration on the Eradication of Hunger and Malnutrition. Complete with political cartoons by Plantu, Honoré and Bellenger, the volume is an ambitious and laudable effort to put the concept of a right to food for all people at the top of human rights agendas, despite the obvious complexity of such an endeavor.

The Right to Food: Guide Through Applicable International Law (Guide) collects relevant excerpts of international instruments that provide support in public international law for a right to food. Other than information in the brief prefatory material, there is scant "guidance" or analysis provided to the reader through "authentic texts of the relevant international instruments . . . collected to map out the existing principles and norms on the right to food" (p. xv). The book might more accurately be entitled a compendium or anthology since, without reference to articles contained in *Essays*, the reader is left to find his way through a selection of conventions, United Nations documents and other material, an experience akin to being provided with a compass and told to find the North Pole.

Nevertheless, *Essays* and *Guide*, read together, establish that a right to be free from hunger is essential to the exercise of any human right. *Guide* contains a helpful chronological table, an index and an expanded document commentary on selected international instruments included in the text. For those seeking information on the historical, legal and philosophical underpinnings of a right to food or a right to be free from hunger, these companion volumes provide an invaluable resource.

It would be difficult to exaggerate the primal and humane importance of food to the economic, social and human rights scheme. *Essays* begins with a legal overview dedicated to promoting eradication of hunger and malnutrition (p. 7) and ends with strategies for nongovernmental organizations to exert influence on world decision-making and legislative bodies. A summary of the SIM conference proceedings is provided at the end of the book. The diversity of backgrounds and orientations among the authors causes some unevenness in the articles. Contributions vary in style, length, clarity and scholarship, but the overall message is clear. A right to food, should such a concept be promulgated and protected, is more accurately a "bundle of rights" (p. 207), each component bringing its own complexities and inequities to the continuum of supply and demand. Space limitations prevent mention of each entry, but several articles delineate the scope of the problem in actualizing a right to food and the need, nevertheless, to realize such a right on a global scale.

At the outset, this reviewer needed a historical framework to place the problem of food rights in perspective. The reward came toward the end of the book in an article written by Pierre Spitz, a French agronomist, economist and sociologist. His article is prefaced by two quotes that seem to summarize the human rights concerns of all the articles in *Essays*:

Take a barren year of failed harvests when many thousands of men have been carried off by hunger. If at the end of the famine the barns of the rich were searched, I daresay enough grain would be found in them to save the lives of all those who died from starvation and disease, if it had been divided equally among them [Sir Thomas More, *Utopia*, 1516].

That people are starving for lack of food is because there is grain hoarded in storehouses of the rich instead of in government granaries (. . .) If the ruler fails to take heed, then traders wander in markets and take advantage of want among people [Kuang Chung, First Minister to Duke Huan of the Feudatory of Ch'i, 650 B.C. (p. 169)].

The proposition that lack of adequate food for millions of people is not due to insufficient production but rather to profoundly complicated problems of maldistribution is reiterated time and again throughout *Essays* and brought into historical focus by Spitz's article. It is useful for the reader to reflect that ancient agricultural societies used food extracted from producers as taxes, levies and tributes until the development of monetary systems, which further exacerbated imbalances in agricultural supply, distribution and demand (p. 171). As Spitz illustrates:

To the Confucian arguing for teaching moral conduct to the people instead of imposing laws, the Imperial Secretary answered that "people's characters are fixed by natural endowment and cannot be altered." He said: "Hustling and bustling, all the world goes after profit . . . merchants are not ashamed of disgraceful conduct if it brings them lucre" [p. 173].¹

In a subsequent article, Roger Plant analyzes the cash crop system of many Third World countries and the cycle of inequities that take a state's economy into an inexorable downward spiral (p. 187). These historical perspectives, presented in much greater length and detail than can be discussed here, complement the treatment presented by editor Philip Alston, whose article develops the international legal precedents for a fundamental right to food, most notably Article 11 of the International Covenant on Economic, Social and Cultural Rights (p. 29). It is noteworthy that the right to be free from hunger is the only right that is expressly stated to be "fundamental" in either the aforementioned Covenant or the International Covenant on Civil and Political Rights (p. 32).

Without minimizing the major problems inherent in establishing a global right to food, the authors attempt unflinchingly to accent the positive in the

¹ I KUNG CHUAN HSIAO, *A HISTORY OF CHINESE POLITICAL THOUGHT* 465 (1979).

face of overwhelming conceptual difficulties. Not the least of these difficulties is concern for the world's exploding population. In 1800, the globe played hostess to approximately one billion people. World population grew to two billion by 1930; three billion by 1960 and five billion by 1987, and is projected by the UN World Population Fund to rise to more than six billion by the end of this century. Although editor Katarina Tomaševski maintains in her article that "population growth was a consequence of underdevelopment or maldevelopment, and not the cause of it" (p. 156), in the face of such overwhelming numbers, common sense dictates that maintaining a balance between the world's food supply and its population is a conundrum with no satisfactory solution as yet. At the very least, there are now many more disenfranchised and disinherited people who cannot gain access to the means of subsistence: land and money.

Second, human beings have been, and are, described even by First World economists and ordinary businessmen and women as "human resources" and "human capital" (p. 142). Labor is often expensed on balance sheets as the largest part of overhead, albeit a resource. Nevertheless, Tomaševski's point is well taken that quality-of-life indicators should take individuals as units of observation and human rights should inhere in individuals if such rights are to make any sense at all (*id.*).

Third, food has been, and is, a commodity and a weapon.² Plant's article describing cash crop systems in Latin America brings to mind the latest permutation of cash crops into cocaine and heroin for export to alleviate balance of payment problems in developing countries. The best land is used to produce cash crops, leaving the people little indigenous food to eat.

Finally, the defense of every right requires an enforcement mechanism. Public international law is, at best, morally binding or binding by consent of the involved states. At worst, it is nonbinding. The *Nicaragua* case, followed by the U.S. refusal to comply and withdrawal from the World Court's compulsory jurisdiction, gives added poignancy to the statement late in *Essays* that "[e]ven if the right could be infused with some content, there can be no way of enforcing the entitlements promised" (p. 206). Since there is hardly a state in the world today that can reasonably claim that all of its people are adequately fed, and since statistics on world hunger are worsening, a right to food is still aspiration.

However difficult to implement, the right to food is an essential component of any other human right. This reviewer appreciates the effort, devotion and vision invested in the SIM project and in realizing the right to food as one of the foremost human rights without which all other civil, political, economic and social rights are meaningless. While mindful of the pitfalls along the road to achievement, one need only recall that the United Nations itself, however flawed, evolved out of the chaos and destruction of World War II and in spite of the negative ballast of skeptics and gainsayers. It may

² R. GILMORE, A POOR HARVEST 169 (1982).

be utopian to aspire to a right to food for all people, but if we do not aspire, we do not achieve.

PENELOPE B. RUNDLE
Of the Georgia and Massachusetts Bars

Women's Legal Rights: International Covenants an Alternative to ERA? By Malvina Halberstam and Elizabeth F. Defeis. Dobbs Ferry: Transnational Publishers, Inc., 1987. Pp. xii, 208. Index. \$35.

In the aftermath of the failure of the requisite number of states to adopt the Equal Rights Amendment to the United States Constitution in the required time period, many human rights activists, feminists and legal scholars turned their attention to other remedies, particularly enactment of new legislation and continuing litigation.

Little effort was directed to another possible source of relief contained in international treaties barring discrimination based on gender. Two such treaties, the Convention on the Political Rights of Women and the Inter-American Convention on the Granting of Political Rights to Women, have been ratified by the United States and are now the supreme law of the land under our Constitution. The authors address this additional legal avenue, and argue that various forms of gender-based discrimination may now be unlawful pursuant to these treaty provisions. Further, they make a compelling case for ratification of a host of other treaties concerning specific legal rights of women that have been submitted to the Senate for its advice and consent.

This slim book is of interest to the general reader on several counts. It affords a brief history of women's legal rights in the United States from the earliest days to the present. Constitutional provisions, such as the 14th and 19th Amendments, are scrutinized, as well as Supreme Court decisions thereunder. Existing federal laws affecting women's rights, particularly title VII and title IX, and supporting cases, are summarized and compared with treaty provisions in matters of political rights, employment, education and marriage. Of great interest is the analysis of the extent to which current U.S. law is inconsistent with the requirements of various relevant international conventions.

Starting with the UN Charter itself, as well as the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, and the American Convention on Human Rights, from which the general standard of equality of rights as between men and women can readily be gleaned, the authors proceed to a rigorous review of conventions directed solely to women's rights, most of which are in force, including several conventions promulgated by the International Labour Organisation (ILO) with respect to work conditions for women and maternity protection.

Of greatest interest is the analysis of the most comprehensive treaty in the field: the Convention on the Elimination of All Forms of Discrimination

against Women, adopted by the General Assembly and opened for signature and ratification on March 1, 1980. President Carter signed it on July 17, 1980, and submitted it to the Senate for its advice and consent on November 12 of that year. This treaty requires states to change existing laws, regulations, customs and practices that discriminate against women in virtually every endeavor, and to enact affirmative legislation to ensure maternity leave with pay, protection of seniority, and family services to permit a woman to meet family obligations, work responsibilities and participation in public life. States must take measures to change social and cultural patterns of conduct based on sex roles, with the proviso that "temporary" steps to accelerate de facto equality shall not be deemed discriminatory.

The United States holds a poor record with respect to ratification of human rights treaties in general. It has ratified only five that mandate equality or protection for women in specific areas: the UN Charter, the International Agreement for the Suppression of the White Slave Traffic, the Convention on the Political Rights of Women, the Inter-American Convention on the Granting of Political Rights to Women, and the inter-American Convention on the Nationality of Women. Because of this unfortunate background, the authors undertook to review, and then to dismiss, the various arguments propounded over the years as to the lack of constitutional authority to ratify such treaties. This is a well-mined subject as to which little original thought is offered here.

The great value of this volume is its delineation of existing inconsistencies between treaty provisions and current U.S. law with respect to gender discrimination. On the assumption that prompt ratification of the major treaties analyzed in this book is feasible, the failure of the U.S. Supreme Court to bar all gender-based discrimination under the Equal Protection Clause of the 14th Amendment could be overcome by the application of treaty law. Certain treaty provisions would require implementing legislation to become effective and, if enacted, would serve to invalidate inconsistent state and federal laws. The end result would yield the same practical effect as enactment of the Equal Rights Amendment. Such a scenario would be salutary indeed. While prompt consent by the U.S. Senate to these treaties remains problematic, the authors fill a vacuum in legal thinking and call attention to a neglected source of law to combat gender-based discrimination.

RITA E. HAUSER

Of the New York and District of Columbia Bars

The New Asylum Seekers: Refugee Law in the 1980s. The Ninth Sokol Colloquium on International Law. Edited by David A. Martin. Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1988. Pp. xiii, 217. Index. Dfl.135; \$75; £39.

This volume, containing papers presented in April 1986 at the Ninth Sokol Colloquium on International Law, held at the University of Virginia

School of Law, is a welcome addition to the swelling literature on international human rights law. The contributors include legal scholars from the United States and Western Europe, current and former government officials, and representatives of and advisers to the UN High Commissioner for Refugees (UNHCR) and other international organizations.

The organizing theme of the conference and of the resulting volume is the "new asylum seekers." In his title essay, editor, colloquium organizer and law professor David Martin identifies two novel features distinguishing this decade's asylum seekers from their predecessors. First, "the old system took for granted certain *natural barriers to movement* that kept the numbers of direct asylum seekers tolerably low and thereby shielded the West from having to confront certain fundamental tensions" (p. 8)—in particular, the tension between humanitarian impulses and immigration controls. Second, "[t]he old system provided certain *guarantees of refugee bona fides* that seemed to operate almost automatically, without need of difficult and painstaking adjudications of individual claims to refugee status, and indeed without much clarity about precisely what it is that distinguishes a refugee from other sorts of migrants" (p. 9). Unlike some other contributors to this volume and to the larger debate over asylum policy, Martin takes these governmental, political and legal-formal concerns quite seriously. He insists that they often represent genuine and legitimate fears among those in the receiving countries, and that refugee advocates who simply dismiss these fears as xenophobic and racist may in fact weaken their own cause.

Martin sees three strategic options. First, the receiving countries could expand legal protection for the new asylum seekers. Second, they could renovate the system of adjudication so that it can apply and enforce the existing (or perhaps reformulated) criteria for protection effectively and swiftly enough to achieve fair outcomes, avoid unnecessary detention and deter the less-compelling illegal migrants. Third, they could impose broad-based, inevitably crude restrictive policies, such as interdiction at sea, detention or denial of permission to work, designed to deter migration categorically. Martin strongly opts for the second strategy of reforming the adjudicatory system, a strategy that he has elaborated with great care in other work, including his recent report to the Administrative Conference of the United States. He concludes by gently, but firmly, chiding the refugee advocacy community for allowing the perfect to be the enemy of the good by reinforcing a "vicious cycle" in which the advocates' "maximalism" makes it so difficult for governments to implement the second (adjudicatory reform) strategy that they "tumble into the third and worst option" (p. 14). If this cycle is to be broken, Martin suggests, advocates and the UNHCR may have to take the lead in restraining their aspirations.

Martin's claim is well worth considering. In the end, however, it is an empirical question whether *on balance* the current strategy of advocates advances or retards the goals of legal protection of the truly vulnerable and the respect of states for human rights. Martin's answer to this question is certainly a plausible one, but he provides no convincing evidence on the point. This is hardly a criticism of Martin since such evidence would be

difficult to come by and his purpose is simply to raise the issue. Still, empirical research on this question, even if it proved inconclusive, might well yield a greater marginal return for refugees than the kind of repetitive, abstract theorizing that characterizes so much contemporary writing on human rights law.

Martin can be criticized, however, for not linking his point about refugee advocacy to the central issue of his own essay and of the volume as a whole: what is really new about the new asylum seekers? One answer, which Martin surprisingly ignores, is suggested by the contents of the volume he edited. The new asylum seekers are championed by an advocacy apparatus that seems far more influential and effective than that which defended earlier refugee movements. This apparatus consists of a more militant UNHCR; a growing body of enforceable international human rights law; state bureaucracies concerned with the implementation of these norms; private advocacy organizations whose talented, energetic staffs are sometimes supported by politically well-connected elite boards; and a significant community of scholars committed to expanding legal and social protections for refugees and other unfortunate migrants. One should not exaggerate the power of this emergent advocacy apparatus, of course; it is dwarfed by the political and fiscal resources of the governments with which it must contend, and it loses more battles than it wins. But it would also be a mistake to underestimate the growing political influence of skillful advocates wielding humanitarian norms, invoking legal principles and mobilizing public opinion.

The intellectual work of these advocates, especially the legal scholars and international organizations, is well represented in this volume. Gilbert Jaeger, a leading official of the UNHCR for many years, analyzes the concept of "irregular movements," asylum seekers from country *A* who have received some protection in country *B* but move on to country *C* in an unauthorized fashion, where they then seek asylum. He points to the importance of defining "the level of legal accommodation that amounts to 'protection' in" country *B* before one can sensibly define what constitutes "irregular" movement, and suggests a range of possibilities (p. 31). He tentatively estimates that 20–30 percent of all unscheduled arrivals are "irregular," with higher figures for particular countries or years. He urges that the "fundamental causes" of irregular movements be directly addressed, especially through regional solutions (p. 36).

Michiel den Hond, head of the Asylum Section for the Netherlands Government and a former UNHCR official, emphasizes the phenomenon of "jet-age refugees," who pass some time in another country before reaching the country in which they hope to receive asylum. He notes that they upset the traditional "division of labor" between developing and industrialized countries with respect to refugees, which had kept resistance by receiving countries at a tolerable level. He argues for minimal levels of protection in countries of first asylum to discourage onward movement by refugees and to facilitate more durable solutions.

Doris Meissner, formerly a top INS official and now on the staff of the Carnegie Endowment for International Peace, reviews the history of the 1980 Refugee Act, which she helped to draft, focusing her attention on its

asylum provisions, which were "almost an afterthought" (p. 60). She emphasizes that the assumptions that guided the drafters of the Act became anachronistic almost immediately with the mass migrations of Central Americans displaced by brutal wars. Arguing that the United States has established an asylum process, not a policy, Meissner calls for a reappraisal of the balance that has been struck between foreign policy interests and humanitarian values in the administration of the law. Laura Dietrich, a former State Department official, offers a most unenlightening, formalistic description-defense of American asylum policy.

E. W. Vierdag, a law professor in the Netherlands, argues that one's refugee status should not be vitiated by the fact that one passed through another country and received some protection there short of full asylum. He reviews the policies of the Western European countries on this question; the diversity in state practices, he finds, exacerbates the problem of "refugees in orbit." Joan Fitzpatrick Hartman, an American law professor and a board member of Amnesty International, argues that a consistent state practice has recently developed recognizing a "crystallized norm of temporary refuge" for migrants who do not qualify as refugees under a traditional reading of the Convention definition but who have been displaced by civil strife (p. 87). She maintains that this norm is best protected and vindicated by viewing it not as an adjunct (albeit an enlargement) of refugee law, which is readily politicized because of its concern with the intentions of the state of origin, but rather as a norm of "customary humanitarian law," which focuses on that state's "practical difficulties" in providing de facto protection (pp. 87-88). She goes on to elaborate some of the incidents of this norm and calls for its implementation in American law. Guy Goodwin-Gill, an official of the UNHCR and author of a leading book on refugee law, argues that a quite extensive norm of *non-refoulement* is already fully embedded in customary international law and should be further expanded and specified by convention.

The views of Hartman and Goodwin-Gill are flatly rejected by Kay Hailbronner, a law professor from West Germany. "[S]tate practice," he writes, "particularly as shown by the asylum laws of Western Europe, the United States, and Canada, does not support *nonrefoulement* of all humanitarian refugees as a norm of customary international law" (p. 123). Citing numerous examples of refusal by states to accept *non-refoulement* principles, he argues against confusing the UNHCR's activities, frequent humanitarian admissions or the special admissions programs of some states, with consistent state practice. He also rejects the view that the Convention of the Organization of African Unity establishes temporary refuge for victims of armed conflict as even a norm of *regional* customary international law, and he states that "[t]he policy of the United States, therefore, is by no means singular" (p. 139). Finally, he argues that the established norm against torture does not imply that the *non-refoulement* principle applies as a matter of international law to torture or inhuman or degrading treatment.

Tom Gerety, an American law professor, contributes an eloquent reflection on the sanctuary movement in which he explores the ironic relationship between the legalism of morality-driven sanctuarians and the moralism

of a legal system that seeks legitimacy in the moral sanction of the larger society. The final essay is by Jack Garvey, also an American legal scholar. Garvey emphasizes the fact that "major refugee flows in recent years have been encouraged or even instigated by governments of states of origin as premeditated and malicious acts of deliberate policy" (p. 184). It follows from this, he argues, that far more attention should be paid to enlarging and enforcing the legal responsibility of the state of origin for refugee flows. He forcefully contends that "we should avoid the 'root cause' approach, as well as complete dependence on human rights principles, as the means to address the state of origin" (p. 189), and suggests some "guidelines for guidelines" for increasing that state's legal obligations, including early warning and monitoring of flows and compensation claims.

PETER H. SCHUCK

Yale Law School

Voprosy grazhdanstva v mezhdunarodnom prave (Questions of citizenship in international law). By Jury R. Bojarc. Moscow: "International Relations," 1980. Pp. 158. 70 kopeks.

The author, who teaches at the Faculty of Law of the Latvian State University in Riga, divides his book into two parts: international law problems of citizenship, and the regulation of citizenship in the principal national legal systems. He states in the introduction that the basic principle of citizenship law in the socialist countries consists of the unity and equality of citizens. In the capitalist countries, on the other hand, great differences exist between the legal status of citizens and their real situations. On account of the different political and class interests of states, which result from their different socioeconomic systems, few universal international treaties exist in this field. However, there are a number of multilateral and bilateral treaties. A universal codification was first attempted at the Hague Conference of 1930. The author mentions particularly the multilateral treaty among the Scandinavian states, renewed in 1969 when Finland acceded. He further mentions the European Convention on Reduction of Cases of Multiple Nationality and Military Obligations in Cases of Multiple Nationality of 1963. But, according to him, the system with the most progressive treaties in this field is that of the socialist states.

In the first part of the book, the author shows how the absence of rules of international law on the acquisition of nationality leads to a large number of cases of dual nationality. The origin of the dual nationality problem lies mainly in the fact that conflicts of nationality law arise between states. The two major criteria for the acquisition of citizenship are *jus sanguinis* and *jus soli* and most states at present have a mixed system. There is also the possibility of collective naturalization, particularly in cases of the transfer of territory. Dual nationality can also arise from mixed marriages and from emigration accompanied by naturalization.

Dual nationality is not prohibited by international law but is almost universally regarded as undesirable. The author cites the *Canevaro* and

Nottebohm cases as proving the relevance of effective nationality; they are based on the principle of the closest connection for the determination of nationality (also found in Article 5 of the Hague Convention). The Scandinavian treaty gives preference in cases of dual nationality to the state whose nationality was last acquired and is considered by the author to be an example of the elimination of dual nationality in the Western world.

Statelessness, like dual nationality, is considered undesirable but is not prohibited by international law. Denationalization may take place automatically or by decision of the competent authority and may be either individual or collective. In socialist states it may also take place under treaties providing for option in the case of dual nationality. Denaturalization may not take place on the ground of race, or be applied against religious, social or political groups. (This reviewer would add a reference to Article 9 of the UN Convention on the Reduction of Statelessness of 1961, where this prohibition is stipulated.) The author states that stateless persons are in a precarious position in capitalist states (but here he does not give adequate consideration to the UN Convention Relating to the Status of Stateless Persons of 1954, which has been ratified by 34 states, mainly Western or developing ones).

The second part of the book deals with national rules on citizenship, discussing Britain, the United States, Germany until the Second World War and then the Federal Republic, France, the liberated territories (including Latin America) and the Soviet Union and other socialist states. The historic development of these nationality laws is described. With respect to Great Britain, the author starts with the feudal origin of *jus soli* and deals with the principle that the individual cannot cast off his allegiance—a view that led to conflicts with the United States.

The author also deals with the relations between being a citizen of the British empire, “a British subject,” and a “Commonwealth citizen.” According to the author, naturalized persons in Britain have a less favorable status than other classes of citizens and the status of British subject has a discriminatory character since it can be acquired by Europeans *jure soli* or *jure sanguinis* but by non-Europeans only *jure soli*. The author regards the British legislation of the 1970s and 1981 as racist, having made thousands of persons stateless and discriminating against those of non-European origin. He goes on to assert that the administration of nationality questions is incumbent on the Home Secretary and does not give any procedural guarantees against arbitrariness (though this reviewer would remark on the possibility of recourse to the judiciary by means of prerogative writs).

The legislation of the United States is discussed next. The author explores the difference between “nationality” and “citizenship” under American law. He sees the category of nationals without citizenship as a result of the imperialist policies of the United States. Citizenship was introduced in 1779 under the influence of the French philosophers and reflected “demagogic bourgeois” conceptions that implied the formation of the will of the state with the participation of every citizen. The naturalization statutes of the United States at first were racist in character and now have, owing to the exclusion clauses, political, anti-Communist aspects. In the author’s view,

American policy is still racist, because of immigration quotas, which are ten times higher for the developed countries. And its administration, like that of Britain, is delegated to administrative authorities with only a formal role being played by the courts.

The development of German nationality law up to 1945 is reviewed next. The author highlights aspects of German law that have reached out to those of ethnic German origin who live outside of German territory, including those expelled from other states to the territories of the German Reich as it existed on December 31, 1937. He also reviews the conflicts of position between the Federal Republic, which recognizes only a single German nationality, and the Democratic Republic, which asserts that there are two German states, each with its own nationality—a view that is accepted by the socialist states.

A review of French nationality rules highlights the revolutionary bourgeois aspects of the French Revolution and its shift from the concept of "subject" to "citizen." But in later years, French law took on imperialist overtones, treating inhabitants of colonized territories at first as "protégés," then as French subjects and after 1945 as "nationaux français" but not as citizens. After decolonization France entered into special agreements with a number of the former colonies under which the inhabitants could remain French nationals or could be reintegrated into French nationality. Dual nationality was apparently considered the lesser evil. Thus, according to the author, French nationality law developed in the same way as that of other imperialist states.

As to the newly independent states, the author stresses that their status as states does not depend on their recognition or nonrecognition by the metropolitan states. Their nationality rules exhibit influences of the former colonial power as well as local influences, particularly that of Islamic law in Arab states. In some states naturalized non-Muslims have fewer rights than either native-born citizens or naturalized Muslims. The laws of many of the former British colonies provide for the continuation of Commonwealth citizenship alongside citizenship of the new state.

In Latin America the author sees the influence of the former metropolitan powers, Spain and Portugal, as well as that of the United States. The author describes various special features of Latin American nationality laws, in particular those that give nationals of other Latin American or Central American states advantages with respect to naturalization. A feature of Latin American law is the existence of a number of multilateral and bilateral treaties, particularly the Convention of Rio de Janeiro of 1906 on naturalization; the treaty of 1907 on the equality of rights of nationals in other contracting states; the so-called Bustamante Code of 1928, which guarantees the nationals of one state party national treatment in other state parties; and the Convention of Montevideo of 1933, which provides for the loss of nationality of one country upon the acquisition of another state's nationality and declares that there should be no discrimination on account of sex in nationality laws. Bilateral treaties were concluded with the United States on the reciprocal recognition of naturalization, some of which include a clause

providing for the resumption of the first nationality on returning to the first state for a permanent abode.

In the Soviet Union, citizenship is regulated by the law of December 1, 1978, and the decree of the Supreme Soviet of June 15, 1979. The legislation, according to the author, seeks to avoid conflicts between municipal and international rules concerning nationality. The primary characteristic of Soviet law is the equality of citizens before the law regardless of origin, race, social or property status, ethnic origin, religion, sex, occupation and so forth. Citizenship in a republic and common Soviet citizenship both exist. Naturalization in another socialist country is possible only with the consent of the competent authority to expatriation. The Soviet Union has concluded a great number of treaties with other socialist states in matters of nationality, the first of them with Mongolia in 1937. They deal with such matters as the right of option in cases of dual nationality and with questions of expatriation. In other socialist states, nationality legislation was enacted rather late, after their establishment. There is no discrimination in matters of citizenship on account of race or ethnic origin.

The book shows the author's thorough knowledge of nationality laws and treaties. In his conclusion, he deplores the lack of universal codification of nationality law within the framework of the United Nations. Ultimately, a Convention on the Reduction of Statelessness was adopted in 1961, but it has been ratified by only 14 states so far. Under these circumstances, codification of nationality law within the United Nations seems unlikely for the near future.

The book thus gives the reader an interesting view of Soviet positions on nationality law, both municipal and international.

PAUL WEIS
Geneva

Perspectives du droit de la délimitation maritime. By Prosper Weil. Paris: Editions A. Pedone, 1988. Pp. ix, 319. F.200.

A comparison between land delimitation and maritime delimitation can be made from many points of view. First of all comes that of methodology, since the process leading to the determination of a land boundary is completely different from that aimed at delimiting a maritime boundary. In the first case, the judge has to dispose of a space that is subject to two distinct sovereigns; in the second, there is a zone of overlap where legal titles of two or more states coexist. A comparison can also be made by taking into account the number of delimitations. Nowadays land delimitation is not as important as it used to be, while maritime delimitations have gained currency because of both their complexity and their number. It is therefore necessary to build a doctrine of maritime delimitation having the same dignity and importance as that of territorial delimitation. This task has been

carried out by Professor Weil in a book that can be considered a landmark in the doctrine of the law of the sea.

Weil's book is divided into four parts, preceded by an introduction that raises the main problems of delimitation of the continental shelf. The first part deals with the concept of maritime delimitation. The author rightly makes clear that maritime delimitation, like that of land, involves a legal process and cannot rely on geography alone. Law prevails over geography; lawyers over geographers! Their respective roles and spheres of competence are delineated from the beginning.

According to Weil, maritime delimitation is not declaratory but has a constitutive nature: it is man-made. In effect, any delimitation of the continental shelf, far from being a mere geographical process, is a true legal operation that depends on the titles on which the sovereign rights of states over the continental shelf are based. When title was based on the theory of natural prolongation, delimitation had a declaratory nature, since judges were called upon to adjudicate land nature had already given to the coastal state. The abandonment of the doctrine of natural prolongation and the emergence of that of distance from the coast implies the end of the declaratory theory, whose defeat was definitively proclaimed in the 1985 Judgment in the *Libya/Malta* case. Thus, a judge's aim is to apportion an area as to which competing titles overlap. This requires amputation of the two continental shelves, a legal operation based on a legal title. It must lead to an equitable solution.

Adjacency is the legal title from which one must start. The land dominates the sea through the coast. What matters is not the continental mass, but the coastal development. Therefore, an island is entitled to have a continental shelf in proportion to its coastal development.

The content of the right over the continental shelf depends on three factors: distance, radial projection and coastal length. Distance is the instrument that allows adjacency to be converted into measurable form. Where two continental shelves overlap, the principle of equidistance is the one most in keeping with the spatial criterion of distance. Equidistance also guarantees the principle of nonencroachment. Radial projection allows the projection of territorial sovereignty. Through the coast, it spreads in all directions, with the consequence that radial projection is omnidirectional. Coastal length is the third element to take into account. Here, the starting point is generally a straight baseline or the arc of a circle. However, as far as delimitation is concerned, only those segments whose projection gives birth to an encroachment upon a foreign continental shelf matter.

The influence of law on the physical structure of a coastline is twofold. Law can intervene as to base points. These must be "reasonable and equitable" and their adjustment might be necessary to correct the inequity arising from an equidistance line. The length of coastline can also be taken into account so as to verify the equity of a delimitation. In this connection, however, one must keep in mind that the principle of proportionality—i.e., apportioning continental shelf according to the length of the coastline—is

not an autonomous method of delimitation, but only a criterion for verifying, a posteriori, the validity of a delimitation.

In other words, nature, i.e., configuration of the coastline, is the starting point for a delimitation. Even though delimitation is a legal operation, it is affected by nature, which can adversely influence the outcome. Equity can help in adjusting a negative result. However, equity does not mean equality. Judges cannot entirely refashion nature, though they can adjust it, provided that geography is respected and equity pursued. For instance, the adjustment cannot have as a consequence that a minor geographical accident leads to an apportionment of continental shelf out of proportion with the importance of that accident.

The second part of Weil's book deals with unity and diversity of maritime delimitation according to its different dimensions: negotiated and third-party delimitation, the problem of the single maritime boundary and the problem of conventional and customary law in delimitation.

Negotiated and third-party delimitations are not identical. It is true that in a third-party delimitation the judge has to apply legal rules and to make his judgment according to law and not *ex aequo et bono*. It is also true that states, in negotiating a delimitation, have to follow a few rules, since the aim of the negotiating process is agreement on a delimitation based on equitable principles and embodying an equitable result. However, while judges cannot make decisions at variance with rules on delimitation, states can derogate from them, since rules on maritime delimitation do not belong to *jus cogens*.

Whether there should be a single maritime boundary is a far more complex problem. If the exercise leading to the delimitation of continental shelf and exclusive economic zone is identical, how is it possible to arrive at different solutions? Put another way, must the EEZ and the continental shelf have a single boundary or may they have two different ones? The interests at stake can be conflicting. For instance, a state that obtained an unfavorable delimitation of its continental shelf will try to obtain an EEZ more extended than its shelf, whereas the other state will be interested in having the identical boundary. This problem has not yet been definitively resolved by international courts. It is only echoed in a few judgments. Even the *Gulf of Maine* Judgment does not give a definite answer: in effect, the Chamber was called upon to draw a single boundary that did not delimit the continental shelf and the EEZ, but only the shelf and a fishery zone. Since the parties had asked it to draw a single boundary, the Chamber avoided addressing whether the judge may establish a single boundary even though not requested to do so or, on the contrary, whether he is obliged to draw a single boundary only upon request. To find an answer, one has to take into account the latest developments in the law of the sea.

The concept of a continental shelf precedes that of the EEZ, which, in its turn, in some respects derives from that of fishery zones. Continental shelf and fishery zones had different extensions. However, the consolidation of the EEZ as an institution and the conclusion of the 1982 Convention on the

Law of the Sea put an end to the differentiation. Both zones have a 200-mile limit, unless a more extended natural shelf allows the external limit of the continental shelf to reach farther than that of the EEZ. Policy considerations favor a single boundary; however, neither state practice nor relevant provisions of the 1982 Convention are of any help in determining whether a single boundary is a rule binding the judge. The problem must therefore be resolved by taking into account legal principles and the legal nature of the two zones. Their nature is based on the principle of distance from the coast. It follows that a single boundary should be drawn, rules on delimitation being identical. There are exceptions, of course. One is the case of a continental shelf stretching over 200 miles, since the principle that allows such an extension is not distance from the coast, but natural prolongation.

The doctrine of a single boundary is not without practical importance. One might argue that agreements concluded for the apportionment of the continental shelf could automatically be applied to the EEZ. However, Weil rightly points out that the automatic extension of the continental shelf boundary to the EEZ is to be accepted *cum grano salis*, since existing agreements for the delimitation of the shelf were concluded when the now-obsolete theory of natural prolongation of the continental shelf prevailed.

Is there a real difference between the regime of negotiated delimitation and that embodied in customary law? In the *North Sea Continental Shelf* cases, the ICJ stated that Article 6 of the 1958 Geneva Convention on the Continental Shelf does not embody a rule of customary law and thus rejected the equidistance principle. This assertion has since been restated. By so doing, the Court has attributed customary law value to the pertinent provisions of the 1982 Convention, since it affirmed that an agreement aimed at achieving an equitable result is the only valid criterion for apportioning the continental shelf. However, as Weil observes, the provisions of the Convention on the apportionment of continental shelf do not contain rules that bind the judge and are more in the nature of directives for the negotiators of a treaty of delimitation. In its obstinate rejection of equidistance, the Court has somewhat deviated from the current idea of custom since, in identifying its material element, it has not taken into account the numerous treaties concluded for the delimitation of continental shelf.

The third part of the book deals with the "normative density" of the law of maritime delimitation. The basic rule, applied in the *Gulf of Maine* Judgment, states that any delimitation should achieve an equitable result. However, judicial decisions show that there are different views about the content of the law of maritime delimitation. The first sees the law of delimitation enshrined in the basic rule mentioned above; the second states that that law is made from the basic rule and equitable principles; and the third conceives of the delimitation as a process that includes the basic rule, equitable principles and relevant circumstances, and the method of delimitation. Equity, not to be mistaken for adjudication *ex aequo et bono*, is a legal process that is not, however, an autonomous criterion of delimitation. It is only a corrective, since it prevents the application of general rules to a single case from leading to a nonequitable solution.

The fourth part is the core of the entire volume, since it deals with the delimitation process, which consists of two stages. First, a provisional line is drawn; thereafter, the provisional line is tested to verify whether the resulting apportionment of the continental shelf can be considered an equitable solution. Only after this second operation has been concluded can a definitive boundary line be drawn.

The first stage can be summarized as follows. The initial line is drawn by applying the criterion of equidistance. After that, the provisional line is tested, taking into account equitable principles and relevant circumstances. They are interconnected, since equitable principles are to be examined in conjunction with relevant circumstances. For instance, the principle that all circumstances relevant to a particular case must be taken into account is an equitable one. The function performed by relevant circumstances consists in preventing any particular feature of a single case from leading to an inequitable solution. A list of relevant circumstances, or those that are claimed to be relevant, is given. Each relevant circumstance is thoroughly examined: those of a geographical nature (such as the general configuration of the coast, islands and coastal length) and those of a different nature (equality of states, economic factors and security considerations). The review shows that relevant circumstances do not all have the same value and that a number of factors that are claimed to be relevant circumstances do not fall into that category.

Once this operation has been accomplished, the second stage is set in motion. Two possibilities are envisaged. The equidistance line, tested in the light of relevant circumstances and equitable principles, proves to be an equitable solution. In this case, the equidistance line becomes the definitive boundary. The second alternative is that the equidistance line does not turn out to be equitable. In this case, the judge is called upon to intervene so as to make a proper adjustment, provided that the inequity is clearly evident. In correcting the line, the judge is not completely free, since he has to follow a number of criteria. This point is underlined by the *Anglo-French* case, even though subsequent judgments contain some ambiguity. Using the so-called simplified line of equidistance, giving partial effect to islands and adjusting base points are among the methods mentioned for correcting the distortion of an inequitable line of equidistance. The author admits, however, that the problem of adjustment has not yet been completely resolved. He foresees that the evolution of customary law will be aimed at clearly showing methods and criteria for adjustment, so that the judge is only exceptionally entitled to derogate from equidistance.

In his conclusion, Weil points out the results achieved. The doctrine of natural prolongation has been abandoned in favor of that of distance from the coast—a development of paramount importance, since it renders possible the establishment of a single boundary for both the shelf and the EEZ. The two-stage structure of the delimitation process has been clarified and founded on a sound legal basis. The consequence is that an equitable solution is not the result of the free choice of the judge, but, on the contrary, is achieved through the process that has given legal value to equitable princi-

ples and relevant circumstances. This means that the result of a delimitation can in some respects be predicted. This body of rules renders it possible for an international tribunal to draw the definitive line, without confining itself to indicating principles and rules that the parties subsequently have to apply with the help of a boundary commission.

The present reviewer prefers to give a full account of the book, rather than mark areas of agreement and disagreement. This is done to show the complexity of Weil's work. In one passage, he states that much more work has to be done "before it will be possible to write a treatise on the law of maritime delimitation" (p. 297). It can be affirmed that Weil's book is a real treatise, filling a lacuna, and representing a landmark in the doctrine of the law of the sea. It has recently been translated into English.¹ Having had the chance to see it as soon as it was released, this reviewer was impressed by the quality of printing and by the care taken with the English version, which has a useful index, while the French does not. However, one wonders why a French book on public international law needs to be translated into English. It is usually assumed that an international lawyer is familiar with most important languages and has direct access to the continental doctrine of international law, as well as knowledge of the main systems of law. Should this not be the case, he will have a limited vision of international law and find himself confronted with difficulties not easy to overcome. How, for instance, could he expect to make proper use of one of the sources of law referred to in Article 38 of the ICJ Statute, namely, "the general principles of law recognized by civilized nations"?

NATALINO RONZITTI

University of Pisa, School of Law

Mediterranean Continental Shelf: Delimitations and Regimes. International and National Legal Sources. 4 vols. By Umberto Leanza and Luigi Sico. Italy: University of Rome—University of Naples; Dobbs Ferry, New York: Oceana Publications, Inc., 1988. Vol. I: pp. 527; vol. II: pp. 534–1099; vol. III: pp. 1105–1511; vol. IV: pp. 1517–2003. Author index. 4 vols.: \$250.

Oil and gas are currently being produced from the continental shelves of 6 of the Mediterranean's 18 states. Increased offshore hydrocarbon production in the Mediterranean may well result when the technology to drill in deeper waters develops and if and when more continental shelf boundaries are agreed upon (of the 36 potential such boundaries in the Mediterranean, only 7 have so far been determined). It is with this latter question that this four-volume collection of documents is principally concerned, covering—as the editors put it—"dispositions directly or indirectly relevant to determining the extension and delimitation of the continental shelf, including those

¹ P. WEIL, *THE LAW OF MARITIME DELIMITATION—REFLECTIONS* (1989).

concerning demarcation of the baseline and extension of the territorial sea, which are essential to constructing the configuration of the continental shelf." In addition, "the obvious link between problems of delimitation and exploitation led to the decision to publish national and international regulations on the utilization of [continental shelf] resources" (pp. 26-27).

The work is divided into six main parts. The first part (pp. 33-153) is concerned with international agreements. It includes the 1958 Continental Shelf Convention and extracts from the 1958 Territorial Sea Convention and the 1982 Law of the Sea Convention (together with the declarations and reservations made by Mediterranean states, as well as information on the signature and ratification of the Conventions by those states); the five current continental shelf boundary agreements; various other delimitation agreements; and three arbitration agreements. The second, and by far the longest, part (pp. 155-1099) contains the domestic legislation of all 18 Mediterranean states relating to the territorial sea and continental shelf. As to the latter, the legislation included is generally only the basic statute; but footnotes refer to implementing legislation.

Judicial decisions are the subject of the third part (pp. 1103-1251). This includes extracts from the International Court's Judgments in the *Tunisia / Libya* and *Libya / Malta* cases. Here, instead of simply reproducing the Court's Judgments, the editors have selected extracts from the Judgments, together with passages from individual opinions, and arranged them under systematic headings of their choice ("concept of the continental shelf," "legal title to the continental shelf," and so forth). The editors argue that this scheme is more useful than simply reproducing the Judgments, which are easily obtainable elsewhere. It is a little surprising that there is not some coverage of the *Aegean Sea* case. The final section of this part includes four judgments of Italian courts.

The fourth part (pp. 1253-1511) covers the contributions made by the Mediterranean states relating to the continental shelf at the first and third UN Conferences on the Law of the Sea. This is followed (pp. 1515-1771) by what is perhaps the most useful part, because its materials are the least accessible elsewhere—diplomatic negotiations. Of particular interest are the collections of documents covering the Greek-Turkish dispute in the Aegean and the abortive negotiations in the 1970s between France and Italy over a continental shelf boundary. The volumes are rounded off by an extensive bibliography (pp. 1772-1854), comprehensive indexes, and appendixes containing notes on offshore hydrocarbon activities in the Mediterranean, the existing boundary agreements and maps.

The documents are published in two languages, one of which is always English, and the other, Italian, French or Spanish, where that is the original language of the document. Documents in any other language, or in English, have been translated into Italian, so as to provide a parallel text with the English version (each page being divided vertically in half).

This collection of documents will prove very useful for all scholars of maritime delimitation, particularly, of course, for those concerned with continental shelf delimitation in the Mediterranean—though its price and

the fact that many of the materials it includes are easily available elsewhere will mean that it is more likely to be consulted in libraries than bought. These volumes will also be useful as a starting point for the English- or Italian-speaking petroleum lawyer wanting to know about the legal regime governing offshore hydrocarbon activities in any particular Mediterranean state.

R. R. CHURCHILL

Cardiff Law School, United Kingdom

The Korean Straits. By Chi Young Pak. (International Straits of the World. Edited by Gerard J. Mangone.) Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1988. Pp. xiv, 157. Indexes. Dfl.130; \$69; £42.

This is a highly informative book on the Korean Straits, which are made up of the Korea Strait (between Korea and Japan's Tsushima Islands) and the Cheju Strait (between the southwestern tip of the Korean Peninsula and Cheju Island). The author, Professor Chi Young Pak of Hanyang University in Seoul, deftly guides the reader through the straits' physical characteristics (geography, oceanography, mineral resources, major ports), traffic, fisheries, continental shelf, strategic position and legal issues. The usefulness of the book—the tenth in the series *International Straits of the World*, edited by Gerard J. Mangone—is enhanced by the addition of many maps and figures, as well as eight documentary appendixes.

The history of the Korean Straits mirrors the power struggle among the northwestern Pacific states of China, Japan, Korea and Russia—into which the United States has been catapulted since World War II. The struggle has even spilled over to the nomenclature. For example, Japan, after World War II, began to call the eastern channel of the Korea Strait the "Tsushima Strait"—a name Japan has subsequently applied to the entire Korea Strait (p. 1). Indeed, Japan calls the sea enclosed by Japan, Korea and the Soviet Union the "Sea of Japan," which Korea has continued to call the "East Sea" (*id.*).¹ The United States has taken a middle position in this mapping war—siding with Korea on the "Korea Strait," but with Japan on the "Sea of Japan."²

Of particular interest is chapter 5 on the legal issues concerning the Korea Strait. As pointed out by Pak, both Japan and Korea extended their territorial seas to 12 nautical miles in 1977, but froze the preexisting 3-mile limit in the western channel of the Korea Strait. He gives the reasons for the dual widths as follows: since the narrowest width of this channel is only 23.2 miles, the adoption of a 12-mile limit by Korea and Japan "would create an overlapping of their territorial seas," thus necessitating negotiations on

¹ On this point, the author is not consistent since he uses the term "Sea of Japan" elsewhere in the book.

² See the maps of Korea and Japan of the National Geographic Society (1987) and the Central Intelligence Agency (Stock No. 800652, July 1986).

boundary delimitation as well as converting the entire western channel into a "territorial strait." Such a conversion would pose a "challenge to the free passage of the Soviet warships," as well as impose certain responsibilities on the strait states, e.g., prescribing routes, monitoring "expeditious" passage and enforcing regulations.³ The retention of the 3-mile limit, on the other hand, would leave "a high seas area of about 17 miles wide in a strait where maritime state[s] can continue to enjoy the freedom of navigation and over-flight" (p. 75).

Two interesting questions arise from the preceding paragraph: (1) May a state simultaneously maintain different widths for different parts of its territorial seas? and (2) Are the concerns about making the Korea Strait a "territorial strait" valid?

On the first question, customary international law and the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone⁴ are silent. Since absence of prohibition by international law allows freedom of action by sovereign independent states,⁵ the latter may prescribe different widths for different parts of their territorial seas. Thus, the Federal Republic of Germany, while adhering in general to a 3-mile limit, makes an exception for German Bight at Heligoland box, which has a 12-mile limit. Turkey subscribes to the 12-mile limit in the Black Sea and in the Mediterranean subject to reciprocity, but to a 6-mile limit in the Aegean.⁶ In general, states have refrained from setting dual or multiple widths to their territorial seas more for reasons of symmetry and administration than as a matter of international law.

Article 3 of the 1982 Convention on the Law of the Sea, which has not yet come into force, provides: "Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles"⁷ Thus, it does not rule out the possibility of dual or multiple breadths so long as they remain within the 12-mile limit. This flexibility within the 12-mile limit also answers Pak's own question as to whether adherence to the 1982 Convention by Korea and Japan would compel them to adopt a 12-mile limit for the Korea Strait (p. 76).

As for the second question, it should be noted that the 1958 Geneva Convention assimilates innocent passage through straits into such passage through the territorial sea (with an additional nonsuspension guarantee for straits passage under Article 16(4)). The straits navigation provisions of the 1982 Convention on the Law of the Sea, on the other hand, have been interpreted to allow all vessels and aircraft, military as well as civilian, to engage in continuous and expeditious passage through, under or over inter-

³ For laws and regulations of states bordering straits relating to transit passage, see Article 42 of the Convention on the Law of the Sea, UN Doc. A/CONF.62/122 (1982), *reprinted in* 21 ILM 1261 (1982).

⁴ 15 UST 1606, TIAS No. 5639, 516 UNTS 205.

⁵ See *S.S. Lotus (Fr. v. Turk.)*, 1927 PCIJ (ser. A) No. 10. See also 2 WORLD COURT REPORTS 20 (M. Hudson ed. 1935).

⁶ 488 PARL. DEB., H.L. (5th ser.) 594 (1987); 58 BRIT. Y.B. INT'L L. 594 (1987).

⁷ See *supra* note 3.

national straits overlapped by territorial seas, without prior notification to or authorization from states bordering straits. In either case, it is questionable whether the extension of the territorial sea to 12 miles would pose a challenge to the free passage of Soviet warships. The burden of the strait state in any event does not appear to be a heavy one.

The fact that provisions concerning transit passage through straits under the 1982 Convention are more liberal than those under the 1958 Geneva Convention raises the important question of what rights third states (which have not signed it) have under the new Convention. Pak takes note of the differences of opinion concerning rights of third states.⁸ He does not, however, pursue the matter except to say that the matter is "moot" in the case of the United States, which, he asserts, enjoys the right of passage in the Korea Strait under its 1953 Mutual Defense Treaty with Korea.⁹ The question is nevertheless relevant as to the transit rights of third states other than the United States, as well as the rights of the United States when and if the Mutual Defense Treaty lapses. Though inextricably bound up with the larger issue of the relationship between the provisions of the 1982 Convention on transit passage and customary international law, it could still have been dealt with more fully.

The above discussion is not intended to criticize the book, but merely to accent the complexity of the subject matter. Both Pak and Mangone are to be congratulated for this very useful addition to law of the sea literature.

LUKE T. LEE

Droit international de l'environnement. By Alexandre Kiss. Paris: Editions A. Pedone, 1989. Pp. 349. Index. F.240.

International environmental law has emerged as one of the most important and fastest-growing areas of international law. Yet there has been no source book that covers these developments. Professor Alexandre Kiss, an eminent scholar in the area, has now presented us with such a book. It is a very useful, wide-ranging review of the international legal rules, multilateral conventions and, to a lesser extent, the international institutions that exist in the emerging field of international environmental law.

After several introductory chapters on the nature of international environmental law, its evolution and its sources, Kiss sets forth in chapter 4 his view of the generally applicable principles, which include the obligation of a

⁸ Pp. 92-93, citing this reviewer's *The Law of the Sea Convention and Third States*, 77 AJIL 541, 544-45 (1983), in contrast to Caminos & Molitor, *Progressive Development of International Law and the Package Deal*, 79 *id.* at 871, 872, 876-77, 880 (1985).

⁹ 5 UST 2368, TIAS No. 3097, 238 UNTS 199. Article IV provides: "The Republic of Korea grants, and the United States of America accepts, the right to dispose United States land, air and sea forces in and about the territory of the Republic of Korea as determined by mutual agreement." It should be noted, however, that none of the published agreements deals with U.S. transit rights through the Korea Strait. In any event, as applied to the Korea Strait, this article deals only with the disposition of U.S. naval forces, and not with the passage of commercial vessels.

state not to abuse its rights, the right of a state not to be damaged and rights of sovereignty and exclusive territorial authority. He then elaborates on special rules applicable to transfrontier pollution, including principles of cooperation, notice of accidents, emergency assistance, information and consultation, and equal access. One of the many strengths of the book is that Kiss sets forth in detail the specific provisions of international agreements that incorporate these principles. Surprisingly, he does not address the principle of reasonable and equitable use or any of the international legal rules applicable to international watercourses, except for those regarding water pollution.

In chapter 5, Kiss focuses on state responsibility for providing compensation for damages. He concludes that in the image of "soft law," there is "soft responsibility" for environmental damage (p. 117). He analyzes with particular care the problems in determining and assessing damages and the jurisdictional issues raised by using national courts to settle these disputes. He does not, however, analyze the link between the procedural obligations identified in the previous chapter and liability for ensuing damage, or the work of the ad hoc group of the International Law Commission (ILC) on liability for damage from activities that are lawful in international law. Even though the author may be implicitly critical of the ILC treatment by this omission, it would have been useful to set forth the analysis.

The other chapters describe the important multilateral conventions by sector, including marine, air and freshwater pollution and the conservation of natural resources, and discuss the relevant legal developments as to several of the newer issues, such as nuclear accidents, toxic chemicals and hazardous wastes. The special case study on Rhine River pollution (pp. 189-99) is particularly interesting. The final chapter provides a valuable survey of international, regional and nongovernmental organizations relevant to international environmental law. A chronological list of international environmental agreements appears at the end of the book.

There are no footnotes. The few citations are contained in the text. In some places, particularly in reference to foreign municipal legislation (p. 96), it would have been useful to include citations. A brief bibliography follows most chapters.

This informative book will be of interest to international lawyers, environmental lawyers and anyone interested in knowing how international law has been developing to conserve our global environment.

EDITH BROWN WEISS
Board of Editors

Principles of a New International Economic Order: A Study of International Law in the Making. By Jerzy Makarczyk. Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1988. Pp. 367. Index. Dfl.195; \$105; £57.

When the United Nations was created in 1945, its founders had not anticipated that it would give birth to radically new principles to be applied

to international economic relations. Not long after the establishment of the Organization, the General Assembly began to aid and promote the economic interests of the underdeveloped countries (since 1962 generally called developing countries) on the basis of chapter IX of the Charter, "International Economic and Social Cooperation." The principles of the so-called New International Economic Order first took a concrete form in two General Assembly resolutions of 1952, Resolutions 523 (VI) and 626 (VII), the latter entitled "Right to Exploit Freely Natural Wealth and Resources." Also in 1952, Chile advanced the concept "permanent sovereignty over natural resources" in the UN Commission on Human Rights.¹ From that time on, this has been the principal dogma repeatedly put forward by developing countries in and outside the United Nations in oral debates and in drafts of documents.

For over 35 years, the various organs of the United Nations, especially the General Assembly, have systematically produced a formidable body of principles for international economic relations. These documents, including resolutions of the General Assembly, are often referred to as "soft law." In this book, Jerzy Makarczyk embarks on an ambitious venture, presenting a history of these developments, and an analysis and evaluation. The subtitle, "A Study of International Law in the Making," suggests the scope of his effort. The author's credentials are impressive: he is an internationally known professor of law at the University of Warsaw and the current President of the International Law Association.

Latin American countries have historically asserted their economic sovereignty, particularly toward the United States, in support of domestic legislative or administrative acts that conflicted with contractual or other vested rights of foreign investors. It is therefore not surprising that the principle of permanent sovereignty over natural resources was molded in Latin America.

The organized international community at the end of the 20th century is quite different from the international community of the late 1940s. Over a hundred new countries have emerged and become members of the United Nations. Almost all of them are developing countries, and their economic interests and demands have brought new dimensions to international law.

The concept of permanent sovereignty over natural resources, economic activities and wealth has become a widely, though not universally, recognized principle of international law (as characterized, for instance, in Article 5.1 of the Seoul Declaration on the Progressive Development of Principles of Public International Law relating to a New International Economic Order).

The unwavering efforts of developing countries, solidly supported by the socialist bloc, culminated in the adoption in the General Assembly on December 14, 1962, of the Declaration on Permanent Sovereignty over Natural Resources.² The author states that this was an authoritative affirmation

¹ UN Doc. E/CN.4/L.24 (1952).

² GA Res. 1803, 17 UN GAOR Supp. (No. 17) at 15, UN Doc. A/5217 (1962), *reprinted in* 2 ILM 223 (1963).

of the inalienability of the right of states to exercise sovereignty over their natural resources and the reconciliation and adaptation of that sovereignty with international law, justice and the principles of international cooperation (pp. 226–27). This Declaration provided that foreign investment was to be governed not only by national legislation but also by international law. Makarczyk points out that under this resolution, the foreign investor is entitled to appropriate compensation not only in accordance with the laws in force in the country of activity but also pursuant to international law. According to him, the principle of permanent sovereignty is the most contentious question of the New Order (p. 352). This reviewer finds no fault with this view. Nor does this reviewer question the validity of the thesis that economic sovereignty is a prerequisite for political sovereignty, which is an empty phrase under the conditions of economic exploitation. As the author states: “For some, the principle is *ius cogens*, others consider it merely an obstacle on the path to the unimpeded tapping of another’s resources. In its present understanding, it is undoubtedly an expression of an omnipotent nationalism” (*id.*).

In 1974 the socialist bloc joined the developing countries in voting for the Charter of Economic Rights and Duties of States (CERDS).³ This Charter, particularly in its Articles 18, 19 and 22, imposes one-sided obligations on the developed nations. The developing countries regard the approval of CERDS as the beginning of a new era, a new world, the foundation of a different international law guaranteeing that economic benefits will flow to them from the developed countries. Makarczyk realistically censures such an attitude, stating that “[r]eality, however, has clearly demonstrated that this document [CERDS] is more akin to a summary of the postulates, wishes, and demands of the developing States, whose radicalism and disregard for real international relations has delayed, rather than accelerated, the process of change in many matters” (p. 351).

By 1974, the Third World counted far more sovereign countries among the UN membership than in 1962. In 1962, when Resolution 1803 (XVII) was adopted, “appropriate” compensation was prescribed according to the principles of both the law of the host country and international law. The term “appropriate” was also used in Article 2 of CERDS, but it was to be interpreted by the law of the host country and according to circumstances deemed pertinent solely by the host country. Unlike the 1962 resolution, the 1974 resolution omits reference to international law. “Appropriate” has become an inescapable compromise term in negotiations and agreements between developing and developed countries, and has also found acceptance in declarations and resolutions of nongovernmental international organizations. Makarczyk deplores the omission of the norms of international law in dealing with compensation for the nationalization of foreign property. But he seems to contradict this position in his discussion of the Seoul Declaration of the International Law Association (ILA).

³ GA Res. 3281, 29 UN GAOR Supp. (No. 30) at 50, UN Doc. A/9030 (1974), reprinted in 14 ILM 251 (1975).

Makarczyk attaches great importance to the Seoul Declaration of the International Law Association, an organization he now heads. Many Western jurists, particularly Americans, are not satisfied with the Seoul Declaration, although in some respects it represents a significant retreat from CERDS. Makarczyk reproachfully contends that the Declaration takes an overly conservative approach; in that it essentially expresses the interests of the Western states and the traditional Western doctrine by subjecting nationalization to the principles of international law, including appropriate compensation. He then states "As we can see, the standpoint of the West prevailed throughout the whole of the ILA Declaration" (p. 252). Indeed, the American delegates in Seoul were greatly responsible for eliminating the original wording that permanent sovereignty over natural resources, economic activity and wealth represented *jus cogens* in international law. If permanent sovereignty is *jus cogens*, no international agreement adjusting frontier territory would be valid, at least insofar as natural resources *in situ* are concerned. Furthermore, this principle, at least at this time, lacks the status of a peremptory norm of general international law and does not come within the requirements of Article 53 of the Vienna Convention on the Law of Treaties. The ILA Declaration recognizes that permanent sovereignty is a principle of international law, that it emanates from the principle of self-determination, but that it is subject to the application of relevant principles and rules of international law. This text represents a compromise among various points of view. This reviewer disputes Makarczyk's conclusion that "there can be no doubts as to the fact that primary consideration was given to the investor" (p. 254).

Such related subjects as the right of developing countries to development, the duty of the developed states to cooperate for global development, principles of international development law and the principle of the common heritage of mankind are outside the scope of this treatise. Makarczyk's work is an important scholarly contribution to understanding the development of the principle of permanent sovereignty and the emergence of the New International Economic Order principle in the United Nations. Time will tell whether these principles qualify as general norms of international law. The International Court of Justice has not voiced an authoritative opinion on the matter. In this reviewer's opinion, a persuasive answer will not be forthcoming without the issuance of one or more opinions by that Court.

NICHOLAS R. DOMAN

Of the New York and District of Columbia Bars

Trade Policies for a Better Future: The 'Leutwiler Report', the GATT and the Uruguay Round. Dordrecht, Boston, Lancaster: Martinus Nijhoff Publishers, 1987. Pp. vii, 174. Dfl.105; \$52.50; £32.

In an age aptly characterized by its information explosion, how welcome is the brief brief on a vital issue. Concise, elegant, reasonable, persuasive—the *Leutwiler Report* on the GATT has been reprinted, nicely supplemented by five illuminating essays, in a hardback volume. Any government official

responsible for trade policy, any businessman or lawyer concerned about the future of international trade, would profit from this 3-hour lecture.

The heart of the book is the report released in early 1985 by a group of seven business leaders and politicians enlisted by GATT Director-General Arthur Dunkel "to look at the state of the international trading system, to try to understand the fundamental reasons for the difficulties faced by the system and to make proposals for action" (p. 2). The group was chaired by Fritz Leutwiler, now Chairman of Brown Boveri in Switzerland and previously Chairman of the Swiss National Bank. Senator Bill Bradley was the sole U.S. member. A Brazilian Finance Minister, the Indian Director of the London School of Economics, the French Vice-President of the International Court of Justice, a Swedish industrialist and an Indonesian professor also served. GATT experts aided the group in its 1-year study and writing effort.

Free of pressures from the constituencies of their native countries and any obligations to institutional or appointing authorities, this collegial band was able to prepare an exceptionally readable document. They identified the need for all countries to accept and adjust to the reality of change. They candidly recognized that, with one exception, virtually every piece of "trade law" adopted or implemented in every country of the world is essentially designed to prevent, resist or delay adjustment to change that *must* inevitably occur. The one "shining exception" is the GATT itself. Its simple theses of unconditional, multilateral "most-favored-nation" and "national" treatment for all imported merchandise consume but a page of the General Agreement's voluminous text. The balance is a crust of barnacles, weighing it down with provisos and exclusions, from grandfather rights to agricultural exceptions to developing country preferences. But it is with this baggage that we are constantly occupied, forgetting the underlying truths.

The *Leutwiler Report* reminds us that international trade is like road traffic. Unless every participant knows and follows the rules, reasonable progress is likely to be hazardous at best for *any* traveler and impossible for most. Faithful adherence to the simple, important, guiding GATT rules for all commodities and, eventually, services, capital and labor, is the most likely, ultimately least difficult, way to achieve the greatest good for the greatest number.

The authors of the report are not, however, monastics preaching from a distant ivory tower. They recognize that the greatest good for the greatest number is often not the best for a small group with an immediate problem and the incentive and means to try to take corrective steps in its own interests.

Thus, it may well be that in the United States, the production of basic steel is no longer economically feasible. Our economy might be better used, in a worldwide environment of free trade and peaceful coexistence, to concentrate on designing new processes for making steel, devising new alloys of steel for untried applications, building steel-making facilities in other countries, raising the capital to do so, insuring the risks, transporting the materials, advertising the output, training the workers and managers

and providing for their vacation and recreation—in short, as many scenarios as an imaginative participant in the “service economy” can conjure. But that is a hard vision to sell to a millworker in Youngstown, threatened with the loss of his job, the obsolescence of his skills, the decay of his town, the destruction of his way of life. At age 50, it is not easy for a puddler of ore to learn computer-aided design or even to push paper in the finance or insurance sides of the steel business. Add to that the generally unprovable claims of “national security” needs in an unsettled world, and it is not hard to understand why the steelworker—here today, in the voting booth tomorrow—is more likely to receive the attention of elected officials and trade law administrators.

And, of course, the steelworker’s story is, in some senses, the *easier* problem of adjustment to change. It would be unfair to forget that in the past 20 years the steel producers of the industrial world have rebuilt their plants to be more efficient, highly automated models. They have cut and retrained or otherwise “adjusted” over half of their work forces to new jobs. How much more difficult is the problem of agriculture, a need for which no society wants to become entirely dependent on others? Some internal fallback is always claimed to be essential for any country asserting “sovereignty” in a world of equal sovereigns.

But is the claim more persuasive with regard to food than with regard to steel? In the event of worldwide nuclear war—if that is a “real” threat to security—there may be no need for food after the first day. In ongoing “brush fire” wars, as have occurred with regularity around the world since World War II, food stuff deliveries have not been interrupted seriously. (Even the U.S. embargo on grain to the Soviet Union in the early 1980s “came a cropper” under the pressure of universal oversupply.) Finally, a worldwide “replay” of World War II seems a very remote risk. The “security” argument cannot be taken seriously.

More serious is the desire of most societies to continue the maintenance of agriculture as a social goal. “Keepin’ ’em down on the farm” (or up in the Alps) relieves urban congestion and promotes self-reliance. (While I was in the Government as administrator of the U.S. countervailing duty law in the late 1970s, I asked a Swiss counterpart why his country subsidized its farmers to the extent that each liter of milk, converted to Emmenthaler cheese, cost the equivalent of a liter of cognac. I was told—seriously—that the cows were needed to cut the grass to preserve the beauty of the Alps for the tourist trade! We suggested that these high-cost lawn mowers be moved to the tourist budget and that the cheese be consumed domestically. Of course, the true point of the Swiss program was neither to cut grass nor to make cheese, but to prevent the move to the cities by the high-mountain folk.)

The bulk of both the report and the ancillary essays details the need for, and ways of accomplishing, adjustment to change. Its first proposal is the development in each country of the equivalent of an “impact statement” in which trade law officials would be required to record the possible advantages *and costs* of any particular action (or nonaction). If import restraints are

to be imposed on, say, steel sheet imports, the government would first be obliged to project the positive effects of the reduction in competition in the near and long term, and the negative effects of increased prices on sheet users in the United States (the producers of autos or refrigerators) and U.S. consumers of those products. To the extent that autos or refrigerators cost more, the effects on their sales as export merchandise would also be quantified. The duration of the import restraint would also be projected, with estimates provided of the ability of U.S. producers of steel to thrive without it. The cost to U.S. taxpayers both of granting or denying the relief would be computed, including the real costs of worker retraining, the loss on invested capital by the producers shutting down and the infrastructure costs incurred when the entire population of a steel mill town abandons its homes for Silicon Valley, leaving behind (but requiring new) homes, schools, parks and roads.

It is a super idea! But, alas, it seems to me totally unworkable. While I was at the Treasury, the Chairman of the Senate Trade Subcommittee once asked me how much in antidumping duties we had collected that year. I assured him the answer would be available the next day. It was not—the next day or the next year. To this day, the Treasury does not know what it collects in antidumping or countervailing duties. Yet that figure is the smallest, easiest type of data to collect and tabulate if there were the will to do so. The much more meaningful data, recording the effects of *existing* trade relief measures, are not now collected by any agency. No systematic reports are compiled on the impact of antidumping orders on imports, employment, downstream production, export of downstream products and the similar criteria that Leutwiler would have officials study and project *in advance*. Import and domestic data are still not in concordance. (The Harmonized System of Tariff Classification, now used to classify and monitor imports, is still wholly separate from the Standard Industrial Codes used for analyzing domestic data.) More importantly, trade actions must be taken quickly to be meaningful. And yet, as counsel to parties in numerous such proceedings, I can attest from experience to the enormous problem all participants in such cases (whether domestic or foreign) face in compiling and presenting meaningful, relevant data. For example, a steel sheet producer may well have no regular accounting for its production of hot rolled sheet, as distinguished from its 48 other mill products, although, if action to curb or tax sheet imports is to be taken, what else is relevant?

One would have hoped that with so much experience and good sense brought to bear on their work, the authors of the report would have had a better grasp of the real-world problems with their key suggestion. Unfortunately, none of the other commentators address this issue either. I felt a similar disappointment with their failure to address the difficult “new” problem of this “Post-Industrial Age,” namely, oversupply. The world is awash in steel and footwear, computer chips and pasta. We make more, more quickly, more cheaply, than we can consume—or at least pay for. Here is where the debt crisis intersects with trade problems. But the issue is not even mentioned.

The largest failing of this book, however, is its wholly undocumented presentation and its absence of illustrative facts. The report reads well, but it "preaches to the choir" of those already committed to the free trade dream. To skeptics—at whom the report *ought* to be aimed—it lacks the factual bases to be convincing. Not one substantive footnote is to be found. Without that type of scholarship, the reader can only rely on his assessment of the reputations of the authors and his own experience to accept what is proposed.

Once the decision was made to republish the report 3 years after its initial release, it ought to have been fully documented. An index and a table of cases should have been prepared; a more extensive bibliography could easily have been compiled. Typographical errors, even the omission of an entire line (p. 21), should not exist in a 170-page book for which the publisher asks \$52.50! At that price, appropriate for a permanent addition to a library, the buyer deserves more. As a paperback reprint for \$10, this volume could have been a priority addition to the collection of anyone concerned with the future of world trade. In its present form, this valuable document is unlikely to achieve the circulation it deserves.

PETER D. EHRENHAFT

Of the District of Columbia and New York Bars

The New GATT Round of Multilateral Trade Negotiations: Legal and Economic Problems. Edited by Ernst-Ulrich Petersmann and Meinhard Hilf. Deventer, Boston: Kluwer Law and Taxation Publishers, 1988. Pp. x, 597. Index. Dfl.250; £81; \$144.

This volume contains the papers and comments presented at a conference of the same name, held in Bielefeld, Germany, in June 1987. The contributors include an impressive cross section of what might be termed the GATT establishment—GATT officials, academics formally or informally associated with the GATT and negotiators from a number of member nations. The book is divided into three parts: "Constitutional Problems of the GATT Multilateral Trade System," "Strengthening Existing GATT Rules and Disciplines," and "Negotiating Additional GATT Rules and Disciplines."

The Uruguay Round of multilateral trade negotiations has accomplished very little in the 2 years since the conference. The outgoing American administration foreclosed progress by making agreement to eliminate agricultural subsidies completely a precondition for provisional agreement in any other area. When the new administration sensibly compromised on agriculture in April 1989, the GATT released four frameworks for agreements that were little more than elaborations of the negotiating plans agreed upon in January 1987. At present, in fact, the GATT negotiations are but a small sideshow on the international economic stage. There seems to be much more at stake in other dramas: threatened U.S. retaliation under the "super 301" procedures of the 1988 trade law, the march towards 1992

in the EC, the roller-coaster behavior of the dollar and the persistent problems of less-developed country debt.

Thus, the question asked by the editors in their introduction to this volume remains relevant, even urgent: "How can the multilateral GATT legal system, which all countries need in order to increase their national welfare through trade, be further strengthened?" (p. ix). Unfortunately, there is a notable disjunction between the acuity of much of the analysis and the timidity of most of the recommendations for restoring a stable, growth-sustaining international trade system. The better papers demonstrate how much the global economy has changed since 1947, while the recommendations seem bound by traditional, "GATT-like" assumptions about government economic roles, the efficacy of international rule systems and the dynamics of international relations. As one might suspect from the identities of the contributors, the schizophrenia of much of the volume reflects the dilemma of participants in the Uruguay Round: most recognize the degree to which global economic problems have outstripped traditional approaches to trade agreements, but they lack the creativity, will or power to fashion the required innovations. At the risk of oversimplification, I have identified three basic viewpoints in the papers, roughly, though not perfectly, congruent with the topical division mentioned earlier.

The first viewpoint appears in the small group of papers that simply do not confront the realities of international trade today. Most of these papers appear in part I, which deals with GATT as a constitutional system. One is tempted to think that the authors who address GATT as a system are most likely to be captive to the assumptions and beliefs that prevailed at its inception. Most obvious in this regard is the lengthy paper by Ernst-Ulrich Petersmann, which seems mired in nostalgia for a past that existed only in international economics textbooks. The reader is placed on notice early that this is more a tract than an analysis, when the author summarizes what "economists" think by quoting only Milton and Rose Friedman, and citing only to economists who can be fairly characterized as hard-liners on free trade policies (pp. 42-43). The much-acclaimed recent work of Paul Krugman, James Brander and other strategic trade theorists is never cited, much less discussed. A few pages later, the author tells us that "the most successful trading nations . . . tend to be those countries with the most liberal foreign trade laws" (p. 52) and includes Japan as an example. Until very recently, of course, one could not even have made a respectable argument that Japan's trade laws were among the "most liberal" unless one were prepared to ignore completely that the government supplemented formal legal import barriers with informal, but effective, barriers such as administrative guidance. Even today, many foreign business executives and government officials claim that extensive *de facto* barriers remain. Furthermore, numerous scholars and policy analysts argue that the selective restraint of imports has been one of a number of policy instruments successfully used by the Japanese Government in its role as a "developmental state."

Petersmann answers the question how to strengthen GATT by arguing for strengthening the "constitutional" principles of a liberal trade regime in

GATT member nations. He explicitly follows von Hayek in arguing for minimalist government. He favors maximum restraint—through international agreement and national constitutional provisions—on the discretionary trade policy powers of national governments. He leaps from the problems of logrolling in U.S. congressional tariff making of the early 20th century (pp. 53–54) to the conclusion that all import restraints are presumptively the result of a capture of government policy making by special interests (p. 80).

This paper and the few like it are really of no help in the formidable tasks facing the GATT negotiators. As the paper on subsidies by Jacques Bourgeois points out, government involvement in the economies of member states has become more pervasive since the founding of GATT. There is widespread belief that certain forms of government intervention have accelerated economic growth in many nations (Japan being the most obvious example). The way to strengthen the international trading system simply does not lie through minimalist government.

In happy contrast to this first viewpoint, a second group of papers takes pains to debunk some time-honored, but incorrect, arguments offered in support of certain GATT principles. Most notable here are Professor Robert Hudec's valuable essay on discriminatory trade measures and Professor Stefan Tangermann's paper on agricultural trade. Hudec demolishes the traditional arguments—economic and political—against discriminatory trade measures. He shows how the economic argument against discrimination depends on trade-diverting effects exceeding trade-creating effects, an outcome that may or may not obtain in particular cases. Hudec also discredits the simplistic argument that governments will not negotiate reciprocal reductions in trade barriers unless they can be assured of unconditional most-favored-nation (MFN) treatment in the future. This argument is usually based on historical experience, specifically that of the late 19th century and the 1930s. But, as Hudec convincingly argues, the GATT system has itself changed the structure of international trade bargaining, providing a continuity that could "absorb a greater amount of discrimination without chilling tariff negotiations" (p. 192). In fact, as experience with some of the Tokyo Round codes shows, conditional MFN treatment may be necessary to induce nations to assume a new set of obligations. Moreover, differences in the kinds and purposes of contemporary discrimination may produce a different set of effects.

Tangermann provides a superb analysis of why "neither means nor results of trade policies are good candidates for improved GATT rules on agriculture" (p. 255). He dispenses with idealized theory and opts for a more realistic empiricism, as demonstrated by his introductory comment that the "world market for agricultural products is more a battlefield for government policies than a reflection of comparative advantage" (p. 244). Neither investigations into motive or purpose, nor standards for market allocation have been a satisfactory basis for international agreement, and Tangermann sees little to recommend these methods in the Uruguay Round.

When it comes to making recommendations for strengthening the GATT, however, both authors shy away from the implications of their own penetrating analyses. Hudec ends with an attack upon two modern uses of discriminatory measures—selective quantitative restrictions and the Generalized System of Preferences. His argument here is far less convincing, and he does not indicate whether he would condemn *all* forms of discriminatory treatment. Tangermann proposes quantifying all government measures affecting agriculture as a “super-rule” on the basis of which negotiators could proceed with liberalization. The FAO and OECD have developed somewhat different measures of “producer subsidy equivalents” (PSE) so as to make such a calculation. This approach is at least an effort to manage the effects of government policies, rather than to denounce all government intervention. Yet the hurdles to such an approach are revealed in Tangermann’s suggestion that PSEs exclude income supports (p. 258), even though significant use of this policy would surely affect trade flows.

In each case, though in different ways, the authors lapse into more conventional assumptions about the principles necessary for the organization and liberalization of world trade. Hudec does not ask whether some principle other than MFN is appropriate for today’s conditions. And for Tangermann, government agricultural programs are a given. He does not ask why and how government involvement came so early in most nations, and he offers no standards for deciding how much “liberalization” is desirable or realistic. By not asking such questions, the authors spare themselves a complete break with traditional GATT wisdom. It is almost as if the authors, having pursued a rigorous analysis, found that they had undermined most of the GATT structure. Faced with a daunting new construction job, they crept back under the rickety, but familiar, framework.

A third group of papers in the volume considers quite openly the possible need for new foundations, even though most are quite cautious when it comes to making recommendations. It is probably no coincidence that these more adventurous papers deal with areas that GATT does not now cover. In his paper on the relationship between industrial policies and competition policies, Professor Mitsuo Matsushita states explicitly what some of the other contributors have only hinted—that the problems of reaching new international economic agreements are complex in theory, as well as in practice, because varieties of government economic interventions can have positive effects: “as long as the objectives of industrial policies are valid, the policies should not be singled out for criticism and eliminated because they may have some negative impact on international trade, since such policies may be vitally important for the national economy of a country” (p. 425). Once the desirability, as well as inevitability, of a mixed economy is acknowledged, the principles for mutually advantageous international agreement become much harder to derive. The elimination of government involvement can no longer be the prime goal.

This challenge was already apparent during the Tokyo Round, at least in the negotiations over the Subsidies Code. The results of those negotiations, long on process and short on substance, have not been very effective in

dealing with trade frictions. The problems of distinguishing "good" government intervention from "bad" are considerable. Moreover, there may be forms of government economic involvement that are advantageous for nations so long as only a few nations practice them, but become efficiency-diminishing for the world economy if many nations adopt them (a kind of international analogue to the familiar problem of sports fans standing up to see the game better). And while various forms of managed trade seem inevitable for at least the short run, there is as yet no convincing theory for a managed trade regime that regularizes economic change without stifling it.

Little wonder, then, that the easy prescription for less government involvement remains appealing. In one of three contributions on trade in services, Wedige von Dewitz, of the West German Ministry of Economics, asserts that "deregulation . . . is a synonym for liberalization" (p. 478). In this area, alone of all its topics, the book offers an alternative. In their paper on EC rules for services, Claus-Dieter Ehlermann and Gianluigi Campogrande of the Commission of the European Communities emphasize that certain forms of regulation are wholly consistent with the public interest. Thus, the EC model for liberalization of trade in services is described as an effort to assure market access for foreign producers and to make compatible national and community-wide rules on services. Although the authors do not use the term, they really describe an effort to harmonize regulatory systems as a means of liberalizing trade. The vital question for GATT is whether greater liberalization is more likely with a model that aims at deregulation with certain "exceptions" for national measures, or with a model that aims at harmonization and emphasizes uniform rules and standards across national boundaries. As Ehlermann and Campogrande point out, the EC is founded on a strong shared political commitment and increasingly strong institutions. What I have called a harmonization approach to trade liberalization requires continuous regulation and adjudication. Thus, they call for international institutions that do "not require consensus at the time of exercising control" (p. 489). Whether the world is capable of the same boldness as the EC remains doubtful, as evidenced by the tentativeness of even the best papers in this volume, but dramatic action may be necessary if there is to be a new life for an aging GATT.

DANIEL K. TARULLO
Of the District of Columbia Bar

Sanctity Versus Sovereignty: The United States and the Nationalization of Natural Resource Investments. By Kenneth A. Rodman. New York: Columbia University Press, 1988. Pp. xvii, 403. Index. \$45.

The developing world's quest for a new international economic order has so far not met with broad success. In international trade law and in the monetary sphere, no major changes have taken place in favor of less-developed countries (LDCs). In fact, since 1982, the demands of the Third World

have been voiced in a rather cautious and limited manner. Possibly, the immediate requirements of global environmental strategies and their financial implications will in the relatively near future bring the subject of economic relations between North and South back to the center stage of international debate. The basic demands and principles as formulated by both sides in the 1970s may then reemerge with the modifications indicated not only by the political changes that have occurred subsequent to 1974, but also by the economic experience gathered internationally since then.

The only area in which a major reform of the law has taken place concerns the framework for foreign investments. Whereas the jurisprudence of international tribunals and the discussions in international organizations have so far not led to unequivocal results on the issue of compensation in case of expropriation, a definite change has occurred in the legal framework that governs day-to-day operations of natural resource investments: ownership rights granted by traditional concession-type arrangements have been replaced by contractual rights and obligations under such umbrella concepts as service contracts, management contracts and marketing agreements. Rodmar's book on one level traces the historical developments that have prompted this fundamental change, and on another level analyzes the manner in which the United States has responded.

In several well-researched case studies, mainly concerned with the exploration and exploitation of oil fields in Latin America and in the Arab world, the gradual evolution of U.S. policy toward renegotiations and expropriations is illustrated, reaching from strict rejection of such actions taken by Mexico and Bolivia in the 1930s for fear of precedential value ("regime concern," in the author's terminology) to encouragement of accommodation in the 1970s after the sharpening of OPEC oil policy. The theoretical background against which the author views the case studies concerns the factors that have determined official U.S. policy, be it identification with the self-definition of corporate interests ("the capitalist model"), the recognition of overriding foreign policy interests ("the static model") or some other version. The author concludes that generalizations along these lines, as previously suggested by theoreticians of foreign policy, are difficult to reconcile with the vagaries of actual policy making. As the case studies clearly show, different answers have been reached at different periods and under different circumstances. It also becomes apparent that sometimes the foreign policy community and the business community have held identical positions, but at other times their assessment of the proper foreign policy has been at odds, and occasionally the major elements of business have been inclined to be more accommodating than the State Department. Ideological hard-liners can draw no comfort from this study.

One of the fascinating aspects of the book is that it reveals in detail how diversified the composition and perspectives of decision-making actors have been. Established oil companies have held views different from newcomers to the business, while the interests of manufacturers at times collided with those of the foreign investment community. Banks had their own views which are, however, only marginally discussed here. Within the bureau-

crazy, the State Department, the Treasury Department, the President and Congress have played the major roles, often also with opposing perspectives.

As to the means available to prevent the turning of the tide in favor of host country control, the author shows how such diverse instruments as political isolation of the host country and general economic policies promoting political instability, including a cutoff from bilateral and multilateral aid and the refusal of loans to state-owned companies, were all at times discussed and utilized with varying success. The author correctly points out that coherent economic strategies of disinvestment and boycott by the private sector have at times been strong enough to counteract state policies.

In 1972, earlier than certain segments of the foreign investment community, the State Department recognized that the assumption of formal control of oil markets by host countries represented one evolutionary stage in bringing the concern over nonrenewable resources to the forefront of international economic and political policies. Gradually, but increasingly, the Western industrial states decided that issues of formal ownership were not as central to their aim of preserving economic security as had been assumed. The author also points out that, at the same time, oil corporations discovered that their new roles were not as uncomfortable as predicted. In this respect, the study could have added that the financial risks attending ownership rights have more recently received considerable attention in high-cost projects by host countries, and perhaps in the next decade the process may occasionally go full circle if host states come to prefer foreign ownership to the new forms of investment.

From the legal point of view, the discussion of the Hickenlooper and Gonzalez amendments is of particular interest; the author shows how these laws originated in Congress to secure executive protection of corporate interests through aid mechanisms, and how the Executive found ways to sidestep the problems created by a one-dimensional approach to foreign investment issues. Also, the lack of any major role for third-party settlement in this process is evident.

Developing states almost consistently refused offers to arbitrate, in part because of mistrust of arbitration proceedings, but mainly because they recognized that their claims were not based on existing law but upon the novel order toward which they aspired. As to the current state of customary law, it is not surprising to learn that the U.S. position has called for prompt, adequate and effective compensation. However, the reader hardly senses the debate among legal experts in the State Department over whether an international tribunal would follow this approach, and whether in their view book value or a claim of lost profits would be the basic component of an international award in case of a nationalized contract. Incidentally, a legal perspective on the subject would also have included a discussion of bilateral and multilateral treaty practice in the past two decades.

The difficulties with the enforcement of the position taken by the United States in part stemmed from the fact that the regime that the United States supported was not unanimously believed in by the international community, and that unilateral economic sanctions therefore were of limited effective-

ness unless matched by other capital-exporting countries once these had emerged as actors with economic weight and independent judgment.

Accepting the decline of traditional friendship, commerce and navigation treaties, the United States launched its initiative toward a new type of bilateral investment treaty which, contrary to established European practice, attempts to implement an open door policy by requiring admission of most types of foreign investment. As illustrated by the current discussions about the future of GATT, a legal cementation of neoclassical economic theory in the sphere of international law has encountered opposition on the basis of arguments pointing to the imperfect state of international markets, due to the slowness of adjustment measures and political and social considerations within national communities. GATT has aimed at an approximation of liberal policies acceptable within this framework, and the statute of the recently established Multilateral Investment Guarantee Agency contains elements that could be further developed toward an international consensus on foreign investment. At a time when asymmetric economic relationships dating from colonial periods have been terminated and extreme notions of sovereignty have been reconsidered in many quarters, the prospects for a multilateral regime appear to be more promising than a decade ago. In the absence of such a multilateral basis, states will continue to seek ways to implement their unilateral vision of the appropriate economic order.

Rodman's detached and perceptive study deserves high praise for the presentation of major developments in this field since the 1930s. However, the international lawyer should not expect a detailed discussion of legal issues. The author, an assistant professor of politics, has rightly resisted the temptation to venture into legal technicalities, even though major elements within the legal culture do not themselves always respect the borderline between the law created by the international community of states and the preferences of individual actors.

RUDOLF DOLZER

*Max Planck Institute for Comparative Public Law
and International Law, Heidelberg*

Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works. Prepared by the United Nations Commission on International Trade Law. New York: United Nations, 1988. Pp. xv, 346. Index.

International construction contracts are inevitably extraordinarily complex and require the parties to deal with a myriad of issues. The *Guide* effectively outlines the business and legal issues that must be dealt with in a construction contract where the contractor and the purchaser are from different nations. While written to cover contracts for the construction of what are called "works" (factories and other industrial plants), the *Guide* should also be useful in drafting and negotiating any type of construction

contract, including those for public works and those that are not international. As an attorney practicing construction law, I know of no better checklist of business and legal issues to be considered in making a construction contract.

Rather than prescribe a contract form, as other organizations such as FIDIC¹ have done, the *Guide* generally describes the types of provisions the parties may wish to consider. Each chapter deals with a general subject area and describes the advantages and disadvantages for both the contractor and the purchaser of different types of provisions in that area. Frequently, the *Guide* suggests compromises and a variety of alternatives that the parties might consider.

The book begins with a discussion of contract approaches, comparing build-to-design construction contracts (in which the purchaser designs or has designed the project and then contracts actual construction) with turn-key contracts where the contractor does the design and the construction. It discusses the various contractual roles that consulting engineers may be given and the pros and cons of multiple construction contractors. The *Guide* also discusses the methods under which a contract can be entered into, including tenders and negotiation. These discussions are primarily directed at purchasers who must decide how to undertake their project. In each instance, the *Guide* fairly describes the advantages and disadvantages of each approach.

In terms of drafting, various elements of the contract are discussed, including the description of the work, guarantees, technology transfers, pricing and payment,² scheduling, the role of the consulting engineer, subcontracting, inspection, completion and acceptance, risk of loss, security,³ delays, damages and liquidated damages, excusability provisions,⁴ changes, suspensions, terminations,⁵ postconstruction supply of spare parts and repair services, choice of law and settlement of disputes.

¹ The Fédération Internationale des Ingénieurs-Conseils (FIDIC), located in The Hague, has produced Forms of Agreement and complementary Conditions of Contract (International) for Works of Civil Engineering Construction that are used throughout the world on construction projects.

² The price and payment chapter of the *Guide* is particularly valuable. It discusses the types of contracts that may be used, including lump sum, cost-type and unit price contracts. Possible price revision provisions to deal with inflation and other variables are considered, as are currency exchange problems.

³ The security discussion includes provisions for guarantees of performance by the contractor and for guarantee of payment by the purchaser.

⁴ The *Guide* contains two chapters on excusability. One sets forth *force majeure* or excusable delay provisions. This discussion includes not only provisions for excusing the contractor for delays caused by uncontrollable circumstances such as unusual weather, governmental action, war or strikes, but also provisions excusing purchaser performance. Such provisions could result in a contractor's not being paid for work performed and seem out of line with normal practice and the general evenhandedness of the *Guide*. A second chapter deals with hardship clauses providing relief to either party where circumstances make its bargain unreasonable or unacceptable. Such provisions, too, would seem difficult for contractors to accept to the extent that they would affect payment for work done.

⁵ Discussions of terminations include those for default and those for the purchaser's convenience, as well as termination by the contractor in the event of nonpayment.

The format followed for each topic is to present the possible provisions a contract may contain and then to explain the advantages and disadvantages of each type of provision for each party. Footnotes give illustrations of the provisions discussed in the text. These illustrations could not be used to put together a contract but should assist in the drafting of provisions. The *Guide* further indicates, without identifying specific countries, provisions that may conflict with various national laws and suggests caution in such areas.

Each chapter starts with an executive summary that provides an easy-to-understand overview useful to persons not expert in construction contracts.

My only criticism of the *Guide* is its failure to deal effectively with the continuation of work while disputes are resolved. In various countries, including the United States, doctrines of constructive change and suspension have arisen to allow the purchaser to order the contractor to perform in accordance with the purchaser's interpretation of the contract, giving the contractor financial relief under changes or suspension clauses if he is ultimately found to be correct. Such concepts are not, however, universally recognized and it would be useful to have guidance on practical solutions that would allow work to continue during disputes. The omission of discussion of this subject may be due to its sensitivity,⁶ although the *Guide* does deal with many other sensitive subjects in a fair and evenhanded manner.

This book should be a valuable resource for any purchaser contemplating a construction contract and for anyone drafting construction contracts either for the purchaser or the contractor in almost any construction context. In layman's language, the *Guide* effectively describes the options available for each party.

MATTHEW S. PERLMAN
Of the District of Columbia Bar

Arbitraje Comercial Internacional: Tendencias y Perspectivas. By Rubén B. Santos Belandro. Uruguay: Fundación de Cultura Universitaria, 1988. Pp. 392.

Mr. Santos Belandro's book is divided into four parts. The first one, under the ambitious title "Universal Codification of Arbitration," is in fact an analysis of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which has been ratified by Uruguay, the author's country of origin. The second part covers essentially the 1975 Panama Inter-American Convention on International Commercial Arbitration. The third and fourth parts deal, respectively, with (1) the role of institutional arbitration rules and of *lex mercatoria* (the latter as understood by French authors) in the development of international commercial

⁶ Purchasers worry about constructive change provisions that can lead to unintended price increases. Contractors often do not like to be forced to do work that they do not regard as required, especially when there may be some question about the purchaser's ability to pay if the contractor is found to be correct that there was a change.

arbitration and the influence of international commercial arbitration in the formation of "anational" *lex mercatoria* rules, and (2) the impact of treaties ratified by Uruguay in the treatment by Uruguayan law and courts of international commercial arbitration. The last 90 pages or so include a bibliography and Spanish texts of the main international conventions and arbitration rules referred to in the book.

The author has devoted 159 out of 317 pages of text to a serious and detailed analysis of the 1958 New York Convention. For this purpose, he has mainly resorted to the current bibliography on the topic in French and, to a lesser extent, in English, Spanish and Italian, and to court decisions on the Convention, generally as published in the *Yearbook of Commercial Arbitration*. References to court decisions or literature on the Convention from Latin American courts or authors (which, in truth, are scarce) are practically absent. This part, therefore, mainly aims at exposing a Spanish-speaking audience to ideas and sources published in English or French that are not easily available in an organized way even to someone fluent in those languages. On the other hand, the author articulately expresses his views on certain traditional problems regarding the Convention, such as whether its provisions apply to "floating" arbitration awards (against) and "arbitrato irrituale" awards (in favor), and the room left by the Convention for party autonomy in the organization of arbitration and the selection of the applicable law.

The second part opens with references to the history of the codification, through international treaties, of international commercial arbitration laws in Latin America. It is one of the few academic writings in which a study of the provisions on the recognition and enforcement of foreign arbitral awards in the 1889 and 1940 Montevideo Treaties on International Procedural Law may be found. The 1975 Panama Convention on International Commercial Arbitration is analyzed next. Some of its shortcomings (such as the absence of a definition of international commercial arbitration that would distinctly determine its scope of application, or the strange incongruity of its Article 3, which provides that arbitral proceedings in each member country are to be governed by the Rules on Arbitration of the Inter-American Commission on Commercial Arbitration, though the existence and future variations of those rules do not depend on the decision of the member countries but on the changes the Commission would unilaterally like to introduce in its own rules) are considered critically and lucidly.

In the third part, the author gets involved in the endless debate on the interaction between international commercial arbitration and "anational" or "transnational" legal sources. His conclusions can only be shared: without ignoring the serious attention paid by arbitrators in their awards to transnational commercial courses of dealing, practices and usages, the fact that the validity of arbitral agreements and the enforcement of arbitral awards largely depend on national courts acting within the national territories where arbitration develops itself, or where arbitral awards are to become effective, indicates that public policy provisions of state source and national authorities will have the last and prevailing say and that arbitrators

are not likely to ignore this circumstance. It is thus doubtful that arbitral adjudication can create an "anational" *lex mercatoria* totally free from the constraints of national laws. Coinciding in his opinion of this with another recent and prestigious book on the topic,¹ the author believes that only after the creation—through international treaty—of an international court charged with the task of reviewing arbitral awards at the world, or at least the regional, level will it be possible to have awards sufficiently free from national constraints to be able to develop a *lex mercatoria*, if not totally indifferent to national laws, at least out of the reach of parochial rules and regulations.

The last part is the only one really devoted to the law on arbitration of a Latin American country—Uruguay. However, Santos Belandro's ideas in this respect—that the ratification of or accession to international conventions facilitating international commercial arbitration leads to interpreting and construing local laws and regulations less parochially in order to favor international commercial arbitration—are certainly applicable to other countries (like Argentina) increasingly involved in a trend in that direction.

In short, Santos Belandro's book is a useful tool for approaching the problems of international commercial arbitration, particularly for those who feel more at ease reading technical texts in Spanish and who seek comprehensive information and analysis of the provisions of inter-American treaties and arbitral rules dealing with international commercial arbitration.

HORACIO A. GRIGERA NAÓN

Of the Buenos Aires and New York Bars

International Business Bibliography. By William R. Slomanson. Buffalo: William S. Hein & Co., Inc., 1989. Pp. xli, 408. \$47.50.

Bibliographical works do not share the limelight with their scholarly counterparts. This book may be the exception. It is a comprehensive compilation of English-language books that relies upon sources from all over the world. In a book on international business, any criticism of the "foreign presence" would be parochial. Foreign materials provide an invaluable means of acquiring accurate perspectives on practices in other business environments.

This book makes a noticeable contribution to the stockpile of literature that occupies a broad and an ill-defined subject. The user can quickly determine what information is available on many subjects in international business. The detailed table of contents facilitates convenient access to the thousands of entries. The primary indexing device is the topical heading—ranging from "Accounting" to "Transnational Legal Practice." Within each of these alphabetized headings, the author further divides the entries into subheadings—both by country and by subtopic.

¹ M. RUBINO-SAMMARTANO, *L'ARBITRATO INTERNAZIONALE* 629-30 (1989).

The author does not use typical bibliographical format. The individual entries, for example, are listed alphabetically by book title. This is a welcome deviation from the tradition of ordering under the last name of the authors. The latter is a useless tradition that limits reader access to the content of any long work. There is another break from tradition. Most bibliographies list only the date of the book. This one includes the publisher, city or country of publication and number of pages.

An appendix provides the addresses of the publishers identified in the individual entries, allowing the reader to easily acquire a publication. This appendix occupies approximately 15 percent of the book—a decision that would detract if this work were not otherwise so comprehensive. The other 85 percent seems to cover all dimensions in the universe of international business-related publications in the last 10 years.

One limitation is the absence of a "historical presence." This reviewer found few entries on the historical background of distant lands now emerging in the international marketplace. This exclusion may be appropriate, however, given the sheer volume and complexity of the literature in this rapidly changing field. One hopes that there will be periodic updates. Otherwise, this book will become dated.

This particular reference tool should be useful for lawyers, business executives and academic institutions. It lists two competitors (business bibliographies)—one was published in 1977 and the other is modest in scope. While many international bibliographies have been published, this one's emphasis on international business uniquely promotes reader access to the literature on doing business in and with other countries.

C. ANTHONY VALLADOLID
Of the California Bar

The Valuation of Nationalized Property in International Law. Volume IV. Edited by Richard B. Lillich. Charlottesville: University Press of Virginia, 1987. Pp. xvii, 238. Index. \$30.

My expectations were high. Since its introduction in the early 1970s, Professor Richard Lillich's *Valuation of Nationalized Property* series has provided the essential starting point for legal and economic analysis of compensation matters arising from expropriation of foreign investments. By dint of his stewardship of this series and through his own contributions, Lillich has become one of the world's leading authorities in this vital area.

Volume IV more than lives up to such expectations. It provides valuable insights into developments subsequent to the publication of volume III in 1975 and into some enduring conceptual issues.

Important arbitral and judicial decisions were rendered in this period. Richard Young and William Owen introduce the arbitration concerning the 1977 Kuwaiti decree that terminated American Independent Oil Company's oil concession and nationalized its assets. They describe the background to the concession and the takeover, the claims of the parties and the arbitration tribunal's views on the principal substantive issues, with special

attention to valuation and compensation. Brice Clagett, counsel for a number of claimants before the Iran-United States Claims Tribunal, discusses pertinent Tribunal cases and what he perceives to be the applicable international standard of compensation. His thoughts on the interlocutory award in *Starrett Housing Corp. v. Iran* and the potential use of the discounted cash flow methodology in that case make for especially interesting reading in light of the subsequent final award.¹ Relying on an impressive amount of research, Clagett makes one of the most forceful cases to date for a full compensation standard. Victor Rabinowitz, counsel for Cuba in connection with U.S. Second Circuit litigation pertaining to Castro's nationalization of U.S. banks, discusses the Cuban litigation and the requirements of international law. Rabinowitz quite properly devotes closest attention to *Banco Nacional de Cuba v. Chase Manhattan Bank*² and the rather ambiguous language of that case as to compensation standards.

Following the lead of certain European countries, the United States began to sign bilateral investment treaties. K. Scott Gudgeon, an assistant legal adviser with the State Department at the time of writing, discusses the expropriation provisions of the five treaties that the United States had signed as of May 1985. Gudgeon provides perspective on the provisions of the U.S. treaties by comparing them with 90 bilateral investment treaties entered into by other countries.

Volume IV's materials pertaining to enduring issues in the expropriations area are also valuable. Two contributors examine the impact of domestic law concepts. Karl Meessen concludes that transferring such concepts to international law "is either unwarranted . . . or does not justify a deduction from full compensation." Haliburton Fales finds that the measure of compensation employed in two recent international arbitrations parallels "in many respects" techniques used by American courts in connection with valuing shares held by shareholders who dissent from corporate mergers.

The most important of the enduring issues is, of course, the standard of compensation called for under international law. The State Department's Memorandum on the Application of the Treaty of Amity to Expropriations in Iran (included as the appendix to volume IV), as well as the Clagett and Fales essays, deals most directly with that standard. The State Department argues that both the U.S.-Iran Treaty of Amity and international law require payment of full compensation.

My only quibble with the book is that it could have addressed more fully some of the fundamental questions associated with the baseline "full compensation" standard. As a legal matter, how exactly does the concept of value embodied in such a standard differ (if at all) from "fair market value" as understood in the business world? What are the complete policy implications of a full compensation standard as compared with "appropriate compensation"? If full compensation is called for, how exactly should the applicable economic methodology or methodologies be applied and by what means should generalist arbitrators evaluate the technical analyses?

¹ See *Starrett Housing Corp. v. Iran*, 16 IRAN-U.S. CLAIMS TRIBUNAL REP. 112 (1987 III).

² 658 F.2d 875 (2d Cir. 1981).

Most important of all, it would have been worthwhile to explore key ideas such as fair market value and discounted cash flow more deeply. Fair market value issues can be quite complex even in the far more antiseptic context of domestic mergers or acquisitions involving corporations with publicly traded securities.³ Moreover, especially in view of revolutionary developments in the 1970s and 1980s in "option-pricing theory,"⁴ discounted cash flow techniques might no longer be the sole source of methodological light and truth. For instance, relying in part on option-pricing theory, two economists⁵ have argued that use of discounted cash flow procedures can lead to significant errors in the evaluation of domestic natural resource investments. The international expropriations literature may need to begin a fundamental reexamination of the discounted cash flow paradigm, taking full advantage of possible insights from modern financial theory.

The flow of foreign direct investment by multinational companies has increased substantially in recent years. With the apparent receptiveness to foreign investment on the part of many countries today, the establishment of the Multilateral Investment Guaranty Agency, the emergence of debt-equity swaps and a myriad of other factors, foreign investment is likely to be an enduring feature of the world financial landscape. Expropriation and compensation disputes will inevitably also continue to take place. Through this and previous works, Lillich and his contributors significantly enhance the quality of the dialogue.

HENRY T. C. HU

University of Texas School of Law

BRIEFER NOTICES

International Control of Sea Resources. Reprint with a new introduction. By Shigeru Oda. (Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1989. Pp. xxxv, 215. Indexes. Dfl. 135; \$75; £45.) This volume represents a reprinting, together with a new introduction, of a work by the distinguished Japanese international lawyer and judge of the International Court of Justice, Shigeru Oda. The original version, published in 1960, and the updated edition presented in the Hague Academy lectures of 1969 were reviewed in the *Journal*.¹ The introduction deals with the exclusive economic zone, high

³ See, e.g., Black, *Bidder Overpayment in Takeovers*, 41 STAN. L. REV. 597 (1989); Kraakman, *Taking Discounts Seriously: The Implications of "Discounted" Share Prices as an Acquisition Motive*, 88 COLUM. L. REV. 891 (1988).

⁴ See Baumol & Faulhaber, *Economists as Innovators: Practical Products of Theoretical Research*, 26 J. ECON. LIT. 577, 584-85 (1988). Cf. Lee, *What's with the casino society?*, FORBES, Sept. 22, 1986, at 150, 156 (quoting one academic as saying that the option-pricing formula developed by Fischer Black and Myron Scholes was "the most important discovery ever made in financial economics"). See also Hu, *Swaps, The Modern Process of Financial Innovation and the Vulnerability of a Regulatory Paradigm*, 138 U. PA. L. REV. 333 (1989) (describing, among other things, recent developments in financial theory).

⁵ See Brennan & Schwartz, *A New Approach to Evaluating Natural Resource Investments*, in THE REVOLUTION IN CORPORATE FINANCE 78 (J. Stern & D. Chew eds. 1986); Brennan & Schwartz, *Evaluating Natural Resource Investments*, 58 J. BUS. 135 (1985).

¹ 58 AJIL 1046 (1964); 68 AJIL 138, 141-42 (1974).

seas fisheries and the continental shelf, bringing developments in those fields up to date.

Plaidoiries davanti alla Corte Internazionale di Giustizia. By Antonio Malintoppi. (Rome: Giuffrè Editore, 1989. Pp. x, 413.) This volume gathers the pleadings prepared by the late Antonio Malintoppi, a distinguished Italian international lawyer, in several cases before the International Court of Justice—*Arbitral Award Made by the King of Spain, Barcelona Traction, Tunisia / Libya* and *Gulf of Maine*—together with tributes by Paolo Ungari and Roberto Ago.

COLLECTED ESSAYS

Le droit international à l'heure de sa codification, études en l'honneur de Roberto Ago / Il diritto internazionale al tempo della sua codificazione / International Law at the Time of its Codification, Essays in Honour of Roberto Ago. (Milan: Dott. A. Guifrè Editore, 1987. Vol. I: pp. 604; vol. II: pp. 554; vol. III: pp. 524; vol. IV: pp. 455.)

Vol. I: *Les Principes et les Sources.* Henri Batiffol, *L'apport d'un internationaliste à la notion de positivité du droit*; Alessandro Migliazza, *L'oeuvre scientifique de Roberto Ago*; Nagendra Singh, *The Achievements of Roberto Ago in the Field of International Organisations*; Georges Abi-Saab, *La coutume dans tous ses états ou le dilemme du développement du droit international général dans un monde éclaté*; Chittharanjan Felix Amerasinghe, *Sources of International Administrative Law*; Giovanni Battaglini, *Il riconoscimento internazionale dei principi generali del diritto*; Maarten Bos, *Aspects phénoménologiques de la codification du droit international public*; Ian Brownlie, *Problems Concerning the Unity of International Law*; Philippe Cahier, *Le changement fondamental de circonstances et la convention de Vienne de 1969 sur le droit des traités*; Giorgio Cansacchi, *Souveraineté e diritti sovrani*; Francesco Capotorti, *Sul valore della prassi applicativa dei trattati secondo la convenzione di Vienna*; Maxwell Cohen, *Technology, Multiple Fora and the Time-Factor: the International Legal Response*; Giorgio Conetti, *Gli organi per la codificazione progressiva del diritto internazionale nella Società delle Nazioni*; Manuel Diez de Velasco Vallejo, *Législation et codification dans le droit international actuel*; René Jean Dupuy, *La codification du droit international a-t-elle encore un intérêt à l'aube du troisième millénaire?*; Luigi Ferrari Bravo, *Alcune riflessioni sui rapporti fra diritto costituzionale e diritto internazionale in tema di stipulazione di trattati*; Paolo Fois, *La funzione degli accordi di codificazione nella formazione dello jus cogens*; Giorgio Gaja, *Unruly Treaty Reservations*; Manfred Lachs, *La diplomatie par les conférences et le droit*; Edward McWhinney, *"Classical" Sources, and the International Law-Making Process of Contemporary International Law*; Riccardo Monaco, *Dal coordinamento al controllo nell'ordinamento internazionale*; Fritz Münch, *La codification inachevée*; Geraldo Eulalio do Nascimento e Silva, *Treaties as Evidence of Customary International Law*; Paul Reuter, *Traités et transactions. Réflexions sur l'identification de certains engagements conventionnels*; Shabtai Rosenne, *Conceptualism as a Guide to Treaty-Interpretation*; Walter Rudolf, *Technological Development and Codification of International Law*; Tullio Scovazzi, *Considerazioni sui rapporti tra forma e sostanza delle norme di un trattato di codificazione*; José Sette-Camara, *The International Law Commission, Discourse on Method*; Krzysztof Skubiszewski, *Resolutions of the U.N. General Assembly and Evidence of Custom*; Erik Suy, *Rôle et*

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BOOKS RECEIVED*

International Law—General

- Recueil des Cours de l'Académie de droit international de La Haye, 1987.* Vol. V (Vol. 205 of the collection.) Dordrecht, Boston, Lancaster: Martinus Nijhoff Publishers, 1989. Pp. 394. Dfl. 175; \$92.50; £57.50.
- Recueil des Cours de l'Académie de droit international de La Haye, 1988.* Vol. II (Vol. 209 of the collection.) Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1989. Pp. 452. Dfl. 175; \$92.50; £59.50.
- Recueil des Cours de l'Académie de droit international de La Haye, 1988.* Vol. III (Vol. 210 of the collection.) Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1989. Pp. 400. Dfl. 175; \$92.50; £59.50.
- Annuaire Européen / European Yearbook 1987.* Volume 35. Published under the auspices of the Council of Europe. Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1989. Dfl. 395; \$195; £129.
- Bernhardt, Rudolf (ed.). *Encyclopedia of Public International Law.* Instalment 11: Law of the Sea. Air and Space. Published under the auspices of the Max Planck Institute for Comparative Public Law and International Law. Amsterdam, New York, Oxford, Tokyo: North-Holland, 1989. Pp. xv, 353. Distributed in the U. S. and Canada by Elsevier Science Publishing Co., Inc.
- The Canadian Yearbook of International Law / Annuaire canadien de Droit international 1988.* Volume 26. Published under the auspices of The Canadian Branch, International Law Association. Vancouver, B. C.: University of British Columbia Press, 1989. Pp. 499. Index. \$60.
- Cursos de Derecho internacional de Vitoria-Gasteiz, 1987.* San Sebastián: Universidad del País Vasco, 1989. Pp. 236.
- Matthews, James M. (ed.). *Kime's International Law Directory 1989.* Carlisle, England: Kime's International Law Directory Limited, 1989. Pp. 1195.
- Polish Yearbook of International Law. Volume XVI, 1987.* Warsaw: Institute of State and Law, Polish Academy of Sciences, 1989. Pp. 248.

International Economic Law & Relations

- Austmann, Andreas. *Basispreise und Trigger-Preise im Antidumpingrecht: Eine vergleichende Untersuchung zu Recht und Praxis der Montanunion und der Vereinigten Staaten von Amerika unter Berücksichtigung des GATT.* Heidelberg: Verlag Recht und Wirtschaft GmbH, 1989. Pp. 221. Index. DM 78.
- Baudot, Barbara Sundberg. *International Advertising Handbook: A User's Guide to Rules and Regulations.* Lexington, Mass., Toronto: Lexington Books, 1989. Pp. xxx, 359. Index. \$54.95.
- Levey, Marc M. (ed.). *Foreign Investment in the United States: Law, Taxation, Finance.* New York, Chichester, Brisbane, Toronto, Singapore: John Wiley and Sons, 1989. Pp. xlix, 766. Index. \$95.
- Stowell, Alan M. (ed.). *U. S. International Trade Laws. 1989 Edition.* Washington: BNA Books, 1989. Pp. xxxiii, 730. \$48.

Law of the Sea & Maritime Law

- Dallmeyer, Dorinda G., and Louis DeVorse, Jr. (eds.). *Rights to Oceanic Resources: Deciding and Drawing Maritime Boundaries.* A Dean Rusk Center Monograph. Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1989. Pp. xiii, 207. Index. Dfl. 125; \$67.50; £39.
- Kwiatkowska, Barbara. *The 200 Mile Exclusive Economic Zone in the New Law of the Sea.* Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1989. Pp. xxviii, 397. Indexes, Dfl. 195; \$105; £60.

* Mention here neither assures nor precludes later review.

Morris, Michael A. *The Strait of Magellan*. (International Straits of the World. Edited by Gerard J. Mangone.) Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1989. Pp. xii, 237. Index. Dfl.145; \$79; £46.

Vukas, Budislav (ed.). *The Legal Regime of Enclosed or Semi-Enclosed Seas: The Particular Case of The Mediterranean*. Zagreb, 1988. Pp. vi, 515.

Weil, Prosper. *The Law of Maritime Delimitation—Reflections*. Cambridge: Grotius Publications Limited, 1989. Pp. xv, 327. Index. £55; \$98.

Use of Force & Law of War

Henkin, Louis, Stanley Hoffmann, Jeane J. Kirkpatrick, Allan Gerson, William D. Rogers, and David J. Scheffer. *Right v. Might: International Law and the Use of Force*. New York, London: Council on Foreign Relations Press, 1989. Pp. xii, 123. Index. \$12.95, paper.

Kalshoven, Frits (ed.). *Assisting the Victims of Armed Conflict and Other Disasters*. Papers delivered at the International Conference on Humanitarian Assistance in Armed Conflict, The Hague, 22–24 June 1988. Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1989. Pp. vii, 258. Dfl.150; \$79.50; £47.50.

Kalshoven, Frits, and Yves Sandoz (eds.). *Implementation of International Humanitarian Law / Mise en oeuvre du droit international humanitaire*. Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1989. Pp. xiv, 472. Dfl.265; \$145; £85.

Terrorism

Alexander, Yonah, and Abraham H. Foxman (eds.). *The 1987 Annual on Terrorism*. Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1989. Pp. vii, 527. Dfl.250. \$145. £82.

Cassese, Antonio. *Terrorism, Politics and Law: The Achille Lauro Affair*. Princeton: Princeton University Press, 1989. Pp. xi, 162. Index. \$19.95.

Crenshaw, Martha. *Terrorism and International Cooperation*. New York: Institute for East-West Security Studies; Boulder: Westview Press, 1989. Pp. iii, 89. \$7.95.

Human Rights

Chowdhury, Subrata Roy. *Rule of Law in a State of Emergency: The Paris Minimum Standards of Human Rights Norms in a State of Emergency*. New York: St. Martin's Press, 1989. Pp. xiv, 290. Index. \$45.

Donnelly, Jack. *Universal Human Rights in Theory and Practice*. Ithaca and London: Cornell University Press, 1989. Pp. x, 295. Index. \$36.50, cloth; \$12.95, paper.

Fricke, Karl Wilhelm. *Zur Menschen- und Grundrechtssituation politischer Gefangener in der DDR*. Colon: Verlag Wissenschaft und Politik Berend von Nottbeck, 1988. Pp. 256. Index.

Hannum, Hurst, Richard B. Lillich, and Stephen A. Saltzburg. *Materials on International Human Rights and U. S. Criminal Law and Procedure*. Washington: The Procedural Aspects of International Law Institute, 1989. Pp. ii, 122.

Israel Yearbook on Human Rights 1988. Volume 18. Published under the auspices of the Faculty of Law, Tel Aviv University. Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1989. Pp. 336.

Ramcharan, B. G. *The Concept and Present Status of the International Protection of Human Rights: Forty Years After the Universal Declaration*. Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1989. Pp. xi, 611. Index. Dfl.295; \$159.50; £94.50.

Environment & Natural Resources

Favre, David S. *International Trade in Endangered Species: A Guide of CITES*. Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1989. Pp. xx, 415. Index. Dfl. 235; \$129; £75.

Sand, Peter H. *Marine Environment Law in the United Nations Environment Programme: An Emergent Eco-Regime*. London and New York: Tycooly Publishing, 1988. Pp. xxvi, 265. \$50.

Air & Space Law

Baker, Howard A. *Space Debris: Legal and Policy Implications*. Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1989. Pp. xi, 175. Dfl.135; \$72; £43.

Jacewicz, Andrzej, and Jerzy Markowski. *Kosmos a Zbrojenia. Aspekty polityczne, militarne, prawne* (Outer Space and the Arms Race. Political, Military and Legal Aspects). Warsaw: Książka i Wiedza, 1988. Pp. 464.

Young, Andrew J. *Law and Policy in the Space Stations' Era*. Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1989. Pp. xxiii, 323. Dfl.160; \$95; £52.

International Labor Law

International Labour Law Reports. Volume 7. Dordrecht, Boston, Lancaster: Martinus Nijhoff Publishers, 1989. Pp. xxxvii, 647. Dfl.325; \$175; £105.

International Organizations

Dembinski, Ludwik, and Richard O'Regan (eds.). *International Geneva Yearbook, 1989. Organization and Activities of International Institutions in Geneva*. Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1989. Pp. xii, 359. Index. Dfl.100; \$54; £32.

Gill, Terry D. *Litigation Strategy at the International Court. A Case Study of the Nicaragua v. United States Dispute*. Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1989. Pp. xv, 362. Dfl.175; \$95; £56.

Malintoppi, Antonio. *Plaidoiries davanti alla corte internazionale di giustizia*. Milan: Giuffrè Editore, 1989. Pp. x, 413. L. 38.000.

Siekmann, Robert C. R. *Basic Documents on United Nations and Related Peace-Keeping Forces—with an Appendix on UN Military Observer Missions* (2d rev. ed.). Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1989. Pp. xxi, 415. Index. Dfl.205; \$109; £68.

European Community Law

Brealey, Mark, and Conor Quigley. *Completing the Internal Market of the European Community. 1992 Handbook*. London, Dordrecht, Boston: Graham & Trotman, 1989. Pp. xxx, 273.

Hacker, Jens, and Siegfried Mampel (eds.). *Europäische Integration und deutsche Frage*. Berlin: Duncker & Humblot, 1989. Pp. 175.

Maresceau, Marc (ed.). *The Political and Legal Framework of Trade Relations Between the European Community and Eastern Europe*. European Institute—University of Ghent. Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1989. Pp. xiv, 351. Index. Dfl.135; \$72.50; £42.

Treaty Law

Rosenne, Shabtai. *Developments in the Law of Treaties 1945-1986*. Cambridge: Cambridge University Press, 1989. \$75.

Jurisdiction & Immunities

McClanahan, Grant V. *Diplomatic Immunity: Principles, Practices, Problems*. New York: St. Martin's Press, 1989. Pp. xvii, 283. Index. \$39.95, cloth; \$15.95, paper.

U. S. Law & Foreign Relations

Gartner, Michael G. *Advertising and the First Amendment*. New York: Priority Press Publications, 1989. Pp. ix, 69. Index. \$18.95, cloth; \$9.95, paper.

Stillman, Richard J., II (ed.). *The American Constitution and the Administrative State. Constitutionalism in the Late 20th Century*. Lanham, New York, London: University Press of America, 1989. Pp. x, 309. \$18.75.

Foreign Relations of the United States. Memoranda of the Secretary of State, 1949-1951, and Meetings and Visits of Foreign Dignitaries, 1949-1952. Microfiche Publication. (Dept. of State Pub. 9672.) Washington: U. S. Govt. Printing Office, 1989. 39 microfiches. Printed index.

Foreign Relations of the United States, 1952-1954. Volume X: Iran 1951-1954. (Dept. of State Pub. 9690.) Washington: U. S. Govt. Printing Office, 1989. Pp. xxi, 1092. Index.

Regional, Foreign & Comparative Law & Politics

Folsom, Ralph H., and John H. Minan. *Law in the People's Republic of China. Commentary, Readings and Materials*. Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1989. Pp. xviii, 1076. Dfl.495; \$245; £159.

Legislative Responses to AIDS. World Health Organization. Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1989. Pp. xliii, 296. Dfl.150; \$82, £47.50.

Sung Yooᄁ Cho. *Law and Legal Literature of North Korea: A Guide.* Washington: Library of Congress, 1988. Pp. ix, 256, Name Index.

International Relations & Politics

Kaufmanr, Johan. *Conference Diplomacy: An Introductory Analysis* (2d rev. ed.). Dordrecht: Martinus Nijhoff Publishers, 1988. Pp. xxix, 208. Index. Dfl.100; \$55; £30.50.

Kratochwi, Friedrich V. *Rules, Norms, and Decisions: On the conditions of practical and legal reasoning in international relations and domestic affairs.* Cambridge: Cambridge University Press, 1989.

Suganami Hidemi. *The Domestic Analogy and World Order Proposals.* Cambridge: Cambridge University Press, 1989. \$44.50.

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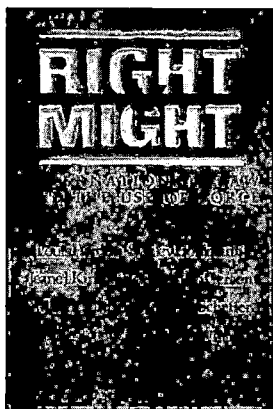
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U.S. RATIFICATION OF THE COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: THE NEED FOR AN ENTIRELY NEW STRATEGY

By Philip Alston*

In January 1989, in the follow-up to the Conference on Security and Co-operation in Europe (the so-called Helsinki process), the United States signed the Vienna Declaration, in which it recognized "that the promotion of economic, social, cultural rights . . . is of paramount importance for human dignity and for the attainment of the legitimate aspirations of every individual."¹ To that end, the United States in signing the declaration undertook, *inter alia*, to guarantee "the effective exercise" of economic, social and cultural rights and to consider acceding to the International Covenant on Economic, Social and Cultural Rights.² These undertakings seem to warrant renewed consideration of proposals that have been made at various times over the past quarter of a century for the United States to ratify the Covenant on Economic, Social and Cultural Rights.³

Almost invariably, the proposal has been put forward as part of a package deal under which the United States would also ratify several other international human rights treaties, including in particular the International Covenant on Civil and Political Rights,⁴ the Convention on the Elimination of All Forms of Racial Discrimination⁵ and the American Convention on Human Rights.⁶ These four treaties constituted the package that President Carter sent to the U.S. Senate in 1978 for its advice and consent.⁷ Since that time,

* Professor of Law and Director, Centre for Advanced Legal Studies, Australian National University. While the author has been rapporteur of the United Nations Committee on Economic, Social and Cultural Rights since its creation in 1987, the views expressed herein are solely his own. An earlier version of this analysis was presented as part of an expert panel, "U.S. Ratification of the Human Rights Treaties Now!," held in the U.S. Senate Foreign Relations Committee Room, Washington, D.C., on Mar. 16, 1989. The author wishes to thank Professor Henry Steiner for perceptive comments on an earlier draft.

¹ Concluding Document of the Vienna Meeting 1986 of Representatives of the Participating States of the Conference on Security and Co-operation in Europe, Held on the Basis of the Provisions of the Final Act Relating to the Follow-up to the Conference, 28 ILM 527, 534, para. 14 (1989).

² *Id.* at 533, para. 13(a) and (b).

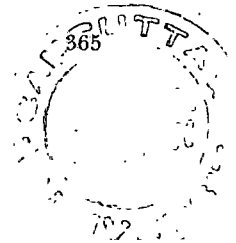
³ GA Res. 2200, 21 UN GAOR Supp. (No. 16) at 49, UN Doc. A/6316 (1966) [hereinafter *Covenant*].

⁴ Dec. 16, 1966, 999 UNTS 171.

⁵ *Opened for signature* Mar. 7, 1966, 660 UNTS 195, *reprinted in* 5 ILM 352 (1966).

⁶ Nov. 22, 1969, *reprinted in* ORGANIZATION OF AMERICAN STATES, BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM 25, OEA/Ser.L/V/II.71, doc. 6, rev.1 (1988).

⁷ Message from the President Transmitting Four Treaties Pertaining to Human Rights, S. EXEC. DOCS. C, D, E and F, 95th Cong., 2d Sess., at III (1978).



however, the ratification process has remained virtually dormant, although human rights and other groups have urged, from time to time, that it be reactivated.⁸ The thrust of the analysis that follows is to endorse the call for U.S. ratification of the Covenant on Economic, Social and Cultural Rights but to suggest at the same time that the strategy that will be required if success is to be achieved is very different from that pursued so far by the proponents of ratification.

In the past, the tendency has been to portray the Covenant as though it did not differ significantly from the other treaties whose ratification was being advocated. Two different reasons suggest themselves as possible explanations for that tendency. The first is that it was assumed that the best hope of achieving ratification of a potentially controversial Covenant was to smuggle it through as part of a "package" of treaties, the majority of which would presumably be endorsed fairly readily because of their similarity to the U.S. Bill of Rights. A second, alternative, explanation is that it was assumed that the Covenant could be "sold" as part of a package deal largely because it could convincingly be portrayed as being devoid of any substantive practical or legal significance. Metaphorically speaking, it could be characterized as being the ultimate toothless tiger.

There is good reason, however, to question whether the Covenant can, or should, be "sold" to the U.S. Senate on the basis of either of these two approaches. In the first place, despite having been around since 1966, the Covenant has failed to attract any significant domestic support, even from within the human rights community, which has (incorrectly, for reasons explained below⁹) always been assumed to be its natural constituency. Of even greater relevance is the extent to which it seems to be viewed with suspicion by many Americans, who tend to think of it less as an international treaty seeking to promote the satisfaction of basic material needs than as a "Covenant on Uneconomic, Socialist and Collective Rights." Only by facing that reality, and by taking it as a starting point for an open and animated public debate, is there any real prospect of securing the broad-based support and momentum without which the Senate is unlikely ever to act.

The Covenant on Economic, Social and Cultural Rights thus finds itself in a very different situation from that of the other principal international human rights treaties. It is now generally agreed that there is no fundamental incompatibility between the latter and U.S. law.¹⁰ As a result, the princi-

⁸ See, for example, the reports of the panel discussions organized at the Annual Meetings of the American Society of International Law in 1968, 1976 and 1986: *The United Nations Human Rights Covenants: Problems of Ratification and Implementation*, 62 ASIL PROC. 91 (1968); *U.N. Human Rights Covenants Become Law: So What?*, 70 ASIL PROC. 103 (1976); and *Human Rights: The 1966 Covenants Twenty Years Later*, 80 ASIL PROC. 408 (1986).

⁹ See text at notes 100-09 *infra*.

¹⁰ "As the representative of the Justice Department, I am here to assure you that, subject to the proposals that we have made, there are not any legal obstacles to our becoming a party to these treaties." *International Human Rights Treaties: Hearings Before the Senate Comm. on Foreign Relations*, 96th Cong., 1st Sess. 35 (1979) [hereinafter *Hearings*] (statement of Jack Goldklang, Office of Legal Counsel, Department of Justice).

pal issues to be resolved relate to only two matters. The first concerns the exact nature and scope of the reservations and understandings to be attached to any act of ratification, and whether those proposed by President Carter are acceptable for current purposes.¹¹ The second issue is whether the Bush administration is prepared to distance itself from the preference for unilateralism and general disinterest in multilateral organizations that characterized so much of the Reagan foreign policy.¹² In the absence of a clear willingness to make such a break with the immediate past, the strengthening of international procedures for promoting and monitoring respect for human rights is most unlikely to be placed on the agenda. Although the prospects in that regard do not seem particularly encouraging, the point is simply that political will is the basic ingredient required to achieve ratification of those other treaties.

By contrast, the obstacles to be overcome to secure ratification of the Covenant on Economic, Social and Cultural Rights are much more formidable. They arise essentially from the absence of clear agreement on values between the United States and the international community when it comes to the very concept of economic, social and cultural rights. The lack of the necessary community of values is most clearly attested to by the fact that the U.S. Government, for almost a decade, has categorically denied that there is any such thing as an economic, a social or a cultural human right.¹³ This denial has given rise to the placement of the word "rights" in quotation marks every time it follows the phrase "economic, social and cultural" and to the equally pointed rebuff of inserting "so-called" in front of the full phrase whenever its use cannot be avoided. The evolution of this policy will be traced briefly below, but it is appropriate to emphasize here that this obstacle could be removed as quickly as it was created (by a decision of the Secretary of State during the first months of the Reagan administration).

The second obstacle is rather more complex and will prove considerably more difficult to overcome. It derives from the conjunction of two factors. The first is that the nature of the obligations contained in the Covenant on Economic, Social and Cultural Rights, while by no means the object of pre-

Louis Henkin had expressed a similar view a few months earlier:

I can . . . dispose quickly of constitutional objections to ratification. In principle, there are no constitutional objections. The treaty makers can adhere to the human rights covenants. There are no constitutional objections based on federalism or on the separation of powers or on some notion that the subject is not of international concern.

Henkin, *The Covenant on Civil and Political Rights*, in U.S. RATIFICATION OF THE HUMAN RIGHTS TREATIES: WITH OR WITHOUT RESERVATIONS? 20, 21 (R. Lillich ed. 1981) [hereinafter Lillich].

¹¹ See Lillich, *supra* note 10, *passim*; Weissbrodt, *United States Ratification of the Human Rights Covenants*, 63 MINN. L. REV. 35 (1978); and Schachter, *The Obligation to Implement the Covenant in Domestic Law*, in THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS 311, 321-25 (L. Henkin ed. 1981).

¹² See generally Farer, *International Law: The Critics Are Wrong*, FOREIGN POL'Y, No. 71, Summer 1988, at 22.

¹³ See text at notes 27-44 *infra*.

cise agreement among governments or scholars, is nevertheless considerably more substantial and demanding than has been assumed in most of the ratification debate in the United States so far. Moreover, as the "jurisprudence" relating to individual economic, social and cultural rights becomes clearer, and as the recently established Committee on Economic, Social and Cultural Rights¹⁴ begins to generate a deeper and more widely shared understanding of the nature of the obligations in the Covenant,¹⁵ a decision by the United States to ratify will take on more and more significance. The second complicating factor is the lack of consensus within the United States as to the desirability, or philosophical and political acceptability, of the domestic recognition of economic, social and cultural rights.¹⁶ Perceptions in that regard differ considerably at present and it is not the intention here to argue that these rights are unacceptable either to the majority of the U.S. public or to Congress. For present purposes, the point is that ratification of the Covenant by the United States would entail the acceptance of certain obligations, and that it is by no means certain that in the current political, ideological and economic climate, those obligations will be acceptable if they are subjected to the scrutiny they deserve.

The problem with this analysis, of course, is that even if the premises on which it is based are accepted, the implications that flow from it will be unpalatable, at best, to many U.S. human rights advocates. The principal argument is that the existing strategy for ratification is both ineffectual and inappropriate and that an entirely new strategy needs to be devised. One hopes that this prescription, rather than discouraging efforts to achieve ratification of the Covenant, will instead stimulate more careful consideration of the issues and the launching of a far more nuanced and broadly based ratification campaign.

Before elaborating on the main points outlined above, it is appropriate to summarize the content of the Covenant and its current status in terms of ratification and implementation.

I. AN OVERVIEW OF THE RIGHTS AND OBLIGATIONS

The Covenant is sometimes described by its critics as though it were really a "holidays with pay treaty." The reason is that some of its most persistent detractors have long singled out that particular provision as indicative of the utopian and highly demanding nature of all of the rights recognized in the Covenant.¹⁷ While it is tempting to be diverted into a debate on that issue, it

¹⁴ The Committee was established pursuant to ESC Res. 1985/17, 1985 UN ESCOR Supp. (No. 1) at 15, UN Doc. E/1985/85.

¹⁵ See Alston & Simma, *Second Session of the UN Committee on Economic, Social and Cultural Rights*, 82 AJIL 603 (1988).

¹⁶ See text at notes 54-76 *infra*.

¹⁷ The most notable example is Maurice Cranston. See, e.g., Cranston, *Are There Any Human Rights?*, DAEDALUS, No. 4, 1983, at 1:

[O]ne can justify the existence of . . . universal human rights, provided one does not do what the UN did in 1948, and which fashionable opinion has continued to do; that is, to postulate as human rights universal claims to amenities like social security and holidays with pay. Such things are admirable as ideals, but an ideal belongs to a wholly different logical

must suffice in this context to note that although the right to take an occasional break from work (a sabbath, in religious terms) is an important one, it is perhaps less self-evidently fundamental than several of the other rights dealt with. They include the right to work, which, notwithstanding allegations to the contrary, has always been interpreted by international organizations so as to avoid the implication that a job is guaranteed by the state to all and sundry. The relevant provision, however, does indicate that the job in question should be freely chosen or accepted (Art. 6(1)) and that appropriate policies should be pursued "under conditions safeguarding fundamental political and economic freedoms to the individual" (Art. 6(2)). The link between the two sets of rights is thus strongly reaffirmed.

Articles 7 and 8 deal with conditions of work, including fair pay, equal pay for work of equal value, safe and healthy working conditions, and the right to form and join trade unions. Article 9 provides for the right to social security—exactly the term the United States has opted for since the Great Depression. Article 10 confirms the importance of the family as a social group and calls for special protection for children and young persons and for mothers during a reasonable period before and after childbirth. None of these provisions appear to be controversial or out of step with widespread practice in the United States. The same can be said of Article 15, which in most respects raises issues that seem more relevant to the Covenant on Civil and Political Rights. It confirms the right to take part in cultural life, the right to enjoy the benefits of science and the right of authors to have their creative work protected.

The remaining articles (Arts. 11–14), however, are more problematic from a U.S. perspective. In essence, they deal with the rights to food, clothing and housing, the right of access to physical and mental health care, and the right to education. In terms of the "ratifiability" of the Covenants by the United States, the issues raised by that cluster of rights are twofold. Is the United States prepared to commit itself to the general proposition that there is indeed a human right to each of these social goods or, put differently, to the satisfaction of each of these basic human needs? And, even if it is, is it prepared to accept the specific level of obligation in that regard provided for by the Covenant?

The latter question raises the most technically complex and politically controversial issue pertaining to the Covenant: the precise scope and nature of its various obligations clauses. The most important of these is Article 2(1), which provides:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the

category from a right. If rights are to be reduced to the status of ideals, the whole enterprise of protecting human rights will be sabotaged.

Id. at 12.

rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

The implications of that and related provisions are dealt with below (in part III) in connection with the interpretation proposed by the Carter administration.

The Covenant makes clear that the responsibility for monitoring and promoting the implementation of the various rights is principally incumbent upon the state party itself. This fact is sometimes downplayed by human rights advocates, who are anxious to emphasize the element of international accountability but do so at the expense of underestimating the central importance of domestic activities in this regard. The sole international implementation mechanism provided for in the Covenant consists of the duty assumed by each state party to report at regular intervals on the measures adopted, the progress made and the difficulties encountered in fulfilling its obligations.¹⁸ If the United States were to ratify the Covenant, it would be required under existing arrangements to produce an initial comprehensive report within 2 years and to submit follow-up (or so-called periodic) reports at 5-year intervals thereafter.¹⁹ These reports are examined by the UN Committee on Economic, Social and Cultural Rights,²⁰ to which they are presented by representatives of the state parties with expertise in at least some of the fields covered. On the basis of these presentations, members of the Committee pose questions, to which answers are expected at a later stage. The procedure is based on the assumption that a constructive dialogue between the Committee and the state party, in a nonadversarial, cooperative spirit, is the most productive means of prompting the government concerned to take the requisite action. The process can be expected to become gradually more sophisticated and effective over time as the Committee improves its procedures, develops greater expertise and elicits enhanced responsiveness from governments.

An important example in this regard is the Committee's first "General Comment," adopted in February 1989, which deals with "reporting by States parties." In it, the Committee identifies seven different objectives of the reporting process. For present purposes, it is sufficient to cite the first two of those objectives to demonstrate that the process is not merely a pro forma exercise but, rather, is one that, at least in the future, will come to have substantive implications:

[T]o ensure that a comprehensive review is undertaken with respect to national legislation, administrative rules and procedures, and practices in an effort to ensure the fullest possible conformity with the Covenant.

. . . [T]o ensure that the State party monitors the actual situation with respect to each of the rights on a regular basis and is thus aware of

¹⁸ Covenant, *supra* note 3, Arts. 16 and 17.

¹⁹ ESC Res. 1988/4, para. 6. For all the relevant Council resolutions and decisions, see UN Doc. E/C.12/1989/4.

²⁰ See notes 14-15 *supra*.

the extent to which the various rights are, or are not, being enjoyed by all individuals within its territory or under its jurisdiction.²¹

In general terms, the potential effectiveness of the reporting procedure clearly lies less in the formal exchanges between the Committee and the state party and more in the mobilization of domestic political and other forces to participate in monitoring government policies and providing a detailed critique (assuming that one is warranted) of the government's own assessment of the situation.

Although we noted above that the principal thrust of the implementation provisions of the Covenant is to emphasize the responsibility of the state party itself, the element of international accountability is not thereby rendered irrelevant or meaningless. It is therefore important to clarify the following commentary on the Covenant contained in the *Restatement (Third) of the Foreign Relations Law of the United States*:

By adhering to this Covenant, the United States would be obligated to take legislative, executive, and other measures, federal or State, generally of the kind that are already common in the United States, "to the maximum of its available resources," "with a view to achieving progressively the full realization" of those rights. Since there is no definition or standard in the Covenant, the United States would largely determine for itself the meaning of "full realization" and the speed of realization, and whether it is using "the maximum of its available resources" for this purpose.²²

If the word "largely" were to be interpreted in a controlling sense to indicate that the United States would have the sole and exclusive right to determine whether it had satisfied its obligations, the analysis would clearly be inaccurate. The provisions of many human rights treaties, including, for example, the International Covenant on Civil and Political Rights, are not necessarily susceptible of precise "definitions or standards." Nevertheless, what constitutes "cruel, inhuman or degrading treatment or punishment" for the purposes of international law (to take but one example) is not solely a matter for a state party itself to decide. Vesting such auto-interpretive authority in a state would clearly undermine the concept of accountability, which the Covenant is designed to achieve, as the United States Government would undoubtedly be quick to point out if the Soviet Union were to make such a self-serving claim for its own purposes. Thus, the word "largely" in the *Restatement* must be read as indicating that the question of full U.S. compliance would still ultimately be subject to (albeit advisory and thus unenforceable) determination by the Committee. But, lest it be feared that the Committee will thus take it upon itself to sit in judgment on the United States, it should be noted that it has to date demonstrated a strong reluctance to determine, in any formal sense, the existence of policies or practices that it considers *not* to be in compliance with the Covenant. For such an approach

²¹ UN Doc. E/C.12/1989/CRP.2/Add.1, General Comment No. 1, paras. 2-3.

²² RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §701 Reporters' Note 8 (1987).

would in many instances not be conducive to the development of the constructive dialogue sought by the Committee.

A final point to be made in this overview is that as of March 1, 1989, the Covenant had been ratified by 92 states, including the vast majority of Western states.²³ Indeed, of the 22 states other than the United States in the Western European and Others regional grouping,²⁴ only 3 have not ratified the Covenant: Ireland, Malta and Turkey. Of those, Ireland has recently indicated its intention to do so.²⁵ The United States is thus soon to be left with Malta and Turkey as the only Western group states that are not parties to the Covenant. Insofar as resource constraints are relevant to a decision to ratify, it is appropriate to note that the per capita gross national product of the United States is 5 times that of Malta and 16 times that of Turkey.²⁶

II. THE FOREIGN POLICY OBSTACLE: U.S. REJECTION OF ECONOMIC, SOCIAL AND CULTURAL "RIGHTS" AS RIGHTS

In the early days of the Reagan administration, an internal memorandum of the Department of State on human rights policy was leaked to the press and reprinted in full in the *New York Times*.²⁷ The memorandum, which was apparently approved by then Secretary of State Alexander Haig, has subsequently been shown to have had a major impact on U.S. policy.²⁸ It dealt with a variety of issues and, although it exhibited a degree of subtlety and caution on most of them, it nevertheless endorsed the unqualified rejection of economic, social and cultural "rights" as rights. Human rights were to be explicitly defined for the purposes of future U.S. policy as "meaning political rights and civil liberties." To entrench this highly restrictive definition, the memorandum urged that the administration "move away from 'human rights' as a term, and begin to speak of 'individual rights,' 'political rights' and 'civil liberties.'"²⁹

This strategy of simply defining economic rights out of existence was rapidly put into place by deleting the sections dealing with "economic and social rights" from the first of the State Department's annual *Country Reports on Human Rights Practices* submitted to Congress by the Reagan administration in February 1982.³⁰ This deletion was strongly defended by Assistant

²³ See HUMAN RIGHTS: STATUS OF INTERNATIONAL INSTRUMENTS AS AT 1 MARCH 1989, UN Doc. ST/HR/5 (1989).

²⁴ The members of the group are Australia, Austria, Belgium, Canada, Denmark, Finland, France, the Federal Republic of Germany, Greece, Ireland, Italy, Luxembourg, Malta, the Netherlands, New Zealand, Norway, Portugal, Spain, Sweden, Turkey, the United Kingdom and the United States. This listing, which is based on UN practice, is taken from NEW ZEALAND MINISTRY OF FOREIGN AFFAIRS, UNITED NATIONS HANDBOOK 1988, at 7-8 (1988).

²⁵ See Power & Quinn, *Ireland's Accession to the United Nations' Human Rights Covenants*, IRISH L. TIMES, February 1989, at 36.

²⁶ WORLD BANK, WORLD DEVELOPMENT REPORT 1988, at 222 (Turkey), 223 (the United States), and 289 (Malta) (1988).

²⁷ N.Y. Times, Nov. 5, 1981, at 1 and 29.

²⁸ Jacoby, *The Reagan Turnaround on Human Rights*, 64 FOREIGN AFF. 1066 (1986).

²⁹ N.Y. Times, note 27 *supra*.

³⁰ DEPARTMENT OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1981, 97th Cong., 2d Sess. 2 (1982).

Secretary of State Elliott Abrams in a congressional hearing to review the report.³¹ His arguments were buttressed by both pragmatic and philosophical considerations. The former, which have been repeated in every subsequent issue of the *Country Reports*,³² consisted of two strands: The first was that recognition of economic and social rights "tends to create a growing confusion about priorities in the human rights area and a growing dispersion of energy in ending human rights violations."³³ The second was that the rights in question are "easily exploited to excuse violations of civil and political rights."³⁴ Leaving aside the validity of these arguments, it could be contended that they need not *per se* preclude ratification of the Covenant by the United States since they appear to be directed primarily at foreign, rather than domestic, policy considerations.

Abrams's historical and political arguments, however, constitute the most significant obstacle to acceptance of the very concept of economic and social rights and hence to ratification of the Covenant. In brief, Abrams invoked the public/private distinction: "The great men who founded the modern concern for human rights . . . established separate spheres of public and private life . . . Social, economic and cultural life was left in the private sphere . . ."³⁵ Without so labeling them, Abrams used the distinction between positive and negative categories of rights and concluded that "the rights that no government *can violate* [i.e., civil and political rights] should not be watered down to the status of rights that governments should *do their best* to secure [i.e., economic, social and cultural rights]."³⁶ This interpretation of the philosophical underpinnings of human rights owes much to the Founding Fathers of the United States and nothing at all to the drafters of the Universal Declaration of Human Rights or the International Covenants. But even though Abrams's assessment of the unacceptability of economic, social and cultural rights was unqualified, as well as clearly reflected in U.S. policy, the administration tended initially to avoid unnecessarily confrontational tactics on the issue. The result was that few, if any, U.S. human rights groups treated the issue with any degree of priority or urgency, and scholars could write, as late as 1986, that the Reagan administration "has not actually repudiated [the Covenants] in public (unless one so construes the 'rumblings of discontent' expressed by . . . Abrams at various times about the Economic and Social Covenant)."³⁷ In fact, however, the signals had been sufficiently clear and consistent to indicate that the problem was more a reflection of the reluctance of nongovernmental organizations (NGOs) and the

³¹ *Review of State Department Country Reports on Human Rights Practices for 1981: Hearing Before the Subcomm. on Human Rights and International Organizations of the House Comm. on Foreign Affairs*, 97th Cong., 2d Sess. 7 (1982) (statement of Elliott Abrams, Assistant Secretary of State, Bureau of Human Rights and Humanitarian Affairs) [hereinafter Abrams].

³² E.g., DEPARTMENT OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1988, 101st Cong., 1st Sess. 4 (1989) ("We have found that the concept of economic, social, and cultural rights is often confused, sometimes willfully by repressive governments . . .").

³³ Abrams, note 31 *supra*, at 13.

³⁵ *Id.* at 15.

³⁴ *Id.* at 14.

³⁶ *Id.* at 16 (emphasis in original).

³⁷ Lillich, *U.S. Ratification of the Human Rights Covenants: Now or Ever?*, 80 ASIL PROC. 419, 420 (1986).

academic community to confront the situation than of any uncertainty or wavering by the administration.

After 1986, the language of rejection became even more straightforward, and unquestionably consistent. Thus, to take but one example, the U.S. representative told the Third Committee of the UN General Assembly in November 1988 that

responsible adults select their own careers, obtain their own housing, and arrange for their own medical care. It is true that the state must establish a legal framework which encourages fairness and prohibits fraud; but, having done so, the state must then get out of the way and permit individuals to live their own lives as they see fit.³⁸

She went on to criticize UN bodies for departing from the "traditional concern for civil and political rights" and having "from time to time . . . decreed the existence of so-called social and economic rights."³⁹ A similar suggestion, to the effect that United Nations human rights organs have exceeded their mandates by discussing economic, social and cultural rights, was made recently by Assistant Secretary of State Richard Schifter. In his view, the Reagan "Administration opposed dilution of the Commission's activities regarding civil and political rights by introduction of such matters as a 'right to development' or 'a right to housing' " because it "believed that development, housing and similar topics could be discussed in other, more appropriate, international fora by qualified experts."⁴⁰ But such suggestions run counter to the clearly defined and frequently endorsed mandate of the Commission on Human Rights,⁴¹ which unquestionably includes economic, social and cultural rights and has never formally been challenged by any government.

This process of reinventing the concept of human rights to make it resemble more closely the ideological predilections of the U.S. Government reached a high point in a June 1988 statement by the Deputy Assistant Secretary of State for Human Rights and Humanitarian Affairs, in which she sought to dispel a number of "myths" about human rights, the first of which was that " 'economic and social rights' constitute human rights."⁴²

³⁸ Statement by Ambassador Patricia M. Byrne to the Third Committee of the UN General Assembly, Nov. 9, 1988, Dep't of State Press Release USUN 129-(88), at 1. For a comparable rejection of the concept of economic, social and cultural rights in a speech to the UN Commission on Human Rights, see UN Doc. E/CN.4/1986/SR.29, paras. 13-18 (Ms. Byrne, United States).

³⁹ Statement by Ambassador Patricia M. Byrne, *supra* note 38, at 1.

⁴⁰ Schifter, *Building Firm Foundations: The Institutionalization of United States Human Rights Policy in the Reagan Years*, 2 HARV. HUM. RTS. Y.B. 3, 16 (1989).

⁴¹ ESC Res. 5 (I), 1 UN ESCOR Ann. (No. 8) at 163 (1946); ESC Res. 9 (II), 2 UN ESCOR Ann. (No. 14) at 400 (1946), para. 4, as amended by the Council; and ESC Res. 1979/36, 1979 UN ESCOR Supp. (No. 1) at 26, UN Doc. E/1979/79.

⁴² Address by Paula Dobriansky, Deputy Assistant Secretary for Human Rights and Humanitarian Affairs, before the American Council of Young Political Leaders, Washington, D.C. (June 3, 1988), reprinted in DEP'T OF STATE, BUREAU OF PUBLIC AFFAIRS, CURRENT POL'Y, No. 1091, 1988, at 2.

Even some of the seemingly more conciliatory statements by administration representatives invariably ended up taking the same line. For example, Assistant Secretary Schifter spoke to a conference in Venice in February 1988 about the two sets of rights and pointed out, correctly in my view, that economic and social rights fit more readily into the program of Franklin D. Roosevelt than into that of Marx or Lenin. He also urged that issues of substance be tackled, rather than debating "*ad nauseam* the question of what does or does not constitute a human right," a debate which in his view "has become extraordinarily sterile."⁴³ The remainder of his speech, however, was devoted to drawing a fundamental distinction between the two sets of rights. He concluded that economic, social and cultural rights should be dealt with "by qualified experts in the fields in question" such as economists, housing experts and health care providers "and should not be injected into discussions on the limits of government, which deal with issues . . . in a wholly different area of expertise."⁴⁴ This argument is disingenuous because it disregards the established fact that international human rights law is a subfield of expertise in itself and that its application requires a detailed knowledge of international standards and procedures that have been painstakingly designed to promote the core element of international accountability. To suggest that economic rights issues should be dealt with exclusively by economists and others is tantamount to suggesting that civil and political rights issues should be seen as the exclusive domain of criminologists, trade unionists, psychologists, physicians, pediatricians, the clergy, communications experts and others. Such a proposition would clearly contradict accepted policy and practice.

Another strand in the arguments used against economic and social rights in recent years by U.S. officials has been to portray the issue as one of East versus West. This argument has been expressed by Assistant Secretary Schifter in the following terms:

Critics of the Western democracies used to contend that, while emphasizing free speech and a free press, the democracies ignored such basic needs as food, jobs, housing and medical care. These critics, particularly those affiliated with the Soviet bloc, stressed that their governments guaranteed citizens the right to obtain these basic needs. Supporters in democracies responded that, people needed, not *guarantees* of food, jobs, housing and medical care, but *delivery* of these benefits.⁴⁵

But the "critics" of whom he speaks have not assailed "the Western democracies" in general, since, with the sole exception of the United States, all the Western democracies have accepted the validity and equal importance of economic, social and cultural human rights, at least in principle. For example: the Australians had championed those rights even before the UN

⁴³ Schifter, *The Semantics of Human Rights*, DEP'T OF STATE, BUREAU OF PUBLIC AFFAIRS, CURRENT POL'Y, No. 1041, 1988, at 1.

⁴⁴ *Id.* at 2.

⁴⁵ Schifter, note 40 *supra*, at 16 n.64 (emphasis in original).

Charter was adopted in 1945;⁴⁶ Dutch courts have applied the provisions of the Covenants in domestic cases;⁴⁷ the Dutch, Greek, Portuguese, Spanish, Swedish and Swiss Constitutions all explicitly recognize at least some economic and social rights;⁴⁸ and the Scandinavians have consistently accorded prominence to those rights in the context of their domestic political agendas.⁴⁹ Moreover, this approach is by no means limited to Western Europe, as is most pertinently demonstrated by the adoption, in November 1988, of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, which was already signed by 13 Latin American states by December 31, 1988.⁵⁰

Many other examples could also be cited. If, for reasons that are unclear, the debate needs to be pursued in geopolitical terms, it is between the United States on the one hand, and most of the rest of the world on the other. It is not principally between East and West.

A final element that is open to challenge in Schifter's argument is the suggestion that a choice must be made between formal guarantees and the actual delivery of things such as medical care and housing. It might be assumed that his argument was inspired by the approach of the Soviet Union, at least in the days before *perestroika*, but he makes it clear that it is of much wider application: "I once asked a representative of Zambia: 'If children in your country are starving would they want a United Nations declaration on the right to food or would they want something to eat?' What the world needs regarding economic and social development is action-oriented programs, not declarations."⁵¹

No specific analysis is offered to support the assumption that formal guarantees will inevitably be hollow and meaningless and that a society which makes such undertakings will therefore fail to honor them. The argument bears disturbing similarities to those made by the Government of the Shah of Iran, that its citizens "might indeed be much happier if they could put more into their mouths than empty words; if they could have a health care center instead of Hyde Park Corner; if they were assured gainful employment in-

⁴⁶ See COMMONWEALTH OF AUSTRALIA, UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATION, SAN FRANCISCO, U.S.A., FROM 25TH APRIL TO 26TH JUNE, 1945: REPORT BY THE AUSTRALIAN DELEGATES, CMD. 24 (Group E), No. F.4311, at 21-22 (1945), for a statement of Australian policy on this issue.

⁴⁷ See *X v. Major and Aldermen of Haarlem*, 10 NETH. Y.B. INT'L L. 494 (1979); and *Non-Discrimination in Dutch Social Security Law*, INTERRIGHTS BULL., No. 3, 1988, at 38-39.

⁴⁸ Starck, *Europe's Fundamental Rights in Their Newest Garb*, 3 HUM. RTS. L.J. 103, 114-15 (1982).

⁴⁹ See, e.g., Erikson & Fritzell, *The Effects of the Social Welfare System in Sweden on the Well-Being of Children and the Elderly*, in THE VULNERABLE 309 (Palmer, Smeeding & Torrey eds. 1988).

⁵⁰ For the Protocol, adopted on Nov. 14, 1988, see 28 ILM 161 (1989). The signatory states, as of Dec. 31, 1988, were Argentina, Bolivia, Costa Rica, the Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Mexico, Nicaragua, Panama, Peru and Uruguay. See Acevedo, *Introductory Note*, *id.* at 156, 159 n.2. Under the terms of Article 21(3) of the Additional Protocol, it will enter into force when 11 states parties to the American Convention on Human Rights have ratified (or acceded to) it.

⁵¹ Schifter, note 40 *supra*, at 16 n.62.

stead of the right to march on the Capitol."⁵² But the dichotomy is a false one. There will always be governments that make empty promises and some will even clothe those promises in the garb of formal guarantees. But many other governments have given carefully worded guarantees and delivered as well. They include the United States with respect to a limited, but nonetheless important, range of social benefits.

This brief survey of official U.S. policy statements plainly demonstrates that ratification of the Covenant on Economic, Social and Cultural Rights could not even be contemplated without a major, and by now rather fundamental, shift in U.S. human rights foreign policy and ideology.

III. THE DOMESTIC POLICY OBSTACLE

The Nature of the Obligations Imposed by the Covenant

The effort by the Carter administration during 1978 and 1979 to promote ratification of the Covenant on Economic, Social and Cultural Rights⁵³ was predicated upon a highly contentious assumption. In the letter that accompanied the transmission of the Covenant to the Senate, the President, on the advice of the Departments of Justice and State, recommended the adoption of the following understanding: "The United States understands paragraph (1) of Article 2 as establishing that the provisions of Articles 2 through 15 of this Covenant describe goals to be achieved progressively rather than through immediate implementation."⁵⁴ In the subsequent hearings before the Senate Committee on Foreign Relations, in November 1979, representatives of the administration emphasized that the Covenant was only "a declaration of aims"⁵⁵ and that "no ratifying party thereby commits itself to present implementation of these rights."⁵⁶ The only obligation was said to be one "to work towards the eventual achievement of . . . minimum standards."⁵⁷ A former U.S. ambassador to the United Nations sought to reassure the Senate committee that the "Covenant is in fact merely . . . a 'statement of goals to be achieved progressively.'"⁵⁸

This view was reinforced by a good many of the other witnesses before the committee, who either omitted all mention of the Covenant on Economic, Social and Cultural Rights or relied upon the administration's proposed understanding to conclude that its ratification would have absolutely no consequences whatsoever for the United States. However, there were also several discordant voices at the hearings, who warned that the Covenant, if ratified, might actually require that something be done.

⁵² Amuzegar, *Rights and Wrongs*, N.Y. Times, Jan. 29, 1978, §E, at 17, col. 1. (At the time, Amuzegar was Iran's representative to the International Monetary Fund.)

⁵³ While the Carter administration did try to advance economic, social and cultural rights, it did so, in the words of its representative to the UN Commission on Human Rights in 1979 and 1980, "in a token, not well-thought-out manner." Shestack, *An Unsteady Focus: The Vulnerabilities of the Reagan Administration's Human Rights Policy*, 2 HARV. HUM. RTS. Y.B. 25, 40 (1989).

⁵⁴ Message of the President, note 7 *supra*, at viii.

⁵⁵ *Hearings*, note 10 *supra*, at 36 (J. Goldklang, Department of Justice).

⁵⁶ *Id.* at 28 (R. B. Owen, Legal Adviser, Department of State).

⁵⁷ *Id.*

⁵⁸ *Id.* at 5 (C. Yost).

Some of those voices were anxious to give meaning to the obligations clauses of the Covenant, primarily so as to strengthen the threat posed by their rather fanciful interpretation of the consequences of ratification. Thus, J. P. Anderegg (then an adjunct professor at Columbia Law School) warned that acceptance of the Covenant would bring with it "an enormous and incalculable commitment to an expanding, centralized welfare state with reduced liberties for the individual."⁵⁹ He expressed the view that the obligation contained in Article 2(1) of the Covenant would violate the U.S. Constitution:

I find totally inconsistent and incompatible with the Constitution a purported exercise of the treaty power which would henceforth and for a long time determine the level of subsistence (welfare payments?) and the quality of education (in reality, expenditure on schools) as being at the maximum of the nation's available resources, political forces being excluded from participation in that determination!⁶⁰

He also managed to discern in Article 7(c) of the Covenant, which deals with equal opportunity for promotion in employment, a "right to be free of nepotism," whose enforcement would necessitate "an exercise of governmental power which I believe is not possessed by the Federal Government."⁶¹ In a similar vein, the national Chairman of Stop ERA (a reference to the proposed Equal Rights Amendment), Phyllis Schlafly, concluded that ratification "could mean that the United States is making a legally binding commitment to legislate unlimited taxes on ourselves in order to support every other country in the world"⁶² and warned that the Covenant "would constitute a giant step toward a socialist state."⁶³ Another adjunct professor of law opined that it would not be surprising "if the language of Article 2(1) is read as imposing an obligation to provide foreign aid to developing countries or to implement the so-called New International Economic Order."⁶⁴ On the basis of any serious legal analysis of the provisions of the Covenant, it would be difficult, to put it mildly, to conclude that there is much, if any, substance to such interpretations.⁶⁵ Nevertheless, these were not the only comments to suggest that there was more to the obligations contained in the Covenant than the Carter administration was prepared to concede.

Thus, a critique submitted by the Lawyers Committee for International Human Rights noted that the language used in the administration's understanding regarding Article 2(1) "undercuts the basic character of the Covenant: it does not merely establish goals, it also creates obligations."⁶⁶ The point was made with greater precision by Professor Louis Sohn, who noted that "while it is sometimes said that the U.S. can easily ratify this Covenant as

⁵⁹ *Id.* at 169.

⁶⁰ *Id.* at 173.

⁶¹ *Id.*

⁶² *Id.* at 110.

⁶³ *Id.* at 111.

⁶⁴ *Id.* at 352 (O. Garibaldi).

⁶⁵ These and related claims were analyzed in some detail in Alston & Quinn, *The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights*, 9 HUM. RTS. Q. 156 (1987).

⁶⁶ *Hearings*, note 10 *supra*, at 54.

it does not oblige us really to do anything, this is not exactly true." In his view, the terminology used in Article 2(1)

is obligatory language; States are under a legal duty to take such steps, and this duty needs to be fulfilled in good faith. While the obligation is qualified by the words "to the maximum of its available resources" and "progressively," these words do not attenuate the obligation to the point of extinction.

Perhaps Bangladesh or Mali might plead that they do not have sufficient resources to take any meaningful steps toward the fulfillment of the goals of the Covenant; but the United States, one of the richest countries in the world, does not have that excuse. Similarly, though the word "progressively" makes it clear that this Covenant, unlike the one on civil and political rights, does not impose on a ratifying State the obligation to ensure an immediate implementation of the rights defined therein, it needs to be applied in the same spirit as the Supreme Court decision to desegregate "with all deliberate speed." One cannot procrastinate forever; and there is certainly a clear presumption that one has to go forward, not backward.⁶⁷

According to another witness, the proposed understanding amounted to a reservation, whose effect would be to submit "the principle of progressive implementation itself to progressive implementation."⁶⁸

In my view, these criticisms of the proposed understanding are clearly correct. A careful analysis of the Covenant reveals that the most general obligation of an immediate nature is, to use the wording of the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, "to begin immediately to take steps towards full realization of the rights contained in the Covenant."⁶⁹ This interpretation is also confirmed by the *travaux préparatoires*, in which it was said that "it would be deceiving the peoples of the world to let them think that a legal provision was all that was required."⁷⁰ But the proposed U.S. understanding would remove even the need for the adoption of formal legal provisions. Since a detailed review of the type of steps that might be taken "immediately" is well beyond the scope of the present analysis, one such example must suffice. The starting point for a program to implement economic and social rights is to ascertain, as precisely as possible, the nature of the existing situation with respect to each right, so as to identify more clearly the problems that need to be addressed and provide a basis for principled policy making. Thus, to take the case of the right to adequate food, an immediate and feasible step that the United States could take would be to adopt legislation requiring the various levels of government to collaborate periodically on a detailed survey of the nutritional status of the American people, with particular emphasis on the situation of the most vulnerable and disadvantaged groups and regions. Such a survey could then constitute the basis for

⁶⁷ *Id.* at 93.

⁶⁸ *Id.* at 306 (O. Garibaldi).

⁶⁹ Annex to UN Doc. E/CN.4/1987/17, reprinted in 9 HUM. RTS. Q. 122 (1987).

⁷⁰ UN Doc. E/CN.4/SR.232, at 11 (1951) (Mr. Cassin, France).

carefully targeted legislative, administrative and practical measures aimed at enhancing realization of the right.

Article 2(2) of the Covenant imposes another, even more explicitly immediate, obligation. It requires a state party to the Covenant "to guarantee that the rights enunciated . . . will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." Similarly, Article 3 requires states parties "to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant." The undertakings "to guarantee" and "to ensure" cannot reasonably be construed as mere declarations of goals to be achieved in the distant future. As the then dean of the New York University School of Law observed at the 1979 Senate hearings, the undertaking in Article 3 "probably goes beyond" the range of existing U.S. law,⁷¹ in which case the Covenant would require that appropriate legislative action be taken within a relatively short period after ratification. Finally, there are several obligations in part III of the Covenant that are formulated, not in terms of progressive implementation, but in terms specifically intended to underline their immediacy. They include the following:

- Article 8: "States Parties . . . undertake to ensure: (a) the right of everyone to form trade unions . . ."
- Article 13(3): "States Parties . . . undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities . . ."
- Article 14: Where free, compulsory primary education is not already available, each state party "undertakes, within two years, to work out and adopt a detailed plan of action."
- Article 15(3): "States Parties . . . undertake to respect the freedom indispensable for scientific research and creative activity."

In sum, the understanding proposed by the Carter administration to the effect that *all* of the substantive provisions of the Covenant "describe goals to be achieved progressively rather than through immediate implementation"⁷² is manifestly incorrect and would be incompatible with the basic object and purpose of the Covenant. Accordingly, it cannot serve as an appropriate basis for future public or congressional debate over ratification of the Covenant. Rather, the starting point for such a debate in the 1990s must be recognition of the fact that a significant range of obligations would flow from ratification.

⁷¹ *Hearings*, note 10 *supra*, at 254 (N. Redlich).

⁷² See text at note 54 *supra*.

Domestic Acceptability of an Economic, Social and Cultural Rights Ideology

Another issue that was treated in a rather cavalier fashion by most of the proponents of ratification during the 1979 Senate hearings is the extent to which acceptance of even a fairly low level of obligation with respect to economic, social and cultural rights is likely to be acceptable in domestic political terms in the United States. That issue, in turn, is linked to whether existing U.S. domestic policies can be said to reflect a commitment to securing, even on the basis of progressive realization, the enjoyment of a full range of economic, social and cultural rights for each and every American citizen. The issue is moot with respect to civil and political rights because it can be argued, and indeed is generally accepted, that the relevant international treaties are, for the most part, little more than a reformulation, for the purposes of international consumption, of basic U.S. constitutional principles. Moreover, the ideology of rights⁷³ has long been accepted in the United States as an appropriate, even an ideal, framework for dealing with the types of issues in the Covenant on Civil and Political Rights.

By contrast, the acceptability within the United States of a "rights psychology" in the economic and social domain is much less apparent. However, before moving to that issue, it is important to dispose of a separate, although related, issue that can sometimes mistakenly dominate discussions of this subject. At the opening session of the Senate committee hearings in 1979, Ambassador Yost claimed that the U.S. "record . . . on economic, social, and cultural rights, is as good as, or better than, [that] of almost any other nation."⁷⁴ Similarly, the State Department's Legal Adviser asserted that the "minimum standard of rights for the individual as set forth by the treaties [including the Covenant on Economic, Social and Cultural Rights] . . . is met by our domestic system in practice, although not always in precisely the same way that the treaties envision."⁷⁵ In fact, such claims stand in marked contrast to the findings of most serious studies of U.S. economic and social policy. To take but one example, a major recent comparative study of eight Western countries concluded that

the poverty of American children contrasts glaringly with the poverty of the young in every other country but Australia . . . The poverty rate for American children was 70 percent higher than the rate for children in Canada, our closest neighbor. In fact, American children . . . are at a disadvantage relative to their peers in all the other countries examined here, except Australia.⁷⁶

⁷³ See generally S. SCHEINGOLD, *THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY AND POLITICAL CHANGE* (1974).

⁷⁴ *Hearings*, note 10 *supra*, at 5.

⁷⁵ *Id.* (R. B. Owen).

⁷⁶ The study referred to is the "Luxembourg Income Study" and the eight countries analyzed were Australia, Canada, the Federal Republic of Germany, Norway, Sweden, Switzerland, the United Kingdom and the United States. See Smeeding, Palmer & Torrey, *Patterns of*

Nevertheless, the performance of the United States compared to that of other Western industrialized states or to that of the Eastern European socialist economies is not, and should not be permitted to become, the principal issue in the present context. If universally applicable minimum standards were required to be met before a state could qualify to ratify the Covenant, those standards either would preclude ratification by the great majority of states or would be ludicrously low (because they would reflect a futile and self-defeating attempt to set the lowest common denominator). But, for the most part, there are no such universal benchmarks, and each state is required, in effect, to do its utmost in light of its own situation at the time of ratification.

The issue at hand, therefore, concerns not the actual extent to which economic, social and cultural rights are currently being enjoyed in the United States but, rather, the acceptability of using the notion of human rights (with whatever implications that may have) as one of the principal underpinnings of future American policy endeavors in this domain. In that regard, this is not the place to undertake a detailed analytical breakdown of the component parts of the Covenant so as to identify those rights which have more or less been implemented in U.S. domestic law and policy and those which have not. It is sufficient to note that considerable evidence points to a deep-seated reluctance on the part of the U.S. Government to embrace the concept of economic, social and cultural rights, let alone to do so within the framework of an international treaty that imposes a degree of accountability in that regard. The status of those rights in U.S. domestic law, both federal and state, is far too complex an issue to be dealt with adequately here. Moreover, any such analysis would have to be prefaced by a discussion of the difference between the constitutional or formal legislative recognition of rights for all, on the one hand, and the according of welfare benefits to all, or some, of those in desperate need, on the other.⁷⁷ It would also have to take account of the argument that even if the benefits in question have not formally been accorded "as of right," they have become so well entrenched by

Income and Poverty: The Economic Status of Children and the Elderly in Eight Countries, in THE VULNERABLE, note 49 *supra*, at 89, 115-16. The Australian Human Rights and Equal Opportunity Commission recently undertook a "National Inquiry into Homeless Children"; its report states that "it was clear to the Commission that a large number of Australian children were being denied these fundamental rights [to enjoy special protection, to receive adequate housing, and to be protected against all forms of neglect, cruelty and exploitation]." OUR HOMELESS CHILDREN: REPORT OF THE NATIONAL INQUIRY INTO HOMELESS CHILDREN 3, para. 1.3 (1989).

⁷⁷ In a comparative analysis of approaches to rights in the United States and France, Louis Henkin has observed that "[b]oth countries now recognize and realize welfare rights: in France such rights are constitutional, while in the United States they are *only* legislative entitlements" (emphasis added). Henkin, *Revolutions and Constitutions*, 49 LA. L. REV. 1023, 1049 (1989). He has also suggested that "[i]f France can constitutionalize economic-social rights, the United States can consider entrenching such rights, if only in state constitutions or by adhering to international agreements." *Id.* at 1055. See also Henkin, *Economic-Social Rights as "Rights": A United States Perspective*, 2 HUM. RTS. L.J. 223 (1981).

political standards as to be effectively untouchable.⁷⁸ Nevertheless, it is relevant to note that a 1984 survey concluded that "American courts have never recognized any governmental duty to provide welfare or subsistence benefits to citizens. Even when welfare benefits are provided, there are few constraints on a legislature's discretion in determining who will receive the benefits."⁷⁹ A more recent, and perhaps more nuanced, survey of constitutional developments over the past two decades determined that they have been characterized by "a possible, but not openly professed or entirely consistent, belief in protection for the poor against the most severe forms of deprivation with respect to education, nutrition and welfare."⁸⁰

In 1986 a major review of domestic policy by the Catholic Church in the United States called for "the development of a new cultural consensus that the basic economic conditions of human welfare are essential to human dignity and are due persons by right." It conceded, however, that "securing economic rights for all will be an arduous task,"⁸¹ and in effect acknowledged that there is to date no agreement in principle that American society should accept the concept of economic rights. That view appears to be widely supported.⁸² Thus, for example, writing in 1988, one observer concluded that "[i]n the current United States political environment, . . . the chances of mobilizing adequate public support for the establishment of comprehensive social welfare programs are almost nil."⁸³ This assessment is reinforced by many of the arguments invoked by the ideological opponents of the Covenant, who sometimes seem to portray it as an intrinsically un-American enterprise. Thus, during the 1979 Senate hearings, it was argued by one witness that the Covenant "is largely a document of collectivist inspi-

⁷⁸ See, e.g., Klein & O'Higgins, *Defusing the Crisis of the Welfare State: A New Interpretation*, in *SOCIAL SECURITY: BEYOND THE RHETORIC OF CRISIS* 203 (T. Marmor & J. Mashaw eds. 1988), who write:

Initial assaults appear to have been repelled, reflecting a fact ignored in the rhetoric comparing current events to the 1930s or even the 1830s. . . . In other words, a wide range of programs now exists, has existed for several decades, and is a part of the day-to-day reality and expectation of the population.

Id. at 204.

⁷⁹ Good, *Freedom from Want: The Failure of United States Courts to Protect Subsistence Rights*, 6 HUM. RTS. Q. 335 (1984); see also Woodward, *Affirmative Constitutional Overtones: Do Any Still Sound for the Poor?*, 7 HUM. RTS. Q. 268 (1985); and Bork, *The Impossibility of Finding Welfare Rights in the Constitution*, 1979 WASH. U.L.Q. 695.

⁸⁰ L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1671 (2d ed. 1988).

⁸¹ NATIONAL CONFERENCE OF CATHOLIC BISHOPS, *ECONOMIC JUSTICE FOR ALL: PASTORAL LETTER ON CATHOLIC SOCIAL TEACHING AND THE U.S. ECONOMY* 43 (1986).

⁸² Even many of those who advocate more active and sustained governmental intervention in favor of the poor and disadvantaged are not necessarily favorably disposed to an economic rights approach in the United States. See *FIGHTING POVERTY: WHAT WORKS AND WHAT DOESN'T*, esp. chs. 11 and 12 (S. Danziger & D. Weinberg eds. 1986); and Simon, *Rights and Redistribution in the Welfare System*, 38 STAN. L. REV. 1431 (1986). For a contrary view, see S. BOWLES & H. GINTIS, *DEMOCRACY AND CAPITALISM: PROPERTY, COMMUNITY AND THE CONTRADICTIONS OF MODERN SOCIAL THOUGHT* (1986).

⁸³ *Da's*, *Affirmative action*, in *CIVIL LIBERTIES IN CONFLICT* 85, 99 (L. Gostin ed. 1988).

ration, alien in spirit and philosophy to the principles of a free economy."⁸⁴ An even more extreme assessment is that the "Covenant is a socialist blueprint that encourages open-ended unlimited government meddling of the sort on which dictatorships thrive."⁸⁵

The principal problem that will confront advocates of ratification does not consist of such extreme or hard-line laissez-faire opposition to government involvement in social policy. Rather, it lies in that part of the U.S. psyche which has been best expressed in the following assessment:

American society has found symbols and values different from social solidarity and family policy around which to construct its unity. As others have noted, this country has chosen individualism as a central value. It has sustained its complex multicultural and multireligious diversity, and avoided value confrontations by separating church from state and keeping national government out of the family, unless it can define a particular family as dangerous or endangered. This is the land of incrementalism; we enact programs and policies without voting on or explicating values, and we try to avoid actions that create major value confrontations.⁸⁶

The conclusion to be drawn from this sketchy, and inevitably highly selective, collection of evidentiary snapshots is not necessarily that the concept of economic, social and cultural rights is, by definition, incompatible with the philosophy of the American people or even of recent U.S. administrations. Rather, it is that the acceptability to the American people and their political representatives in the U.S. Senate of the assumptions implicit, and the obligations explicit, in the Covenant cannot readily be assumed. There is, in fact, ample evidence to support the argument that the rejection of economic, social and cultural rights in the context of U.S. foreign policy was largely motivated by the desire to ensure consistency with a comparable domestic policy agenda that has been pursued with vigor and considerable success throughout the 1980s.

IV. SOME CONSEQUENCES OF NONRATIFICATION OF THE COVENANT

For the past decade, the debate has been largely instrumentalist in character, in the sense that the proponents of ratification have promoted the Covenant less on the basis of its intrinsic merits than on that of other goals its ratification could serve indirectly. The most important such goal has been to ensure that the United States retains its credibility as a proponent of international concern for human rights, a status that is widely assumed to require U.S. ratification of each of the basic standards in the field. While some of the merits and demerits of ratifying the Covenants have been dealt with elsewhere, it is appropriate to consider here the consequences of *nonratification* of the Covenant on Economic, Social and Cultural Rights combined with

⁸⁴ *Hearings*, note 10 *supra*, at 325 (O. Garibaldi).

⁸⁵ R. LEE, *THE UNITED NATIONS CONSPIRACY* 108 (1981).

⁸⁶ Kamerman & Kahn, *Social Policy and Children in the United States and Europe*, in *THE VULNERABLE*, note 49 *supra*, at 351, 375.

ratification of the Covenant on Civil and Political Rights. Such a course of action, which has recently been advocated,⁸⁷ seems to have much to recommend it from a tactical viewpoint. In particular, it would reduce the possibility that the former Covenant would act as a lightning rod for criticism from conservative groups, which would threaten the prospects for both Covenants, and it would greatly simplify the range of issues that would need to be addressed by the U.S. Senate. However, it also has some drawbacks, particularly if coupled with the continuing rejection in principle of economic, social and cultural rights. The major problem is that any reference to "internationally recognized human rights" (a phrase commonly used in U.S. legislation dating from the 1970s, most of which is still in force⁸⁸) cannot legitimately be interpreted as referring only to half of the single, "indivisible and interdependent" package of human rights (consisting of economic, social and cultural as well as civil and political rights) that has consistently, and without exception, been endorsed by the international community.⁸⁹ As long as the United States continues to ratify neither of the Covenants, its rejection of the contents of one of them can be played down and its significance interpreted away, if necessary, by deft manipulation of words and concepts.⁹⁰ This balancing act would be much harder to sustain if one of the Covenants were ratified and the other definitively rejected.

The inconsistency of purporting to base U.S. policy on internationally agreed human rights norms, on the one hand, and dismissing the relevance and even the legitimacy of half of those very norms, on the other hand, leads inevitably to a convoluted and ultimately indefensible position. This is perhaps best illustrated in the context of the Helsinki Accords⁹¹ between East and West, which have enjoyed steadily increasing prominence in the United States as the winds of change blow ever more determinedly through Eastern Europe. In the 1975 Final Act, which the United States accepted, it is stated that the participating states "will promote and encourage the effective exercise of civil, political, economic, social, cultural and other rights and free-

⁸⁷ Martin, *A Human Rights Agenda: The Routine and the Special*, 28 VA. J. INT'L L. 885, 887 (1987-88) ("Pick out one or two of the currently pending treaties to push and leave the others aside for now. The International Covenant on Civil and Political Rights holds the greatest promise").

⁸⁸ See Foreign Assistance Act of 1961, as amended, §116(d)(1) (22 U.S.C. §2151n (1982)), and §502B (22 U.S.C. §2304) (1982).

⁸⁹ The indivisibility of the two sets of rights has been recognized ever since the adoption of the Universal Declaration of Human Rights, GA Res. 217A (III), UN Doc. A/810, at 71 (1948). The Assembly was even more explicit on that point in 1950, when it observed that "the enjoyment of civic and political freedoms and of economic, social and cultural rights are interconnected and interdependent." GA Res. 421E (V), 3d preambular para., 5 UN GAOR Supp. (No. 20) at 43, UN Doc. A/1775 (1950). For a more recent statement, see GA Res. 32/130, para. 1(a), 32 UN GAOR Supp. (No. 45) at 150, UN Doc. A/32/45 (1977) ("All human rights and fundamental freedoms are indivisible and interdependent; equal attention and urgent consideration should be given to the implementation, promotion and protection of both civil and political, and economic, social and cultural rights").

⁹⁰ See, e.g., Schifter, note 43 *supra*.

⁹¹ Conference on Security and Co-operation in Europe: Final Act, Aug. 1, 1975, 73 DEP'T ST. BULL. 323 (1975), reprinted in 14 ILM 1292 (1975).

doms all of which derive from the inherent dignity of the human person and are essential for his free and full development."⁹²

Lest it be assumed that this provision is simply a relic from a bygone era, it may be recalled that in January 1989, the United States signed the Concluding Document of the Vienna Meeting of the Conference on Security and Co-operation in Europe (CSCE), as the Helsinki process is formally titled. In this document the United States again agreed to a commitment by the participating states, inter alia, to "develop their laws, regulations and policies in the field of civil, political, economic, social, cultural and other human rights and fundamental freedoms and put them into practice in order to guarantee the effective exercise of these rights and freedoms."⁹³

Nevertheless, while the United States has used the Helsinki Accords, quite correctly, as grounds for calling the Soviet Union and other Eastern European countries to account for their human rights violations, it has done so on the basis of a highly selective, legally insupportable and ethically dubious denial of the legitimacy of the economic, social and cultural rights it formally endorsed in signing the Accords. Thus, Max Kampelman, previously the head of the U.S. delegation to the CSCE, wrote in 1987 that "the Soviet effort to list desirable social or economic goals as 'rights' is nothing but an effort to obfuscate the absence of the fundamental 'rights of man' in their society."⁹⁴ His analysis is contained in the preface to a 1988 book entitled *Social and Economic Rights in the Soviet Bloc*, which is based on materials prepared by the U.S.-funded and -directed Radio Free Europe/Radio Liberty.⁹⁵ In his introduction to the same book, the editor specifically rejects the formulation quoted above from the Helsinki Final Act:

The inclusion in this stipulation of "economic, social, cultural and other rights," along with those traditionally associated with the Rights of Man . . . is misleading and mischievous, for what it says in plain language is that the satisfaction of "social and economic rights" is somehow on a par with, or perhaps even superior to the satisfaction of the freedoms of thought, conscience, religion, assembly and public articulation [*sic*]. This is patently not so.⁹⁶

The irony, of course, is that the book in question seeks to hold the Soviets accountable for their relatively poor performance with respect to economic and social rights, despite the fact that the authors (and their governmental sponsors) completely reject the concept.

Perhaps most troubling of all about this approach is the set of political and historical misrepresentations on which it is based. Take the following assertion:

⁹² 73 DEP'T ST. BULL. at 325.

⁹³ Concluding Document of the Vienna Meeting, note 1 *supra*, at 533, para. 13(a).

⁹⁴ Kampelman, *Preface to SOCIAL AND ECONOMIC RIGHTS IN THE SOVIET BLOC: A DOCUMENTARY REVIEW SEVENTY YEARS AFTER THE BOLSHEVIK REVOLUTION*, at xi (G. Urban ed. 1988).

⁹⁵ *Id.* at viii.

⁹⁶ Urban, *Introduction to SOCIAL AND ECONOMIC RIGHTS IN THE SOVIET BLOC*, *supra* note 94, at 3-4.

Much of the confusion in Western thinking about what is and is not a human right stems from the gradual abolition, under Jimmy Carter's Administration, of the demarcation line between the Anglo-American concept of the Rights of Man (political and civil liberties) and the Soviet-Third World concept of "social and economic rights."⁹⁷

This analysis is wrong on every count. The confusion in question is not in "Western" thinking but in American policy since 1981, a policy that has not been supported by even a single other Western government. On the contrary, as noted earlier, nearly all Western governments have even gone so far as to ratify the Covenant on Economic, Social and Cultural Rights.⁹⁸ Similarly, it was not Jimmy Carter who abolished the distinction between the two concepts but Franklin Delano Roosevelt, who actively advocated the recognition of economic and social rights,⁹⁹ and Harry Truman, whose administration voted to adopt the Universal Declaration of Human Rights (in 1948), which accepted the equality of the two sets of rights. References to "the Anglo-American concept of the Rights of Man" not only ignore that part of U.S. history, but also overlook the enthusiastic support by British governments of various political persuasions for economic and social rights (embodied in the concept of the welfare state), as well as the nature of the French, German, Mexican and other contributions to the original concept. Finally, the suggestion that the concept of economic and social rights is a "Soviet-

⁹⁷ *Id.* at 4.

⁹⁸ See notes 23-25 *supra*.

⁹⁹ In his 1944 State of the Union Message, President Roosevelt used the following words to advocate the adoption by the United States of an "economic Bill of Rights":

We have come to a clear realization of the fact that true individual freedom cannot exist without economic security and independence. "Necessitous men are not freemen." People who are hungry and out of a job are the stuff of which dictatorships are made.

In our day these economic truths have become accepted as self-evident. We have accepted, so to speak, a second Bill of Rights under which a new basis of security and prosperity can be established for all—regardless of station, race, or creed.

Among these are:

The right to a useful and remunerative job in the industries, or shops or farms or mines of the Nation;

The right to earn enough to provide adequate food and clothing and recreation;

The right of every farmer to raise and sell his products at a return which will give him and his family a decent living;

The right to adequate medical care and the opportunity to achieve and enjoy good health;

The right to adequate protection from the economic fears of old age, sickness, accident, and unemployment;

The right to a good education.

All of these rights spell security. And after this war is won, we must be prepared to move forward, in the implementation of these rights, to new goals of human happiness and well-being.

America's own rightful place in the world depends in large part upon how fully these and similar rights have been carried into practice for our citizens. For unless there is security here at home there cannot be lasting peace in the world.

90 CONG. REC. 55, 57 (1944).

Third World" creation does a gross injustice to the Catholic and many other churches (at least since the late 19th century) and those many Western European states, not to mention Australia and New Zealand, which have consistently championed economic and social rights, at least since the creation of the United Nations in 1945 and, in most cases, since the establishment of the International Labour Organisation in 1919.

The principal purpose of the present analysis, however, is not to criticize the distortions in the rationale offered in support of the U.S. position. Rather, it is to emphasize the long-term lack of viability of seeking to rely on international human rights standards in the context of both East-West and North-South relations and at the same time misrepresenting and undermining those standards. While ratification of the Covenant is not indispensable to remedying that situation, its continuing rejection and active disparagement will compound an already unacceptable position.

V. THE U.S. HUMAN RIGHTS COMMUNITY AND RATIFICATION OF THE COVENANT

It is generally assumed that the "natural" constituency for the ratification of all human rights treaties by the United States is "the human rights community," which, in essence, means those scholars and nonprofit groups that are actively involved in international human rights issues. Not surprisingly, at the hearings of the Senate Foreign Relations Committee in 1979,¹⁰⁰ the great majority of those who testified in favor of ratification of the Covenant were members of that "internationalist" community. Nevertheless, there are compelling grounds for arguing that this group is not at all well qualified to lead the campaign when it comes to economic, social and cultural rights. This assessment is based primarily on the record of most of the leading NGOs and on the neglect of those rights that has tended to characterize the work of most scholars of international human rights.

To take the latter point first, the literature on economic, social and cultural rights in U.S. publications is meager at best. Neither of the two voluminous human rights casebooks currently available for teaching purposes contains as much as a small section on the topic.¹⁰¹ Otherwise, the little that has been written has been done by a handful of scholars¹⁰² and some of it has adopted a very negative tone.¹⁰³ Moreover, most of the work is in the nature

¹⁰⁰ See *supra* note 10.

¹⁰¹ L. SOHN & T. BUERGENTHAL, *INTERNATIONAL PROTECTION OF HUMAN RIGHTS* (1973); and R. LILLICH & F. NEWMAN, *INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW AND POLICY* (1979).

¹⁰² The only book on the subject in English is A. G. MOWER, JR., *INTERNATIONAL COOPERATION FOR SOCIAL JUSTICE: GLOBAL AND REGIONAL PROTECTION OF ECONOMIC/SOCIAL RIGHTS* (1985). For a review of some of its shortcomings, see Forsythe, Book Review, 8 HUM. RTS. Q. 540 (1986). For an important contribution to the U.S. literature, see Trubek, *Economic, Social and Cultural Rights in the Third World: Human Rights Law and Human Needs Programs*, in 1 HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL AND POLICY ISSUES 205 (T. Meron ed. 1984) [hereinafter Meron].

¹⁰³ See, e.g., Johnson, *Human Rights in Divergent Conceptual Settings: How Do Ideas Influence Policy Choices?*, in HUMAN RIGHTS: THEORY AND MEASUREMENT 41 (D. Cingranelli ed. 1988) ("Eco-

of a general survey rather than a detailed analysis of specific rights or their applicability in the U.S. context. The only major exception in this regard is a large-scale survey currently being undertaken under the direction of Professor Sohn for the American Society of International Law. A recent illustration of the fact that economic, social and cultural rights are, at best, peripheral to academic human rights work in the United States is a symposium of 12 leading American scholars, who were asked to suggest a human rights agenda for the post-Reagan era.¹⁰⁴ While the majority of them called for ratification of the Covenants, only one, Father Robert Drinan,¹⁰⁵ actually said anything of substance about economic, social and cultural rights. It may be argued that this silence derived from the recognition that no new administration would be prepared to embrace economic rights and that suggestions to the contrary would be an exercise in futility. But such a tactic, which, in any event, was not explicitly acknowledged by any of the contributors, would amount to tacit acceptance of the rejection of the rights in question and is thus unacceptable from the perspective of the relevant international standards.

Nongovernmental organizations, on the other hand, do not have a significantly better record in this field. For example, a wide-ranging recent analysis of the activities of the principal U.S.-based NGOs noted that there is a very significant difference "between the rights affirmed in principle and the rights actually promoted" in practice. The author's conclusion is worth quoting at some length:

[W]ith the exception of the National Association of Evangelicals, all the organizations in this study affirm the major United Nations documents as a valid statement of what human rights are, and most have worked for ratification by the United States of both of the International Human Rights Covenants. Yet none of the organizations specifically advocates all of the rights the Covenants contain. This may be a practical necessity, given the multitude of rights, but it does not appear that the organizations in this study would wish to argue for all the rights in the Covenants.

This fact is most striking in relation to economic, social and cultural rights. We have already noted that virtually no policy advocacy is undertaken in the name of economic rights, and although some of the organizations' literature has occasional references to the right to food or

conomic and social well-being may or may not be desirable governmental policy but it certainly is not 'a right' in any sense in which Americans have understood that term," *id.* at 48; "emphasis on economic and social rights and duties . . . [is] antithetical to fundamental postulates of the American conception of human rights," *id.* at 54); and McNitt, *Some Thoughts on the Systematic Measurement of the Abuse of Human Rights*, in *id.* at 89 ("There is a tendency for those on the left," this writer says, "to include economic rights, income, health and physical conditions in their definition of human rights. We in the West [*sic*] live in a conservative society which defines human rights in legal and political terms. If we hope to influence that society we must adopt a similar restrictive definition," *id.* at 92).

¹⁰⁴ *Symposium on Human Rights: An Agenda for the New Administration*, 28 VA. J. INT'L L. 827 (1988).

¹⁰⁵ Drinan, *A Human Rights Agenda for the Next Administration*, *id.* at 851, 854.

shelter, these are very few indeed. It is fair to say as a generalization—with too few exceptions to invalidate it—that the organizations of the international human rights movement do not interpret economic needs as rights.¹⁰⁶

This conclusion could be illustrated by reference to any one of a multitude of examples.¹⁰⁷ One recent instance is the report *Human Rights and U.S. Foreign Policy* on a major project undertaken by the Lawyers Committee for Human Rights,¹⁰⁸ an important American NGO not covered by the study quoted above. In a summary report of some 60 pages, the sole reference to economic, social and cultural rights is, predictably, in the section calling for ratification of the principal international treaties.¹⁰⁹

The position of the Lawyers Committee, however, is radically favorable to economic, social and cultural rights by comparison with that of the largest, and in some respects, most highly respected of the American human rights NGOs, Human Rights Watch (HRW). HRW includes under its umbrella a range of other groups, the most notable of which are Americas Watch, Helsinki Watch, Africa Watch, Asia Watch and Middle East Watch. The various Watch Committees have studiously avoided recognizing the concept of economic, social and cultural rights and—as a logical, but regrettable, consequence—have tended to rely very little, if at all, in their work on any of the principal international human rights treaties, since every one of these documents explicitly or implicitly endorses the concept of economic rights.¹¹⁰

¹⁰⁶ L. LIVEZEY, *NON-GOVERNMENTAL ORGANIZATIONS AND THE IDEAS OF HUMAN RIGHTS* 89 (1987). For a shorter version of the same study with a narrower focus, see Livezey, *U.S. Religious Organizations and the International Human Rights Movement*, 11 HUM. RTS. Q. 14 (1989).

¹⁰⁷ One rationalization for this position is reflected in the report of a conference involving a small number of American NGOs:

One participant felt strongly that it would be detrimental for U.S. human rights NGOs to espouse the idea of economic, social and cultural rights. Although they refer to important issues, they concern distributive justice rather than corrective justice, like civil and political rights. But distributive justice is a matter of policy, rather than principles; and human rights NGOs must deal with principles, not policies. Otherwise, their credibility will be damaged. Supporting economic demands will only undermine the ability of NGOs to promote civil and political rights, which are indispensable.

M. Rodríguez Bustelo & P. Alston, Report of a Conference held at Arden House, in Harriman, N.Y., in 1986, at 28 (unpublished).

The most notable exception to the neglect of economic rights by American NGOs is the International League for Human Rights, whose President recently characterized U.S. human rights policy as being deeply flawed because it ignores economic and social rights. See *Recent Developments in U.S. Human Rights Policy: Hearings Before the Subcomm. on Human Rights and International Organizations of the House Comm. on Foreign Affairs*, 100th Cong., 2d Sess. 64, 65 (1988) (testimony of Jerome Shestack).

¹⁰⁸ LAWYERS COMMITTEE FOR HUMAN RIGHTS, 1988 PROJECT: HUMAN RIGHTS AND U.S. FOREIGN POLICY: REPORT AND RECOMMENDATIONS (1988).

¹⁰⁹ *Id.* at 38.

¹¹⁰ In the past, the various Watch Committees have generally been reluctant to cite any of the United Nations human rights instruments as providing a legal foundation for their work. Nevertheless, a recent brochure describing the work of HRW stated:

Human Rights Watch evaluates the practices of governments according to standards that are recognized in international law. The principal international agreements that establish

The ultimate irony is that despite the overwhelming neglect of economic, social and cultural rights by U.S. human rights groups, those involved have nevertheless been accused by some conservative intellectuals of having a hidden agenda based on the recognition of economic and social rights. The goal of that agenda is apparently to create a "moral equivalence" between totalitarian or authoritarian governments that emphasize those rights and liberal, capitalist democracies that emphasize traditional political rights.¹¹¹ Thus, in the words of Irving Kristol:

To put it bluntly: the effect of the hidden agenda was to help delegitimize the market economy (capitalism) that is an indispensable precondition of a traditional liberal (bourgeois) society. It had the further implication of casting into doubt the moral status of American foreign policy, which has never thought it appropriate to concern itself with social and economic rights in other countries. The importance of this latter implication has been gradually revealed over the course of the past two decades. It is today the primary hidden agenda of most activist organizations concerned with human rights.¹¹²

Leaving aside the validity of this rather contentious analysis, the significant point for present purposes is that any U.S. group that might contemplate taking economic rights seriously in the future would have to bear in mind that a significant segment of public opinion would be actively opposed to the idea.

The other principal shortcoming of the debate so far has been the tendency to present the issue as though acceptance of an obligation to recognize, and to move purposefully toward the progressive implementation of, a wide range of economic, social and cultural rights were, to put it colloquially, "no big deal." In fact, such a decision would be a very big deal in the light of the attitudes and approaches that have prevailed in the United States, especially over the last decade.

The Carter administration's proposed "understanding," which was explicitly designed to neutralize any impact that ratification might have been expected to have in the normal course of events, could only with the utmost difficulty be characterized as having been put forward in good faith. On careful examination, it is inconsistent with the legal language used in the Covenant and it cannot readily be reconciled with the very nature and pur-

internationally recognized human rights include the Universal Declaration of Human Rights, adopted by the United Nations in 1948; the International Covenant on Civil and Political Rights adopted in 1966; the American Convention on Human Rights adopted in 1969; and the Helsinki accords, adopted in 1975.

HUMAN RIGHTS WATCH, *QUESTIONS AND ANSWERS* 4 (ca. 1988). It is noteworthy that this statement follows the approach of the Reagan and Bush administrations in omitting reference to the International Covenant on Economic, Social and Cultural Rights. That Covenant has simply been "airbrushed," as it were, out of the picture.

¹¹¹ See Kirkpatrick, *Establishing a Viable Human Rights Policy*, in *HUMAN RIGHTS AND U.S. HUMAN RIGHTS POLICY: THEORETICAL APPROACHES AND SOME PERSPECTIVES ON LATIN AMERICA* 84 (American Enterprise Institute Studies in Foreign Policy, H. Wiarda ed. 1982).

¹¹² Kristol, "Human Rights": *The Hidden Agenda*, *NAT'L INTEREST*, Winter 1986/87, at 3, 6.

pose of the act of assuming international human rights obligations. The understanding seems to have been accepted by some of the proponents of ratification largely for tactical reasons, on the grounds that it would be easier to give substance to the obligations of the Covenant after ratification was achieved, rather than before. But there is no reason to believe that recognition of the rights in question can be achieved by stealth, and no justification for believing that it should be.

On the contrary, the ratification debate of the 1990s is going to have to confront the hard issues with a much greater degree of openness and sophistication than has so far been the case. To take but one example: Is there reason to conclude, as an eminent international lawyer and human rights advocate has argued, "that the full achievement of . . . economic and social rights entails a loss of individual liberties which is unacceptable to the western liberal democracies"?¹¹³ And, if so, on what basis and by what means can the obligations contained in the Covenant be interpreted and applied so as to avoid, or at least minimize, such undesirable consequences? It is on issues such as these that the future debate will need to focus.

Given the paucity of serious scholarly analysis, especially from an international legal perspective, of the issues pertaining to economic, social and cultural rights, a good starting point would be to encourage more sophisticated and sustained research in this regard.¹¹⁴ As noted above, however, there is little reason to expect that that challenge will be taken up by many of the scholars, or activist groups, currently working in the human rights field. In the U.S. context, the best prospects seem to lie in convincing other groups, such as those dealing with issues like women's rights, homelessness, child abuse, malnutrition and access to education, that their concerns might usefully be pursued under the rubric of economic, social and cultural rights, and that ratification of the Covenant would be a productive step in that direction. Such a strategy also provides a powerful response to one of the most frequently posed objections to ratification: that is, since some of the states that have actually ratified the Covenant have failed to achieve adequate standards of satisfying the economic and social rights of their citizens, they have clearly not taken the Covenant seriously. Why, therefore, should the United States ratify, given that it, unlike other states, would be sure to take its obligations very seriously?¹¹⁵

Leaving aside the extent to which other states act in good faith with respect to their human rights treaty obligations, the grueling process of achieving the Senate's consent to ratification, the number and range of active and concerned domestic interest groups, and the willingness of U.S. courts to entertain arguments based in part on treaty provisions—all combine to en-

¹¹³ Higgins, *The European Convention on Human Rights*, in Meron, *supra* note 102, at 495, 497.

¹¹⁴ See *supra* note 102.

¹¹⁵ Assistant Secretary of State Richard Schifter put it in the following terms in testimony before Congress: "[I]n an ideal world it may very well be best for every country to ratify and abide by the Covenants. However, if one had to choose only one of these, it would be better to abide and not ratify, than to ratify and not abide." *Implementation of the Helsinki Accords: Hearing Before the Commission on Security and Cooperation in Europe*, 100th Cong., 2d Sess. 10 (1988).

sure that international obligations, once formally accepted, are likely to be taken seriously by the United States. Indeed, for that very reason it is worthwhile for the relevant interest groups to combine their forces in an effort to secure ratification. The externalization of the issues (as though they were only relevant to foreign policy) that has so far dominated much of the debate only serves to ensure that the emphasis is placed on less important issues such as comparative East-West performance and the different status accorded to international obligations under various domestic legal systems. By contrast, the U.S. debate needs to be much more internally focused. In other words, ratification should not be seen primarily as a foreign policy issue but, rather, as one of domestic policy. The key issue then becomes: what can ratification do for the rights of Americans?

While it must be conceded that the road to U.S. ratification of the Covenant on Economic, Social and Cultural Rights is likely to be a long, arduous and uncertain one, it will nevertheless be a far more productive and satisfying journey if the principal focus is on the well-being of Americans, rather than that of Soviets or the citizens of any other country.

THE INVESTMENT PROVISIONS OF THE CANADA-UNITED STATES FREE TRADE AGREEMENT: A CANADIAN PERSPECTIVE

*By Jean Raby**

INTRODUCTION

This is a good deal, a good deal for Canada and a deal that is good for all Canadians. It is also a fair deal, which means that it brings benefits and progress to our partner, the United States of America. When both countries prosper, our democracies are strengthened and leadership has been provided to our trading partners around the world. I think this initiative represents enlightened leadership to the trading partners about what can be accomplished when we determine that we are going to strike down protectionism, move toward liberalized trade, and generate new prosperity for all our people.¹

On January 2, 1988, President Ronald Reagan of the United States and Prime Minister Brian Mulroney of Canada signed the landmark comprehensive Free Trade Agreement (FTA)² between the two countries that already enjoyed the largest bilateral trade relationship in the world. The FTA was subsequently ratified by the legislatures of both countries, if only after a bitterly fought election on the subject in Canada. On January 1, 1989, the FTA formally came into effect.

The conclusion of the Canada-United States FTA is the culmination of a long quest that goes back to 1854, when the short-lived Elgin-Marcy Reciprocity Treaty allowed the free exchange of natural products between the two countries. In 1866 the Treaty was abrogated, and it was not until 1911 that serious discussion about a free trade agreement was undertaken; indeed, an agreement was reached, but the Canadian Liberal Government that negotiated the deal lost the following election to the Conservatives, who thereafter refused to implement it. In 1948 the Canadian Prime Minister considered, but then decided against, such an agreement. At the end of the 1970s, the ever-increasing U.S. trade protectionism convinced Canadian Prime Minister Pierre Elliott Trudeau's Government of the importance of discussing possibilities for freer trade in certain specific sectors with the United States. However, the sectoral approach led nowhere, and, after tak-

* Of the New York Bar. An earlier version of this paper was prepared in partial fulfillment of the LL.M. degree at Harvard Law School. The author wishes to thank Dean Frederick E. Snyder, who supervised and reviewed the manuscript.

¹ 1986-87 CAN. PARL. DEB., H.C., 33d Parl., 2d Sess. 9633 (statement of Prime Minister Brian Mulroney, Oct. 5, 1987, announcing the conclusion on the day before of a free trade agreement between Canada and the United States).

² Free Trade Agreement, Dec. 22, 1987, and Jan. 2, 1988, Canada-United States, H.R. Doc. No. 216, 100th Cong., 2d Sess. 297 (1988), *reprinted in* 27 ILM 281 (1988) [hereinafter FTA].

ing office in September 1984, the Conservative Government shifted the agenda to the negotiation of a broader agreement. In March 1985, in Quebec City, the "Shamrock Summit" between Prime Minister Mulroney and President Reagan led to a far-reaching declaration on trade in goods and services. Six months later, the Canadian Government announced that it would pursue a comprehensive free trade agreement with the United States. Negotiations formally began in May 1986, and 16 months thereafter, on October 4, 1987, an agreement was reached.

The FTA goes beyond the normal scope of a free trade agreement by addressing various issues important to the Canada-U.S. economic relationship: it curtails the use of nontariff barriers; liberalizes trade in services, agriculture, wine and spirits, and energy; provides for expanded access to government procurement; seeks to solve some trade-related irritants; creates a novel set of dispute settlement institutions; and addresses the contentious question of investment barriers. This article specifically proposes to discuss the impact of the FTA on investment barriers.

Numerous commentators in Canada have attacked the investment provisions of the FTA as a unilateral concession by Canada to the American giant; the eventual conclusion of this article will be that, on the contrary, Canada is the big winner on investment. To arrive at this conclusion, first the regulation of foreign direct investment (FDI) in both countries will be described. Note that we are concerned only with direct investment, not portfolio investment. In part II, I will describe the negotiation process of the FTA as it pertained to investment; to appreciate what actually happened during the 16-month negotiations and their eventual outcome, the parties' objectives with regard to this issue must be explained. Part III will provide an in-depth analysis of chapter 16 of the FTA, which deals with cross-border direct investment between the two countries.

Finally, in the main part of this article, part IV, I will assess the impact of the FTA on Canada's economic future. It will first be demonstrated that Canada's ability to regulate and control American direct investment has not been drastically reduced by the FTA; the Canadian Government will be able, if it so chooses, to control and regulate American investments in the Canadian economy. Note that this analysis does not engage us in an economic discussion of whether FDI should be controlled and limited, but simply whether, assuming such a policy choice is made, it can be adequately pursued. In the second section of part IV, I will seek to demonstrate that Canada, far from having made unilateral concessions to the United States, has received an important commitment from the Americans: the guarantee of an open-door policy vis-à-vis direct investment by Canadians in the U.S. market.

I. REGULATION OF FOREIGN DIRECT INVESTMENT

To grasp the impact of the FTA on the regulation of FDI in Canada and the United States, one must first understand the specific rules that governed it before the FTA entered into force. The present analysis, however, will be

restricted to a brief overview of the different barriers a foreign investor faces in each country.

REGULATION OF FOREIGN DIRECT INVESTMENT IN CANADA

The regulation of FDI in Canada has undergone continuous changes over the past 20 years. Until the 1970s, the investment climate for foreigners was quite hospitable and mostly barrier-free. By then, however, public opinion had become increasingly concerned about the high level of FDI and its possible negative effects on the development of the economy. The 1972 Gray Report on the level of FDI in Canada legitimized those concerns: it found, *inter alia*, that nearly 60 percent of manufacturing activities and 76 percent of the energy sector were foreign controlled, and that, in certain industries, such foreign ownership exceeded 90 percent.³ The report concluded that FDI, if it had brought benefits to Canada, was now so prevalent as to impede legitimate Canadian economic objectives, and recommended the creation of a general review process for direct investment in Canada by foreigners.⁴ In response to these concerns, the federal Government enacted, in 1974, the Foreign Investment Review Act (FIRA),⁵ which created the Foreign Investment Review Agency, whose mandate was to review all direct and indirect acquisitions of control of Canadian businesses and the establishment of all new businesses by foreigners.⁶

After the 1981–1982 recession, however, and because of continuing criticism by the international investment community, a change in international investment flows and a better understanding, in all sectors of Canadian society, of the costs of a policy perceived by foreigners as being antagonistic to foreign capital, economic nationalism no longer assumed paramount importance in Ottawa. With the arrival to power of the Conservative Government in September 1984, the political climate definitely became more favorable to foreign capital, and FIRA was repealed and replaced by the more moderate Investment Canada Act (ICA).⁷ The objective of the Canadian Government

³ INFORMATION CANADA, *FOREIGN DIRECT INVESTMENT IN CANADA* (1972).

⁴ Such antiforeign ownership feelings were bound to be directed at the United States, the most important country of origin of FDI in Canada. See Atkey, *A Canadian Perspective on the Investment Implications of the Free Trade Agreement*, in NATIONAL INSTITUTE, UNITED STATES/CANADA FREE TRADE AGREEMENT: THE ECONOMIC AND LEGAL IMPLICATIONS 15, 17 (1988) [hereinafter NATIONAL INSTITUTE].

⁵ Foreign Investment Review Act, 1973–74 Can. Stat., ch. 46, amended by 1976–77 Can. Stat., ch. 52, §128(2), and 1980–81–82 Can. Stat., ch. 107, §63 [hereinafter FIRA], repealed by Investment Canada Act, 1984–85 Can. Stat., ch. 15.

⁶ If it was demonstrated that the investment would be of "significant benefit" to Canada, it would be allowed under FIRA. Of the applications on which a decision was taken from 1974 to 1984, more than 90% were positive. See Dewhirst, *The Canadian Federal Government's Policy Towards Foreign Direct Investment*, in REGULATION OF FOREIGN DIRECT INVESTMENT IN CANADA AND IN THE UNITED STATES 23, 27 (E. Fry & L. Radebaugh eds. 1984) [hereinafter REGULATION OF FDI]; Baker, *From FIRA to Investment Canada*, in CANADA-U.S. ECONOMIC RELATIONS IN THE CONSERVATIVE ERA OF MULRONEY AND REAGAN 47, 48–49 (E. Fry & L. Radebaugh eds. 1985).

⁷ Investment Canada Act, 1985 R.S.C., ch. 20 [hereinafter ICA]. For a detailed review of the ICA, see, *inter alia*, R. PATTERSON, *CANADIAN REGULATION OF INTERNATIONAL TRADE AND*

was simple: as Prime Minister Mulroney said to the Economic Club of New York shortly after the introduction of the ICA, "[O]ur message is clear here and around the world . . . Canada is open for business again."⁸ Indeed, the stated purpose of the ICA represents a drastic change from the attitude manifested toward FDI in the 1970s: "to encourage investment in Canada by Canadians and non-Canadians that contributes to economic growth and employment opportunities and to provide for the review of significant investments in Canada by non-Canadians in order to assure such benefits to Canada."⁹

If the underlying philosophy of the new Act is fundamentally different from that of its predecessor, the ICA represents a change from FIRA not so much in structure but in scope and procedures: thresholds for review have been raised, the review time shortened, the process and standards streamlined. In fact, the underlying concept of the ICA remains, in essence, the same as under FIRA: governmental approval is required before any non-Canadian¹⁰ can acquire control of a Canadian business,¹¹ provided the value of the assets concerned meets the appropriate threshold. Thus, the acquisition of control of a Canadian business will be reviewable in three cases (if one excludes the particular treatment of cultural industries, described below):

- direct acquisition of control of a Canadian business with assets valuing Can. \$5 million or more;¹²
- indirect acquisition of control of a Canadian business where the assets' value is Can. \$50 million or more;¹³ and
- indirect acquisition of control of a Canadian business with assets of Can. \$5 million or more, where the Canadian assets acquired represent more than 50 percent of the aggregate gross asset value of all domestic and international business acquired, directly and indirectly, in connection with the transaction.¹⁴

INVESTMENT (1986); Grover, *The Investment Canada Act*, 10 CAN. BUS. L.J. 475 (1985); Rose, *Foreign Investment in Canada: The New Investment Canada Act*, 20 INT'L LAW. 19 (1986); Spence, *Current Approaches to Foreign Investment Review in Canada*, 31 MCGILL L.J. 509 (1986); Grover, *Colloquy: Canada-U.S. Trade Relations and Negotiations (Part 2)*, in 1987 PRIVATE INVESTORS ABROAD—PROBLEMS AND SOLUTIONS IN INTERNATIONAL BUSINESS, at 2-1.

⁸ Quoted in Spence, *Current Approaches to Foreign Investment Review in Canada*, 11 CAN.-U.S. L.J. 161 (1986).

⁹ ICA, *supra* note 7, §2. This stands in sharp contrast to §2(1) of FIRA, *supra* note 5, which stated in part "that the extent to which control of the Canadian industry, trade and commerce has become acquired by persons other than Canadians and the effect thereof on the ability of Canadians to maintain effective control over their economic environment is a matter of national concern."

¹⁰ Non-Canadians are persons other than Canadians or Canadian-controlled entities; the ICA, *supra* note 7, contains, in §§26 and 27, an extensive set of rules by which the status of the acquirer can be determined.

¹¹ "Canadian business" is defined in *id.* §3, which shows that the ICA is not concerned solely with corporate takeovers, and that the identity of the person carrying on the business is irrelevant.

¹² *Id.* §§14(1)(a) and (b), 14(3) and 28(1).

¹³ *Id.* §§14(1)(d), 14(4) and 28(1)(d)(ii).

¹⁴ *Id.* §§14(1)(c), 14(2), 14(3) and 28(1)(d)(ii).

An indirect acquisition is essentially one where a non-Canadian acquires control of a foreign corporation that controls another entity carrying on a Canadian business, i.e., acquisition of a foreign parent with a Canadian subsidiary. The review of these indirect acquisitions has been a constant source of criticism from abroad, especially from the United States, for the application of the ICA in such circumstances can appear far-reaching.¹⁵ Any other acquisition is the direct acquisition of a Canadian business, and is submitted to the Can. \$5 million threshold. The value of the assets of the entity acquired will include the value of all the other entities controlled, directly or indirectly, by the acquired entity.¹⁶

Even if the asset value does not meet the aforementioned thresholds, the acquisition of a Canadian business, or in this case the establishment of a new one, can still be subject to review if the business is related to "Canada's cultural heritage or national identity,"¹⁷ as defined in regulations adopted by the cabinet under delegated authority. To date, the following business activities have been so designated:

- the publication, distribution or sale of books, magazines, periodicals, or newspapers in print or machine readable form;
- the production, distribution, sale or exhibition of film or video music products;
- the production, distribution, sale or exhibition of audio or video music recordings; and
- the publication, distribution or sale of music in print or machine readable form.¹⁸

Any investment subject to review will be authorized by Investment Canada, the agency in charge of the application of the ICA, if it is found to be of "net benefit" to Canada.¹⁹ The factors to be considered in making this assessment are set out in section 20 and include the effect of the investment on the level and nature of economic activity in Canada; the degree and significance of participation by Canadians in the business in question; the effect of the investment on productivity, industrial efficiency, technological development, product innovation and product variety in Canada; the effect of the investment on competition within Canada; the compatibility of the investment with national industrial, economic and cultural policies; and the

¹⁵ See, e.g., *Issues in United States-Canada Economic Relations: Hearings Before the Subcomm. on International Economic Policy and Trade and on Inter-American Affairs of the House Comm. on Foreign Affairs*, 97th Cong., 1st Sess. 11 (1981) (statement of R. J. Waldmann, Assistant Secretary of Commerce); O'Laughlin, *Extraterritorial Application of Canadian Foreign Investment Review*, 8 NW. J. INT'L L. & BUS. 436 (1987); Bale, *Investment Frictions and Opportunities in Bilateral Trade Relations*, in CANADA/UNITED STATES TRADE AND INVESTMENT ISSUES 165, 175-76 (D. Fretz et al. eds. 1985) [hereinafter CANADA/U.S. TRADE].

¹⁶ ICA, *supra* note 7, §14(3)(b).

¹⁷ *Id.* §15(a).

¹⁸ Investment Canada Regulations, SOR/DORS/85-611, sched. IV, 119 Can. Gaz. II 3027, 3032-33 (1985), *amended* (on other topics) by SOR/DORS/89-69, 123 Can. Gaz. II 130 (1989).

¹⁹ ICA, *supra* note 7, §21.

contribution of the investment to Canada's ability to compete in world markets.

These factors are to be considered in the aggregate, and they will be given "different weight in different circumstances . . . according to the nature of the proposal, the sector in which the investment is to occur, the region in which it is to be made, the kinds of undertakings, if any, offered by the applicant, and other factors and circumstances unique to each case."²⁰ The applicant may submit undertakings with respect to such matters as levels of employment, Canadian participation, research and development, and investment so as to boost his request. The investor may even be invited to present such undertakings if the Minister finds that the investment is not likely to be of net benefit to Canada.²¹ Undertakings can indeed be quite important in certain cases:

[E]xperience to date [under the ICA] would suggest that the most important matters will be the maintenance of Canadian operations and activities—with related undertakings as to the continuation of employment in Canada, management of the business in Canada and the head office of the business in Canada—and the maintenance or enhancement of the degree of Canadian ownership in the business.²²

Undertakings regarding research and development or, at least, an informal understanding not to displace those activities from Canada, will often be part of the evaluation of an application.²³ Undertakings may be particularly important in the oil and gas industry, where investments have been allowed, but only if accompanied by significant commitments related to an increase in Canadian ownership and to capital and exploration expenditures.²⁴

In the end, though, the review process remains "a decision based on policy rather than law";²⁵ the administration of the ICA will vary in response to changing policies of the Government and political considerations will be an important factor. In response to investors' complaints about the uncertain and continuously changing climate they face, the Canadian Government adopted definite guidelines for certain politically sensitive and economically important sectors of the economy, such as book publishing, the film industry, telecommunications, oil and gas, and the uranium industry.²⁶

These policies have a decisive impact on the outcome of a particular case, and exceptions are rarely made. For example, the government policy of prohibiting the acquisition of healthy Canadian-controlled firms in the oil and gas business proved decisive in the proposed takeover of Bow Valley Industries Inc., an oil firm in sound financial condition, by British Gas PLC.²⁷ "Some thought we should relax the rules because of the claimed

²⁰ Atkey, *supra* note 4, at 25.

²¹ ICA, *supra* note 7, §23.

²² Spence, *supra* note 7, at 518.

²³ Dewhirst & Rudiak, *From Investment Screening to Investment Development*, 11 CAN.-U.S. L.J. 149, 159 (1986).

²⁴ Spence, *supra* note 7, at 520-21.

²⁵ Arnett, *From FIRA to Investment Canada*, 24 ALB. L. REV. 1, 26 (1985).

²⁶ These policies will be described in detail in parts III and IV *infra*.

²⁷ Wall St. J., Nov. 6, 1987, at 16.

benefits of this acquisition. We said no. It is bad policy and unfair to change fundamental rules to accommodate individual cases."²⁸

In all other cases, i.e., acquisitions of Canadian businesses not meeting the required threshold and the establishment of new Canadian businesses in sectors other than the cultural industries, the review process is not applicable. Although a few other statutes do regulate or restrict the ability of foreigners to invest in Canada in particular sectors such as agriculture, aeronautics, communications, fisheries, mining, oil and gas, and shipping,²⁹ the comprehensive review procedure set up under the ICA remains, in most cases, the most important mechanism regulating FDI in Canada and the biggest hurdle for a foreigner to overcome before being able to invest in Canada.

REGULATION OF FOREIGN DIRECT INVESTMENT IN THE UNITED STATES

The U.S.-declared policy toward FDI in the United States has traditionally been quite liberal. In 1983 President Reagan restated his administration's endorsement of the open-door policy:

The United States has consistently welcomed foreign direct investment in this country. Such investment provides substantial benefits to the United States. Therefore, the United States fosters a domestic economic climate which is conducive to investment. We provide foreign investors fair, equitable, and non-discriminatory treatment under our laws and regulations. We maintain exceptions to such treatment only as are necessary to protect our security and related interests and which are consistent with our international legal obligations.³⁰

This policy is based on the belief that "an open international investment system responding to market forces provides the best and most efficient mechanism to promote global economic development";³¹ it was reaffirmed in February 1989 by newly elected President Bush, who said that "it is important if we believe in open markets that people be allowed to invest here."³² However, these broad policy statements praising the virtues of FDI in the United States do not mean the total absence of regulation. If Canada, owing to the magnitude and breadth of the FDI in its economy, has chosen to resort to a comprehensive administrative structure, the United States has adopted, in an ad hoc manner, numerous specific restrictions and disclosure requirements that discriminate against foreign investors and even restrict or

²⁸ Address by Marcel Masse, Minister of Energy, Mines and Resources, to the American Stock Exchange, Eighth Annual Oil and Gas Symposium, Toronto (Nov. 5, 1987).

²⁹ See Western Grain Stabilization Act, 1985 R.S.C., ch. W-7, §7; Aeronautics Act, 1985 R.S.C., ch. F-2, §26; Broadcasting Act, 1985 R.S.C., ch. B-11 (the requirements of the Act as to 80% minimum Canadian ownership were also deemed to be applicable to cable television in Capital Cities Communication Inc. v. C.R.T.C., [1978] 2 S.R.C. 14); Fisheries Act, 1985 R.S.C., ch. F-14; Territorial Lands Act, 1985 R.S.C., ch. F-7; Canadian Petroleum Resources Act, 1986 Can. Stat., ch. 45, §§46-49; and Canada Shipping Act, 1985 R.S.C., ch. S-9.

³⁰ International Investment Policy Statement, 19 WEEKLY COMP. PRES. DOC. 1214 (Sept. 9, 1983).

³¹ Bale, *The United States Policy Toward Inward Foreign Direct Investment*, 18 VAND. J. TRANS-NAT'L L. 199, 206 (1985).

³² 25 WEEKLY COMP. PRES. DOC. 221 (Feb. 13, 1989).

prohibit FDI in certain sectors of the economy.³³ This piecemeal approach has resulted in a "highly diffuse set of laws and regulations which may leave [the foreign investor] confused and perhaps suspicious that the very ambiguity of his situation is no accident."³⁴

It is beyond dispute that the United States has adopted numerous exceptions to its own stated policy of granting national treatment to FDI. Indeed, it appears that this policy may slowly be changing, in light of the enactment, in 1988, of the Exon-Florio provision, which authorizes the President to suspend or halt a merger, acquisition or takeover of a U.S. firm by a foreigner on the ground that it would threaten U.S. national security interests.³⁵ Nevertheless, I think it can be said that the United States is still very open to FDI: there is no blanket scheme regulating foreign investors, foreign investment does not usually require prior authorization, and most sectors of the U.S. economy are open to unrestricted direct investment by foreigners. Some even say that "it may well be that the United States has fewer restrictions on foreign direct investment than any other advanced industrial nation."³⁶

It is thus in the context of complete asymmetry between the very interventionist policy toward FDI of the Canadian Government and the much more laissez-faire attitude of the U.S. Government that the negotiation of the FTA as it pertained to cross-border direct investment between Canada and the United States was undertaken.

³³ It is not the purpose of this article to review these restrictions and requirements in detail. For a review of the various statutes dealing with FDI in the United States, see, *inter alia*, FOREIGN INVESTMENT IN THE UNITED STATES (E. Marans, P. Williams, J. Griffin & J. Pattison eds. 1980); Barrett, *Existing Legal Restrictions on Foreign Investment in Specific Industries*, in NATIONAL INSTITUTE, FOREIGN DIRECT INVESTMENT IN THE UNITED STATES 21 (1988) [hereinafter FDI IN THE U.S.]; Vila, *Legal Aspects of Foreign Direct Investment in the United States*, 16 INT'L LAW. 1 (1982); Fisher, *Canadian Investment in the United States: U.S. Restrictions on Foreign Investment*, 8 CAN.-U.S. L.J. 19 (1984); Walsh & Weinstein, *Foreign Investment in the U.S. Fishery Industry After the Anti-Reflagging Act of 1987*, 22 INT'L LAW. 1207 (1988); N. Patterson, *Canada-U.S. Foreign Investment Regulation: Transparency Versus Diffusion*, in REGULATION OF FDI, *supra* note 6, at 47; *Disclosure of Foreign Investment in the United States: Hearings Before the Subcomm. on Telecommunications, Consumer Protection and Finance of the House Comm. on Energy and Commerce*, 99th Cong., 2d Sess. 172 (1986) (statement of Michael Butler, Chairman of the ABA Committee on Foreign Investment in the United States) [hereinafter *House Hearings*]; Balé, *The U.S. Federal Government's Policy Towards Foreign Direct Investment*, in REGULATION OF FDI, *supra* note 6, at 29; H.R. REP. NO. 1216, 96th Cong., 2d Sess. (1980); Butler, *The U.S. Policy Toward Foreign Investment in the United States and Recent Developments Affecting Foreign Investments*, in FDI IN THE U.S., *supra*, at 3.

³⁴ FOREIGN INVESTMENT REVIEW AGENCY, BARRIERS TO FOREIGN INVESTMENT IN THE UNITED STATES 71 (1982); see also to the same effect D'Aquino, *A Canada-United States Free Trade Association: Economic and Legal Perspectives*, 1987 PRIVATE INVESTORS ABROAD, *supra* note 7, at 3-7, 3-14.

³⁵ Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, §5021, 102 Stat. 1107, 1425 (50 U.S.C. app. §2170) (West Supp. 1989)). In July 1989, the Department of the Treasury proposed regulations to implement the Exon-Florio provision. The regulations are expected to be codified, in the first part of 1990, at 31 C.F.R. pt. 800. See the second section of part IV *infra* for fuller discussion of current public opinion regarding FDI in the United States.

³⁶ Fry, *Foreign Investment in the United States and Canada: The Setting*, in REGULATION OF FDI, *supra* note 6, at 1, 5.

II. THE NEGOTIATION PHASE

The negotiation of a free trade area agreement has as its prime objective the removal of tariff and nontariff barriers to the free flow of goods; it does not usually encompass the regulation of FDI, other than in those specific cases where it may result in distorting trade. For example, the U.S.-Israel Free Trade Agreement does not address the question of FDI other than in this limited aspect: Article 13 prohibits minimum export or local-sourcing requirements as a condition for the establishment, expansion or maintenance of investment, or as a condition for governmental subsidies.³⁷ However, the U.S.-Canada free trade negotiations were bound to be different, if only because of the rapid transformation of the world economy: "International trade has been steadily slowing down for most of the past decade. But international investment is booming as never before. It has now become the dominant factor in the world economy."³⁸

The importance that investment issues have acquired in the world economy is intensified in the context of Canada-U.S. economic relations. Canada and the United States share the world's biggest bilateral trading relationship, and each is the other's principal recipient of its direct investment abroad. In fact, the United States and Canada respectively rank first and second in the world as host nations for FDI.³⁹ The disparity in size between the partners, however, creates certain problems and frictions, and investment issues are no exception. The diametrically opposed approaches of the two countries toward FDI questions contributed all the more to making the subject a source of acrimony in their bilateral relations. Because of the contentious character these issues have acquired over the years, they were bound to be discussed at the negotiating table.

THE PARTIES' OBJECTIVES REGARDING CROSS-BORDER DIRECT INVESTMENT

The United States Position

The U.S. Government saw in the FTA negotiations the opportunity to further its policy of liberalization of international investment, both inward and outward, as set forth in the 1983 International Investment Policy Statement:

The basic tenet for treatment of investment is the national treatment principle: foreign investors should be treated no less favorably than domestic investors in like situations. Exceptions should be limited to those required to protect national security and related interests. . . . The United States opposes the use of government practices which distort, restrict or place unreasonable burdens on direct investment. . . . The United States will continue to work for the reduction or elimination of unreasonable and discriminatory barriers to the entry of investment. The United States believes that foreign investors should be able

³⁷ Free Trade Area Agreement, Apr. 22, 1985, Israel-United States, *reprinted in* 24 ILM 653 (1985).

³⁸ Druckner, *From World Trade to World Investment*, Wall St. J., May 26, 1987, at 32.

³⁹ Fry, *supra* note 36, at 1.

to make the same kinds of investment, under the same conditions, as nationals of the host country . . .⁴⁰

Indeed, the great number of bilateral investment treaties the United States has signed, together with its ratification of the 1976 OECD Declaration on International Investment and Multinational Enterprises, testifies to the prime importance attached to this issue by the U.S. Government.⁴¹

The United States also considers that investment is fundamentally intertwined with trade:

It would be incongruous to negotiate a trade regime intended to open the border and not do the same for investment. Businessmen do not separate trade from investment. They make trade and investment decisions together. How do you say to a businessman that the border will be open to your products, but not to your investment in the other country? In many respects they are two sides of the same coin.⁴²

The United States is thus currently seeking to extend the framework of the General Agreement on Tariffs and Trade (GATT) to investment issues: in view of the unequaled extent of the U.S.-Canada trade relationship, any agreement on the topic of FDI would "set an example and provide models for what may be achievable in the [new] GATT round."⁴³

Above all, the United States wished to put investment on the negotiating table because the regulation of U.S. investment in Canada had become one of the most contentious issues between the two countries. Canada's nationalistic economic policies of the 1970s and the Trudeau era had put "considerable strain"⁴⁴ on the relationship and were perceived by American investors, regardless of their actual impact, as being xenophobic, cumbersome and costly. Despite the change in the investment climate following the installation of the Conservative Government in September 1984, the United States still saw the question of investment as one of prime importance to be addressed in the negotiations:

The United States entered the FTA talks seeking to preclude a return to the interventionist policies of the Trudeau regime, when the National Energy Policy forced U.S. divestment of holdings in Canadian energy companies, and when screening by the Foreign Investment Review Agency . . . prompted U.S. firms to forego profitable investments or to commit to costly performance requirements as an implicit condition for approval of the investment.⁴⁵

⁴⁰ International Investment Policy Statement, *supra* note 30, at 1214. This statement is an updated and more detailed version of a similar document presented by the Carter administration in 1977. See Bale, *supra* note 15, at 166.

⁴¹ Bale, *supra* note 15, at 169-71.

⁴² *Questions and Answers to Clayton Yeutter*, in *BUILDING A CANADIAN-AMERICAN FREE TRADE AREA* 202, 207 (E. Fried & P. Trezise eds. 1987).

⁴³ Yeutter, *A Vote of Confidence*, in *id.* at 197, 199.

⁴⁴ Stern, *Canada/U.S. Trade and Investment Frictions: the U.S. View*, in *CANADA/U.S. TRADE*, *supra* note 15, at 32, 59; see also Quinn, *Issues in Canada/U.S. Energy Trade and Investment: a U.S. Perspective*, in *id.* at 256, 263.

⁴⁵ J. SCHOTT, *UNITED STATES-CANADA FREE TRADE: AN EVALUATION OF THE AGREEMENT* 24-25 (1988).

More specifically, the United States sought to liberalize, if not completely eliminate, the restrictive provisions of the ICA, especially in the culture and energy sector. It also sought a guarantee of national treatment for U.S. investors, i.e., that U.S. investors, once established, would be treated no less favorably than domestic ones; the lack of national treatment for the U.S. investor had been most acutely resented in the culture and energy sectors. Finally, the United States wanted to put an end to performance and other requirements as a condition for the entry of U.S. investors into the Canadian investment market.⁴⁶ As a matter of fact, under the GATT, the United States had already brought a complaint about Canada's administration of FIRA with respect to performance requirements regarding mandatory local sourcing of goods, minimum export levels and import substitution; a negative finding was made by the panel only with respect to mandatory local sourcing of goods.⁴⁷

The testimony in April 1986 of U.S. Trade Representative Clayton Yeutter, during the Senate Finance Committee's debate on the possibility of granting expedited approval to the negotiations, made clear that investment issues were at the top of the U.S. agenda.⁴⁸ In his prepared statement, Ambassador Yeutter said that the U.S. objective with regard to FDI was "to produce a Canadian policy environment as open to inflows of foreign direct investment as is our own."⁴⁹ Indeed, assurance by the administration that investment questions would be on the table seems to have been necessary to convince the required number of senators on the Finance Committee to grant the requested "fast-track" authority to negotiate an agreement with Canada.⁵⁰

Shortly after the positive decision of the committee, President Reagan himself, in a letter addressed to its Chairman, Senator Robert Packwood, reiterated this commitment: "Clearly, in the following negotiations we will want to make sure that the outcome provides for comparable treatments for American and Canadian investment . . . in both countries."⁵¹ And again, in August 1986, the U.S. chief negotiator, Peter Murphy, assured members of the House of Representatives that investment was one of the top priorities of the U.S. Government and that "all we are trying to do is seek an investment climate in Canada equivalent to what we have in the United States."⁵²

⁴⁶ UNITED STATES TRADE REPRESENTATIVE, NATIONAL TRADE ESTIMATE: 1986 REPORT ON FOREIGN TRADE BARRIERS 57-59 (1986).

⁴⁷ GATT Report No. CL/5504 (Feb. 7, 1984), reprinted in LAW AND PRACTICE UNDER THE GATT, pt. II at 47 (K. Simmonds & B. Hill eds. 1989). Minimum export requirements were found to be outside the GATT framework, and import substitution was not ruled upon because the panel found this question to be outside the terms of reference of the complaint.

⁴⁸ *Negotiation of United States-Canada Free Trade Agreement: Hearing Before the Senate Comm. on Finance*, 99th Cong., 2d Sess. 28-39 (1986).

⁴⁹ *Id.* at 39.

⁵⁰ D. CAMERON, THE FREE TRADE PAPERS 43 (1986).

⁵¹ Letter from President Reagan to Senator Robert Packwood, reprinted in *id.* at 44.

⁵² *United States-Canada Relations: Hearings Before the Subcomms. on International Economic Policy and Trade and on Western Hemisphere Affairs of the House Comm. on Foreign Affairs*, 99th Cong., 2d Sess. 5-6 (1986).

The Canadian Position

The importance attached by the United States to investment questions stands in sharp contrast to the Canadian attitude. Canada's first and foremost objective in these negotiations was to seek secure access to the American market for its products.

Canada is the only major industrialized country that does not have unfettered access to a domestic market of 100 million people. Its exports represent more than 30 percent of its gross national product, and more than 75 percent of those exports are absorbed by the U.S. market; this means that 2 million jobs in Canada depend on Canadian exports to the United States.⁵³ The growing protectionist mood in Congress and the arbitrary application of trade remedies laws to Canadian exports in the 1980s had convinced the Canadian Government that only assured access to the American market could ensure an economically viable future for the nation. The Royal Commission on the Economic Union and Development Prospects for Canada (the MacDonald Commission), which presented its report in August 1985 after nearly 3 years of studies and hearings, reached the same conclusion and recommended the adoption of a free trade agreement with the United States: "The first, and most important, concern is for Canadian producers to obtain barrier-free market access under a negotiated arrangement which ensures that access is dependable and secure from future political and legal challenges."⁵⁴ Consequently, the Canadian motto, when it came to Canada's objectives in the negotiations, was reduced to three set ideas: securing, enhancing and enshrining access to the U.S. market.⁵⁵

Not surprisingly, therefore, investment questions were not high on Canada's agenda. In view of the relatively liberal U.S. regime for FDI and the more restrictive Canadian one, Canada was satisfied with the status quo.⁵⁶ Nevertheless, Canada did see some prospective benefit of its own in measures improving long-term stability in the regulation of investment:

[T]he high-level of U.S. investment in Canada and the growing level of Canadian investment in the United States suggest that some consideration will need to be given as to whether any special rules are needed to safeguard investment, how to deal with multinational companies, whether trade-related investment issues need to be addressed, etc. Such considerations would be designed to provide long-term stability.⁵⁷

Behind this general statement lies the hint that Canada, as a side issue, appreciated the benefits of eventual protection from U.S. laws discriminating

⁵³ AFFAIRES EXTÉRIEURES CANADA, *LES NÉGOTIATIONS COMMERCIALES: LA CLÉ DE L'AVENIR* 4 (1987).

⁵⁴ 1 REPORT OF THE ROYAL COMMISSION ON THE ECONOMIC UNION AND DEVELOPMENT PROSPECTS FOR CANADA 382-83 and 302⁶ (1985) [hereinafter COMMISSION REPORT].

⁵⁵ AFFAIRES EXTÉRIEURES CANADA, *supra* note 53, at 4-5; DEPARTMENT OF EXTERNAL AFFAIRS, *CANADIAN TRADE NEGOTIATIONS* (1985), reprinted in D. CAMERON, *supra* note 50, at 11, 14.

⁵⁶ See statement of the Canadian Director of United States Trade and Economic Relations, quoted in Aronson, *A Proposed Legal Framework for a Comprehensive Free Trade and Investment Agreement Between Canada and the United States*, 8 FORDHAM INT'L L.J. 161, 180 (1984-85).

⁵⁷ DEPARTMENT OF EXTERNAL AFFAIRS, *supra* note 55, at 21-22.

against foreign investment. This prospect may have been what Simon Reisman had in mind in 1984, before being appointed chief negotiator for Canada, when he said: "the free-trade agreement must have a clear commitment from both countries that they will apply full national treatment to the services, products, and enterprises of the other. . . . To be absolutely certain, I would insist that national treatment apply not only to trade but to investment as well."⁵⁸

On balance, though, Canada looked at investment less as an issue on which it could seek certain American concessions, and more as a bargaining chip in the negotiating process. As the Department of External Affairs wrote, at the outset of the negotiations:

The quid pro quo that the United States is likely to seek in return for securing and enhancing Canadian access to its market is freer and more secure access to the Canadian market. The U.S. Administration has indicated it is prepared to consider our key concerns . . . as long as we are prepared to consider their key objectives (such as mutual elimination of tariffs, and new discipline on investment and services).⁵⁹

Canada was bound, however, to set clear limits on what could be bargained away and what could not. The Canadian Minister for International Trade pointed out that the negotiations would not take the character of a simple *trade-off*, in which Canada would totally accede to American demands if its own requests were met;⁶⁰ gaining bargaining power vis-à-vis the United States would not be the overriding objective when it came to investment, and there were set limits on what Canada could eventually agree to in that regard.

Indeed, at the outset of the negotiations, the mandate given by the Canadian cabinet to the negotiators was strictly limited to the discussion of trade-related investment measures with significant bearing on the Canada-U.S. exchange of goods and services: "The Cabinet has not given the negotiators any mandate in [investment] beyond, of course, trade-related investment, which is what was specified in the original proposals between the Prime Minister and the President."⁶¹

In spite of the secondary character attributed by Canada to investment issues, the way its negotiators dealt with them could be quite determinant in shaping the scope and content of the eventual agreement. Ideally, Canada, through clever maneuvers, could take advantage of the strong U.S. desire of gaining greater access to the Canadian investment market: it could get rid of the controls no longer considered important for the Canadian economy, while making this look like "concessions" demanding reciprocal American responses regarding particular concerns of Canada.

⁵⁸ S. Reisman, *The Issue of Free Trade*, in U.S.-CANADIAN ECONOMIC RELATIONS: NEXT STEPS? 35, 48 (E. Fried & P. Trezise eds. 1984).

⁵⁹ DEPARTMENT OF EXTERNAL AFFAIRS, *supra* note 55, at 14-15.

⁶⁰ CAN. PARL., H.C., MINUTES OF PROCEEDINGS AND EVIDENCE OF THE STANDING COMMITTEE OF THE HOUSE OF COMMONS ON EXTERNAL AFFAIRS AND INTERNATIONAL TRADE [hereinafter MINUTES], No. 23, 1986-87, at 22 (statement of Pat Carney, Minister for International Trade).

⁶¹ 1986-87 CAN. PARL. DEB., H.C., 33d Parl., 2d Sess. 4044 (statement of Minister Carney).

Would the United States Seek to Link Foreign Investment Policy to Trade Negotiations? In my view, the appropriate Canadian response to any such U.S. attempt is clear. We should decide, with ample benefit of hindsight, which parts of our policies that now restrict foreign investment . . . are not in Canada's long-run economic interest. We should then make a necessity of virtue by allowing the United States, in the course of tough negotiations, to "force us" to give up these provisions. Thus we would kill two birds with one stone: such "concessions" would increase our bargaining power in gaining free access to the U.S. market and get rid of our own economically costly restrictions of foreign investment that, for political reasons, we may have great difficulty in getting rid of otherwise.⁶²

This discussion will eventually conclude that such a strategy not only was followed during the negotiations, but also met with greater success than one could have anticipated.

THE NEGOTIATIONS

During the negotiations, the United States made clear at several meetings attended by the Canadian Minister for International Trade, the Minister of Finance and the Secretary of State for External Affairs that it wanted to pursue the discussion on investment.⁶³ Hard pressed during the spring of 1987 by the Opposition, the Conservative Government constantly denied, if sometimes quite evasively, that the negotiators' initial mandate, limited to trade-related investment issues, had been modified.⁶⁴ However, the Government acknowledged having authorized the negotiators "to listen to the Americans to try to determine what areas of investment they would be interested in including in the free trade negotiations."⁶⁵ "We are prepared to consider their specific proposals to discuss investment once we have received them in final form. If they are acceptable to Canada, we are prepared to negotiate on that basis."⁶⁶

This statement of the Canadian Secretary of State betrays the impatience of a Canadian side annoyed by the lack of a clear, precise cabinet-sanctioned U.S. investment position, "setting objectives and limits Canada can reasonably live with, and bargain from."⁶⁷ This ambivalence in the American position might have resulted from differences between the Treasury, which advocated a strong stand on the issue, and the Office of the Trade Representative, which favored a more conciliatory approach. One may wonder whether the American negotiators' uncertainty might in fact have derived from the belief that Canada was merely playing tough and, in due time,

⁶² R. J. Wonnacott, *Potential Economic Effects of a Canada-U.S. Free Trade Agreement*, in CANADA-UNITED STATES FREE TRADE 67, 76 (J. Whalley ed. 1985).

⁶³ 1986-87 CAN. PARL. DEB., H.C., 33d Parl., 2d Sess. 6202 (statement of Minister Carney).

⁶⁴ *Id.* at 4104, 4178 and 6200 (statements of Minister Carney); *id.* at 6238-41 (statement of Prime Minister Mulroney).

⁶⁵ *Id.* at 6199 (statement of Minister Carney).

⁶⁶ *Id.* at 6330 (statement of Joe Clark, Secretary of State for External Affairs).

⁶⁷ Solomon, *It's Time U.S. Put Its Cards on Table*, FIN. POST, June 1, 1987, at 9.

would accede to the U.S. demands. The chief U.S. negotiator reportedly stated that "[i]nvestment is another critical component for any agreement. . . . The Canadians are finally getting the message but are holding it out as bait to get some progress on their key issues, such as contingency protection."⁶⁸

In the spring of 1987, the U.S. Treasury got the upper hand: the U.S. negotiating team demanded a totally open environment for American direct investment in Canada and presented a proposal that amounted to "a scorched-earth razing of investment barriers."⁶⁹ President Reagan himself raised the question of investment with Prime Minister Mulroney and insisted on a "wide open" investment regime.⁷⁰ "The U.S. side has made it very clear at every level, Presidential, Secretary to Secretary, and at the negotiating table, that they were anxious to talk about investment in the broadest sense."⁷¹

Such a proposal was bound to be rejected outright; considering the underlying feeling among Canadians that they are constantly subjected to the threat of a "Yankee" takeover, acceptance would have spelled political suicide in Canada for an agreement. One could say that Canada was playing the negotiating game cleverly; but there was more to it because, as indicated previously, Canada had placed limits on concessions regarding investment. In fact, the United States may have underestimated the Canadian resolve on this issue.

In the end, Canada's rejection of the Treasury's proposal convinced senior officials of the U.S. administration that they needed to realign their objectives and present proposals Canada could reasonably accept. International Trade Minister Pat Carney, in a television interview, pointed the way: "if the Americans want a deal that guarantees them a largely open door for new investment; clear rules which do not discriminate against them as foreigners, other than in a few sensitive sectors; and assurances that the doors won't suddenly be slammed in their faces, I think we'd be quite receptive."⁷²

The Canadian Government was chastised by the Opposition for not having categorically rejected U.S. proposals to extend the discussion of investment.⁷³ The Canadian Government's flexibility represented not only a desire to break the deadlock and to use investment as a bargaining chip, but also the belief that Congress would not approve an agreement that completely ignored the issue. Indeed, senior members of the Senate Finance Committee made clear during the negotiations that any eventual treaty would have to include liberalized rules on investment.⁷⁴

⁶⁸ Statement of Peter Murphy, U.S. chief negotiator, to U.S. Congressmen, *quoted by* Lloyd Axworthy, 1986-87 CAN. PARL. DEB., H.C., 33d Parl., 2d Sess. 6240.

⁶⁹ Solomon, *supra* note 67, at 9.

⁷⁰ 1986-87 CAN. PARL. DEB., H.C., 33d Parl., 2d Sess. 6290 (statements of Prime Minister Mulroney and John Turner, Leader of the Opposition).

⁷¹ Statement of Ambassador Simon Reisman, Canadian chief negotiator, *quoted by* John Turner, *id.* at 6330.

⁷² Solomon, *supra* note 67, at 9 (quoting Minister Carney).

⁷³ A motion blaming the Government was presented in the House of Commons. 1986-87 CAN. PARL. DEB., H.C., 33d Parl., 2d Sess. 6344-71.

⁷⁴ Rasky, *Warning on Canada Accord*, N.Y. Times, Aug. 6, 1987, at D6.

At the end of June 1987, the Canadian chief negotiator indicated that he was now comfortable with his mandate on investment.⁷⁵ Under questioning by the Opposition as to whether this meant that the breadth of investment issues on the table had been extended beyond trade-related questions, the Prime Minister simply said that "the mandate given to Ambassador Reisman in this and all other areas is appropriate."⁷⁶ The answer given by the Secretary of State, however, was less ambiguous and implicitly recognized that the negotiators were now authorized to discuss substantive investment questions; but he asserted that the matter was so important that any final decision would be cleared by the cabinet: "A negotiator, and the authority a negotiator receives, are fluid things. The negotiator has . . . the authority to receive recommendations or proposals the Americans might make respecting investment at the table, but any decision as to the response . . . rests at this time with the Cabinet."⁷⁷

Over the summer, the discussions progressed and, finally, on October 3, 1987, after 16 months of negotiations, a deal was struck just minutes before the deadline set by Congress for an amendment-free confirmation. The successful outcome was due in no small part to the personal involvement of the then U.S. Secretary of the Treasury, James Baker III, who finally proposed the kind of binding, supranational tribunal that met Canada's demands. Investment seems to have been the bargaining chip that brought about this major American concession on dispute settlement.⁷⁸ A provisional accord was signed on the understanding that the official text would be completed in a few weeks. Under the provisional accord, direct investment of the other party was to be given national treatment; equitable norms for expropriation, compensation and repatriation of profits were set; no performance requirements could be imposed on investors; cultural industries were totally excluded from the scope of the provisions; and though all existing laws were "grandfathered," changes were nevertheless made in Investment Canada's ability to review investments. The provisional accord was followed by an official text, which was signed by both parties on January 2, 1988.

III. THE INVESTMENT PROVISIONS OF THE AGREEMENT

As the barriers to bilateral trade and services are reduced substantially over the next decade, the FTA provisions on investment will become increasingly important. The agreement will ensure that companies can take advantage of new opportunities by scaling production to the enlarged North American market, and by pursuing intraindustry specialization strategies.⁷⁹

What are these provisions?

⁷⁵ Quoted by Lloyd Axworthy, 1987 CAN. PARL. DEB., H.C., 33d Parl., 2d Sess. 7607-08.

⁷⁶ 1986-87 CAN. PARL. DEB., H.C., 33d Parl., 2d Sess. 7607 (statement of Prime Minister Mulroney).

⁷⁷ *Id.* at 7608 (statement of Secretary Clark).

⁷⁸ Lewington & Waddell, *Late Push by Baker Shows Reagan Wish for Canadian Pact*, Globe & Mail (Toronto), Oct. 5, 1987, at A5.

⁷⁹ J. SCHOTT, *supra* note 45, at 24.

NATIONAL TREATMENT

The fundamental principle around which the investment provisions of the FTA revolve is the principle of national treatment for FDI, which both countries—subject to important qualifications that will be explained below—undertake to grant prospectively to each other. The benefits of national treatment will flow to every “investor of the other Party,” which includes state/provincial and federal governments, their respective agencies, and nationals. It also includes entities ultimately controlled, directly or indirectly, through the ownership of voting interests, by such persons; entities a majority of whose voting interests are held, in the aggregate, by such persons; and entities a majority of whose voting interests are held by entities that are incorporated or duly constituted in the territory of a party to the FTA and are not controlled, *de facto* or *de jure*, by investors of a third country.⁸⁰

National treatment does not mean harmonization: it simply means that American investment in Canada and Canadian investment in the United States are to be treated no less favorably than domestic investment in like circumstances. This national treatment provision covers the establishment, acquisition, conduct and operation, and sale of business enterprises.⁸¹ Moreover, no minimum domestic ownership requirement, other than nominal participation by directors, may be imposed on a business belonging to an investor of the other party;⁸² as a corollary to that prohibition, neither party may force divestiture of another party’s investment by reason of nationality alone.⁸³

The content of the principle of national treatment, however, is ambiguously defined with respect to states and provinces. Under Article 1604 of the FTA, national treatment is defined as “treatment no less favorable than the most favorable treatment accorded by such province or state in like circumstances to investors of the Party of which it forms a part.” Intuitively, one expects that this provision was designed to enable a province or state to grant special treatment to its own residents, while the most favorable treatment granted by that province or state to residents of the other provinces or states, as the case may be, would be extended to the investors of the other party. For example, the province of Quebec could set up special rules for its own residents, but those set up for residents of the rest of Canada would also apply to U.S. investors. But this is not the meaning of the provision as designed: its wording suggests that a province (or state, as the case may be) may be prohibited from setting barriers vis-à-vis Americans that would be valid vis-à-vis out-of-province Canadian residents. If this interpretation is correct, it would be an incongruous result of the FTA, for residents of the other provinces or states would be disadvantaged in comparison to investors of the other party. Indeed, this result would differ from the traditional U.S. policy. Under its bilateral investment treaty program, the United States simply requires that the treatment accorded by any state to investments of the other party be no less favorable than the treatment accorded by that state to companies consti-

⁸⁰ FTA, *supra* note 2, Art. 1611.

⁸² *Id.*, para. 2.

⁸¹ *Id.*, Art. 1602, para. 1.

⁸³ *Id.*, para. 3.

tuted under the laws of other states.⁸⁴ In light of the foregoing, I believe that the first interpretation should be retained; nevertheless, the ambiguity remains.

As stated earlier, there are significant exceptions to the principle of national treatment: grandfathering of existing legislation and policies, crown corporations, differences based on public policy grounds and outright exclusion of certain specific sectors of the economy.

Grandfathering of Existing Legislation

If the principle of national treatment was accepted by both parties, it was essentially because its application will be prospective only, and any existing nonconforming measure will be safeguarded.⁸⁵ "Measure" includes any law, regulation, procedure, requirement, actual practice or published policy.⁸⁶ Consequently, except for the changes in the ICA, which will be explained below, all existing legislation dealing with the regulation of FDI at the state/province and federal levels in both countries is protected. It is even possible to amend those measures, provided the nonconformity of the provision with regard to national treatment is not increased.⁸⁷

Canadian Crown Corporations

The FTA provides that existing businesses carried on by a Canadian federal or provincial government or by Crown corporations are exempted as to their prospective ownership from the application of the national treatment principle. That is, Canada, or the relevant provincial government, may limit the eventual sale of these businesses to Canadians only; moreover, conditions may be imposed so as to retain future control of the business in Canada.⁸⁸ However, there is a qualification to this exceptional treatment of Crown corporations: once the exempted measures derogating from national treatment have been adopted, Canada is prohibited from amending them or introducing other measures that would render the original measures more inconsistent with the concept of national treatment.⁸⁹ Thus, if ongoing ownership restrictions have been imposed on the business, Canada is not allowed to increase them later.⁹⁰

New government businesses or Crown corporations that are acquired or established by the Government after January 1, 1989, also benefit, but in a more limited fashion, from special treatment. If such businesses are disposed of later on, the initial distribution of shares can be limited to Canadian investors; but restricting the resale of shares to Canadians or otherwise safeguarding future Canadian control is prohibited, since the national treatment principle will be applicable after the initial disposition of the business.⁹¹

⁸⁴ *Treaty Between the United States and ——— Concerning the Reciprocal Encouragement and Protection of Investment*, Art. II(8), reprinted in 4 INT'L TAX & BUS. LAW. 136 (1986).

⁸⁵ FTA, *supra* note 2, Art. 1607, para. 1.

⁸⁶ *Id.*, Art. 1611.

⁸⁸ *Id.*, Art. 1602, para. 5.

⁹⁰ *Id.*, para. 6(b).

⁸⁷ *Id.*, Art. 1607, para. 1(c).

⁸⁹ *Id.*, para. 6(a).

⁹¹ *Id.*, para. 7.

Interestingly, no mention of this special treatment of Crown corporations was made in the original provisional agreement reached on October 3, 1987.⁹² One may therefore assume that Canada was able to extract this further concession from the United States during the drafting of the official text of the accord.

Public Policy Exemption

A country may also depart from national treatment provided it establishes that

- a) the difference in treatment is no greater than that necessary for prudential, fiduciary, health and safety, or consumer protection reasons;
- b) such different treatment is equivalent in effect to the treatment accorded by the Party to its investors for such reasons; and
- c) prior notification of the proposed treatment has been given in accordance with Article 1803 [written notice].⁹³

The purpose of this provision is to enable a country to pursue legitimate goals of public policy. Its application will be a matter of case-by-case interpretation. At the outset, one can say that "prudential" and "fiduciary" can be interpreted very broadly. However, as one author argued, "when considered alongside 'health and safety' and 'consumer protection' in an *ejusdem generis* sense, they take on a narrower meaning."⁹⁴ In any event, what is "prudential" or "fiduciary" is bound to raise legal disputes. The burden of showing that the difference in treatment is within the terms of the provision rests with the party invoking the exception.⁹⁵

The requirement of "equivalent effect" is also a departure from traditional U.S. policy: the United States used to require merely that such measures be subject to most-favored-nation treatment, together with a general injunction against arbitrary measures.⁹⁶

Excluded Sectors of the Economy

Entire sectors of the two countries' economies are also excluded from the application of the investment chapter of the FTA: investments related to financial services and government procurement and the transportation and cultural industries.⁹⁷ Moreover, the obligation of a party to grant national treatment in the conduct and operation of service enterprises located in its territory is limited to those types of services covered in chapter 14 of the

⁹² GOUVERNEMENT DU CANADA, TRANSCRIPTION PRÉLIMINAIRE: ACCORD DE LIBRE-ÉCHANGE ENTRE LE CANADA ET LES ÉTATS-UNIS: ÉLÉMENTS DE L'ACCORD (1987).

⁹³ FTA, *supra* note 2, Art. 1602, para. 8.

⁹⁴ Atkey, *supra* note 4, at 31.

⁹⁵ FTA, *supra* note 2, Art. 1602; para. 9.

⁹⁶ Nelson, *The Investment Provisions of the Free Trade Agreement: A United States Perspective*, in NATIONAL INSTITUTE, *supra* note 4, at 45, 59.

⁹⁷ FTA, *supra* note 2, Art. 1601, para. 2, and Art. 2005.

FTA.⁹⁸ Finally, as will be seen later in more detail, the oil and gas and the uranium-mining industries are exempted from paragraphs 2 and 3 of Article 1602, which paragraphs prohibit minimum domestic ownership requirements and divestiture by reason of nationality alone.

The exclusion of investments related to financial services and government procurement can be explained by the fact that the national treatment principle could not be applied outright because of the importance of the interests involved; these activities are dealt with instead in separate chapters of the FTA. For all practical purposes, transportation services are totally excluded from the FTA, for they are covered neither under the investment chapter nor under chapter 14, which deals with services, investment and temporary entry. This exclusion was to be expected: transportation industries can be characterized as a very sensitive sector for both countries. Indeed, their exclusion was strongly demanded by, inter alia, the U.S. shipping industry, which feared that granting national treatment to Canada would mean the end of the protectionist regime it enjoys under the Jones Act.⁹⁹

By contrast, the exclusion of cultural industries was a *sine qua non* for Canada. The scope of this exclusion is defined in the FTA, whose definition is generally consistent with the meaning given to the "cultural identity/national heritage" exception in the ICA (phrases not included in the ICA are marked below by italics):

[C]ultural industry means an enterprise engaged in any of the following activities:

- a) the publication, distribution, or sale of books, magazines, periodicals, or newspapers in print or machine readable form *but not including the sole activity of printing or typesetting any of the foregoing,*
- b) the production, distribution, sale or exhibition of film or video recordings,
- c) the production, distribution, sale or exhibition of audio or video music recordings,
- d) the publication, distribution, or sale of music in print or machine readable form, or
- e) *radio communication in which the transmissions are intended for direct reception by the general public, and all radio, television and cable television broadcasting undertakings and all satellite programming and broadcast network services.*¹⁰⁰

Cultural industries will therefore still be subject to ICA review in accordance with the policies adopted by the cabinet. For instance, in the book-publishing industry, the Government will review indirect acquisitions case

⁹⁸ *Id.*, Art. 1601, para. 3.

⁹⁹ 46 U.S.C. §883 (1982). Numerous representations by the shipping industry opposing any change in the U.S. maritime policy were made to Congress. See SENATE COMM. ON FINANCE, 100TH CONG., 1ST SESS., DATA AND MATERIALS RELATED TO UNITED STATES-CANADA FREE TRADE NEGOTIATIONS 74-198 (Comm. Print 1987).

¹⁰⁰ FTA, *supra* note 2, Art. 2012.

by case and they "will generally be allowed provided that the acquisition would not significantly lessen effective competition by Canadians in any segment of the Canadian market for books," and provided that "the applicant undertakes to divest control to Canadians within a reasonable period of time (2 years) at a fair market price."¹⁰¹ With regard to new businesses and direct acquisitions,

[t]he government will look with favour on proposals to establish new businesses or to acquire directly existing businesses, whether Canadian or foreign controlled . . . provided the investment is through a joint venture with Canadian control. For direct acquisition of foreign-controlled business, allowances will be possible if the divestiture of control to Canadians occurs within a reasonable period of time (two years), at fair market price.¹⁰²

In this respect, however, Canada has undertaken a special obligation under the FTA: if divestiture to Canadians is required within 2 years of the acquisition, Canada will offer to purchase the business from the U.S. investor at fair market value, as determined by an independent assessor.¹⁰³

Canada has also adopted policies for the film industry: the Government has clearly stated that takeovers of Canadian-controlled distribution businesses will not be allowed, that new distribution businesses will be allowed only for activities related to proprietary products (products for which the investor owns the world rights or is the principal investor), and that takeovers of foreign-controlled businesses will be allowed only if the investor undertakes to reinvest earnings in Canada in accordance with national and cultural policies.¹⁰⁴

Another consequence of the exclusion of cultural industries is that either party could adopt provisions in the future that would increase discrimination against the other party's investors; in that case, however, the Agreement provides that the party that has been discriminated against reserves its right to retaliate and may adopt "measures of equivalent commercial effect."¹⁰⁵ This system of exemption and retaliation sounds more like "a deferral of a decision regarding an appropriate dispute settlement [mechanism] in this politically sensitive area."¹⁰⁶ Retaliation by the United States could take the form of presidential action under section 301 of the Trade Act of 1974, which is permitted when foreign regulations place an unreasonable burden on the United States.

CHANGES IN THE INVESTMENT CANADA ACT

In the eyes of most analysts, the most important part of the investment provisions of the FTA is the one that deals with the ICA. Although the ICA,

¹⁰¹ Address by Marcel Masse, Minister of Communications, at the announcement of the new policy regarding foreign investment in Canadian publishing, Baie-Comeau, Quebec (July 6, 1985).

¹⁰² *Id.*

¹⁰³ FTA, *supra* note 2, Art. 1607, para. 4.

¹⁰⁴ Address by Flora MacDonald, Minister of Communications, to the Canadian Film and Television Association, Toronto (May 5, 1988).

¹⁰⁵ FTA, *supra* note 2, Art. 2005, para. 2.

¹⁰⁶ Atkey, *supra* note 4, at 36.

like any existing measure, is grandfathered and its current nature as a foreign investment review mechanism retained, some changes have been made in it. First and foremost is the modification of the thresholds for review of foreign investments. Under the FTA, the appropriate threshold for review of a direct acquisition of control of a Canadian business will be raised over a period of 3 years, from the present level of Can. \$5 million to Can. \$150 million, in constant 1992 dollars.¹⁰⁷ Moreover, the review of indirect acquisitions will be phased out over 3 years, the thresholds in question progressively rising, in the meantime, from the present level of Can. \$50 million to Can. \$500 million.¹⁰⁸ The indirect acquisition of control is defined by the FTA as acquisition of control of a foreign corporation with a Canadian subsidiary, provided the total value of the assets of the Canadian business(es) acquired represents less than 50 percent of the aggregate value of all the assets acquired by the entire transaction (essentially the definition under the ICA).¹⁰⁹

These new thresholds will apply not only to direct or indirect acquisitions of Canadian businesses by U.S. investors, but also to the acquisition of a Canadian business controlled by an American investor by a purchaser from a third country.¹¹⁰ This "right of exit" granted to the United States leads to the rather peculiar result that an American investor selling his Canadian business finds himself in a better position, in terms of regulatory approval, than a Canadian in the same circumstances.

The ICA is also modified in another significant way: its guidelines and regulations will be amended so as to conform to the prohibition of minimum domestic ownership and performance requirements set out in Article 1602, paragraphs 2 and 3.¹¹¹ The application of this provision, however, could raise a significant problem of interpretation in the context of the telecommunications industry. In 1987 Minister of Communications Flora MacDonald announced a policy limiting foreign ownership in interprovincial and international telecommunications carriers to 20 percent, which was supposed to be followed up shortly by specific legislation.¹¹² Such legislation has still not been enacted. What, therefore, is the status of this policy?

Under Article 1607, all existing measures are grandfathered and, as mentioned earlier, "measure" includes any published policy. Yet, except as provided in paragraph 4 of Annex 1607.3, the guidelines and regulations of the ICA are to be amended so as to put an end to minimum domestic ownership requirements. Consequently, one could maintain that the policy announced by Minister MacDonald falls under the ICA and is thus not applicable to American investors, for it is not safeguarded by paragraph 4 of Annex 1607.3. However, as a contrary argument, I would point out that the policy was announced not as part of the administration of the ICA, but as part of a

¹⁰⁷ FTA, *supra* note 2, Art. 1607, para. 3, and Ann. 1607.3.

¹⁰⁸ *Id.*, Art. 1607, para. 3, and Ann. 1607.3. ¹⁰⁹ *Id.*, Ann. 1607.3, para. 5.

¹¹⁰ *Id.*, para. 2(b).

¹¹¹ *Id.*, para. 3.

¹¹² Address by Minister MacDonald on the policy framework for telecommunications in Canada (July 22, 1987).

general legislative reform; it was clearly stated that this limit on foreign ownership would be enacted through specific legislation, not as a simple policy statement changeable at the Government's will and discretion. Moreover, the Minister's statement neither alluded to Investment Canada nor made any distinction among new investments and direct and indirect acquisitions; these concepts are so essential to the application of the ICA that, if the policy was intended to be applied only within the framework of Investment Canada, they would doubtless have been mentioned. Nevertheless, the ambiguity remains, for the statement speaks of "Canadian ownership guidelines . . . effective from the time of th[e] announcement."¹¹³ Since the 20 percent ownership limit has not been passed in an act of Parliament, how can it be effective from the time of its announcement, if not as part of the guidelines of Investment Canada?

By contrast, there is no doubt about the status of the policies in the energy sector. The oil and gas and uranium-mining industries remain subject to the published policies of Investment Canada, notwithstanding the aforementioned modifications in the ICA.¹¹⁴ The Canadian policy limits foreign ownership of uranium to 49 percent. Nonresident ownership may exceed 49 percent if it is proven that the business is Canadian controlled, or if it is clear that no Canadian partners can be found.¹¹⁵ The policy for oil and gas is more detailed:

disallowance of the sale of a healthy Canadian-controlled business with assets of at least Can. \$5 million;

possibility of approval of the acquisition of a Canadian-controlled business if it is in clear financial difficulty, if it is of net benefit to Canada, and depending on a discussion of undertakings related to equity, investment and employment; and

usual approval of the direct and indirect acquisition of a foreign-controlled business, provided the investor agrees to conditions related to Canadian ownership and investment spending.¹¹⁶

The exclusion of the oil and gas and uranium-mining industries also means that the present thresholds of Can. \$5/50 million continue to apply to those industries, and minimum domestic ownership and performance requirements can still be demanded by Investment Canada.

¹¹³ *Id.*

¹¹⁴ FTA, *supra* note 2, Ann. 1607.3, para. 4. For the sake of clarity, Canada undertook to set out its policies in these areas in a letter to the United States prior to the entry into force of the Agreement.

¹¹⁵ Letter from Michael Wilson to James Baker III (May 12, 1988); FTA, *supra* note 2, pt. A. This policy was first announced in an address by Gerald Merrithew, Minister of State for Energy and Mines, on foreign ownership in the uranium-mining sector (Dec. 23, 1987).

¹¹⁶ Letter from Wilson to Baker, *supra* note 115. This policy was previously stated in two addresses by Marcel Masse, Minister of Energy, Mines and Resources, one to the American Stock Exchange, Seventh Annual Oil and Gas Symposium, in Toronto (Nov. 6, 1986), and one to the American Bar Association, in New York (June 4, 1987).

PERFORMANCE REQUIREMENTS

Article 1603 of the FTA constitutes another exception to the prospective application of chapter 16 on direct investment, and it modifies the ICA by taking a "direct swipe at some of the most notorious demands for undertakings made under FIRA [and the ICA]." ¹¹⁷ This provision provides that trade-related performance requirements may not be imposed on an investor of the other country, either as a term or condition for permitting an investment or in connection with the regulation of the conduct or operation of a business. "Performance requirements" under the scope of this prohibition are those requiring the export of a given level of goods or services; the substitution of local goods or services for imported goods or services; local sourcing of goods or services; or the achievement of a given level of domestic content. ¹¹⁸

Additionally, the FTA prohibits such performance requirements from being imposed on an investor from a third country if the observance of the requirement by such an investor could have a significant impact on trade between the two parties. This provision has been described as "a logical, if not necessarily obvious, extension of the United States policy argument against performance requirements." ¹¹⁹ What this provision means in practice, however, is unclear: if it is to have some actual effect, it must be on trade between the two parties in the products involved. Yet the language used seems to refer more to trade as a whole between Canada and the United States, and it is difficult to imagine a case where a performance requirement affecting a particular product could have significant impact on a trading relationship valued at more than Can. \$170 billion a year.

Since this list of prohibited performance requirements is exhaustive, Investment Canada can still negotiate undertakings related, for example, to local employment, research and development expenditures, technology transfer and world product mandates. The legality of the latter, however, could be challenged, as the demand for a world product mandate could be seen as a circumvention of the prohibition of minimum export levels.

An important qualification to the treatment of performance requirements is that the prohibition of Article 1603 does not apply when governmental procurement or subsidies are involved. This provision is a clear departure from the U.S.-Israel Free Trade Agreement, in which undertakings as to local sourcing of goods and services are prohibited even if imposed as a condition for governmental incentives. ¹²⁰

Finally, a word on an alleged problem of interpretation that was raised by a few commentators with regard to the trade-related performance requirements agreed to by American investors under FIRA or the ICA: does the grandfathering of all existing measures under Article 1607 extend to those contractual undertakings? It is believed that those undertakings are indeed still enforceable and that the remedies for ensuring compliance by the for-

¹¹⁷ Atkey, *supra* note 4, at 31.

¹¹⁸ FTA, *supra* note 2, Art. 1603, para. 1. ¹¹⁹ Nelson, *supra* note 96, at 60.

¹²⁰ Free Trade Area Agreement, *supra* note 37, Art. 13.

eign investor granted by sections 39, 40, and 45 of the ICA can still be resorted to by the Minister. First, measure is defined as including any "requirement,"¹²¹ which could encompass performance requirements. The decisive argument, however, is believed to lie in Article 1603 itself, for its paragraph 3 states that a party will impose performance requirements or minimum Canadian ownership levels in contravention of the FTA if it enforces any undertakings or commitments *given to that party after the date of entry into force of the FTA*. Therefore, the prohibitions set out in paragraph 2 of Article 1602 and Article 1603 do not apply to undertakings given to Investment Canada *before* the entry into force of the FTA. Ultimately, the question may be academic, since the American investor could complain to Investment Canada of being put at a disadvantage vis-à-vis other investors; the Canadian Government has traditionally followed a policy of selective enforcement and has often been receptive to demands for renegotiation.¹²²

MISCELLANEOUS PROVISIONS

Competition Policy

Antitrust laws are completely omitted from the scope of the FTA. In a notable exception, specific mention is made of monopolies. Either party may maintain existing, or designate new, monopolies in any relevant market. The designation of a new monopoly must be preceded by notification to, as well as consultations with, the other party if requested. The monopoly must not engage in discriminatory practices against firms of the other country, and the government establishing the monopoly must endeavor to minimize any possible adverse impact on firms of the other country.¹²³

Dispute Settlement

Although the dispute settlement mechanism for disagreements related to the application of chapter 16 will be the arbitration or panel procedure set up in chapter 18 of the FTA, this mechanism will not apply to disputes related to decisions made by Investment Canada following review of an investment.¹²⁴ This exception was essential to the efficient application of the ICA, for it leaves the minister in charge with the discretionary authority necessary to assess the "net benefit to Canada" test in future acquisitions of Canadian businesses.

The only aspects of the dispute settlement mechanism that pertain specifically to investment are that the parties undertake to make every attempt to name panelists who are experienced in international investment, and that investment disputes should be dealt with by giving due consideration to the internationally recognized rules of commercial arbitration.¹²⁵

¹²¹ FTA, *supra* note 2, Arts. 1611 and 201.

¹²² Atkey, *supra* note 4, at 38; Baker, *Taking the Fear out of FIRA: Legal Considerations for Investing in Canada*, in REGULATION OF FDI, *supra* note 6, at 105, 127.

¹²³ FTA, *supra* note 2, Art. 2010.

¹²⁴ *Id.*, Art. 1608, para. 4.

¹²⁵ *Id.*

Expropriation and Transfer of Profits

Direct or indirect expropriation or nationalization of investments of the other party is allowed under the FTA, provided it is for a public purpose, and done in accordance with due process of the law, on a nondiscriminatory basis, and upon payment of prompt, adequate and effective compensation at fair market value.¹²⁶ This rule is essentially the "U.S.-preferred international law standard."¹²⁷ The FTA also provides for the free transfer of profits, subject, however, to laws of general application on such matters as bankruptcy, taxes, satisfaction of judgments, reporting of currency transfers and criminal offenses.¹²⁸

Monitoring

Each party may still require any investor to submit routine information on its investment, although the objective of any such procedure must be limited to statistical or informational purposes and the information must remain confidential if its disclosure would prejudice the investor's competitive position.¹²⁹ In practice, this means that the information thus acquired should be disclosed only in the aggregate, blended with data from other investors.

Taxation and Subsidies

Subsidies and new taxation measures are excluded from the national treatment principle, provided they do not constitute a means of arbitrary or unjustifiable discrimination between investors of the two countries or a disguised restriction on the benefits conferred by chapter 16.¹³⁰ However, this exclusion is subject to Article 2011, which deals with claims of nullification or impairment of benefits granted under the FTA.

IV. A CANADIAN PERSPECTIVE

It's more than a trade agreement, it's the Sale of Canada Act . . . We have conceded our ability to control investments in Canadian business.¹³¹

Mr. Mulroney, I just happen to believe you've sold us out!¹³²

The November 1988 election in Canada dealt with one issue, and one issue only: the Free Trade Agreement with the United States. The campaign saw such fear-mongering by the opponents of the deal that the preceding statements of John Turner, then the leader of the Opposition in Parliament,

¹²⁶ FTA, *supra* note 2, Art. 1605.

¹²⁷ J. SCHOTT, *supra* note 45, at 26; *see also* International Investment Policy Statement, *supra* note 30; Nelson, *supra* note 96, at 61; *Treaty*, *supra* note 84, Art. III.

¹²⁸ FTA, *supra* note 2, Art. 1606.

¹²⁹ *Id.*, Art. 1604.

¹³⁰ *Id.*, Art. 1609.

¹³¹ Burns, *Canada's Liberals Battle the Trade Pact*, N.Y. Times, Aug. 7, 1988, §5, at 3 (quoting John Turner, leader of the Liberal Party).

¹³² John Turner, to Prime Minister Mulroney, during the electoral debate in English.

appear moderate in comparison.¹³³ Among the prime questions debated during the campaign was the investment chapter of the FTA; it was condemned not only as a unilateral concession by Canada of its ability to control investment, but also as a total surrender of sovereignty. During the campaign, a television advertisement showed the Canada-U.S. border being physically erased on a map by the FTA, and a U.S. flag raised over Canadian territory!

Was there really, to use the expression of Ed Broadbent, the leader of the New Democratic Party, "a total sell-out of Canadian interests"?¹³⁴ In this section, I propose to analyze in a more rational way the implications of the FTA regarding the regulation of cross-border direct investment between the two countries. First, I will demonstrate that the Canadian foreign investment review mechanism has not been altered in any significant way and that, to a considerable extent, Canada can still regulate U.S. investment in the Canadian economy. I will then consider what the investment provisions of the FTA mean for Canadian investment in the United States. At the outset of the negotiations, investment was seen as an area where Canada would have to make concessions in exchange for American undertakings in other areas. It now appears that the investment chapter of the FTA is a good deal for Canada, standing alone. This conclusion will flow from our analysis of the impact of the FTA on American regulation of Canadian direct investment, the importance of Canadian investment in the United States and the present climate for FDI in the United States.

CANADA'S CONTROL OF U.S. DIRECT INVESTMENT

In examining Canada's ability to control U.S. direct investment, one should point out at the outset that, since foreign ownership of the Canadian economy has been constantly decreasing for the past 20 years, the regulation of FDI is no longer a matter of prime concern for Canada.¹³⁵ Since 1970, the overall foreign control of Canadian industry has fallen from 36 to 26 per-

¹³³ The proceedings of the Standing Committee of the House of Commons on External Affairs and International Trade gave a public stage to a few simplistic and exaggerated emotional statements dealing with the question of investment. See, e.g., MINUTES, 1986-87, *supra* note 60, No. 31, at 32 ("the agreement has yielded Canada's right to control investment"; Bill Lesich, M.P. and member of the committee); No. 38, at 8 ("we are not open for business . . . we are clearly up for sale"; Mel Hurtig, President of Hurtig Publishers); No. 49, at 52 ("almost all remaining screening of U.S. investment is to be dropped"; Dixon Bailey, Saskatchewan Pro-Canada Network); No. 50, at 21 ("it is the conquest of Canada" because there is no more screening of new investments, and the prohibition of performance requirements "effectively bars public control over the economic life of this country"; David Orchard, Citizens Concerned about Free Trade).

¹³⁴ 1986-87 CAN. PARL. DEB., H.C., 33d Parl., 2d Sess. 9640.

¹³⁵ Finlayson, *Canadian International Economic Policy: Context, Issues and a Review of Some Recent Literature*, in CANADA AND THE INTERNATIONAL POLITICAL/ECONOMIC ENVIRONMENT 9, 71-72 (D. Stairs & G. Winham eds. 1985) [hereinafter POLITICAL/ECONOMIC ENVIRONMENT]; Rugman, *Multinationals and the Free Trade Agreement*, in TRADE-OFFS ON FREE TRADE 4, 7 (M. Gold & D. Leyton-Brown eds. 1988).

cent.¹³⁶ For present purposes, the numbers to look at are those for U.S. ownership, for we are examining Canada's ability to control FDI vis-à-vis the United States only. In 1985 the figure for overall U.S. control of all nonfinancial Canadian corporations was estimated at 21 percent, far below the level of the 1960s and 1970s.¹³⁷

This figure, while interesting, does not bring us closer to the objective of this discussion: to determine whether, assuming a policy choice is made to that effect, Canada can still significantly control and limit inward flows of U.S. direct investment. To make that determination, I turn to the actual impact of the changes wrought in the ICA by the FTA—first, in and of themselves, and then, in the larger context of the remaining tools and means Canada can use to regulate foreign investment.

Changes in the Investment Canada Act

When one considers the changes in Canada's ICA, it is difficult, as Professor Alan Rugman said, "to understand how the retention of a formal screening process can be interpreted as a sell-out of Canadian sovereignty."¹³⁸ That interpretation is alone belied by the fact that Canada was able to retain its Foreign Investment Review Agency in spite of strong U.S. demands that it be dismantled altogether. In addition, the changes in that agency do not significantly affect Canada's ability to control American direct investment in practice.

New investments. Under the FTA, the review of new investments is prohibited. Although it does curtail Canada's sovereignty, this prohibition can hardly be considered a "sellout," since these investments were not subject to review under the ICA either.

Eliminating the review of new investments had also been endorsed by the MacDonald Commission.¹³⁹ Although the commission did not consider FDI in the specific context of a free trade agreement with the United States, it proposed some changes in the ICA that it believed to be in the best interests of Canada. After noting that domestic ownership of Canadian industry had increased substantially over the past 15 years,¹⁴⁰ the commission specifically recommended, inter alia, that new foreign investments no longer be reviewed.¹⁴¹ Moreover, new investments present less of a problem, from a competition policy point of view, than acquisitions of existing businesses, for "greater freedom of access to the Canadian market for foreign investment interests should help to increase the degree of competition in the Canadian economy."¹⁴²

¹³⁶ A. E. SAFARIAN, *THE CANADA-U.S. FREE TRADE AGREEMENT AND FOREIGN DIRECT INVESTMENT* 4 (1988).

¹³⁷ Rugman, *supra* note 135, at 8.

¹³⁸ *Id.* at 6; see also Rugman, *The Free Trade Agreement and the Global Economy*, 53 BUS. Q., No. 1, 1988, at 13, 18.

¹³⁹ See text at note 54 *supra*.

¹⁴⁰ 2 COMMISSION REPORT, *supra* note 54, at 232-35; and 3 *id.* at 430.

¹⁴¹ 2 *id.* at 241; and 3 *id.* at 430.

¹⁴² 2 *id.* at 226.

The main consideration in this regard, however, derives from the fact that the overwhelming majority of U.S. investments in Canada do not involve new businesses but, rather, the acquisition of existing ones; for example, only 6 percent of U.S. investments during the years 1985 and 1986 led to the establishment of new businesses.¹⁴³ Therefore, the key area of importance for investment control by Canada is acquisitions of existing businesses.

Direct acquisitions of existing businesses. The increase in the threshold of review of direct acquisitions from Can. \$5 million to Can. \$150 million appears, *prima facie*, to be more significant. Detailed analysis, however, shows otherwise.

First, the MacDonald Commission, in its specific remarks on foreign investment, had already recommended an increase to Can. \$50 million, because it would help "focus scarce enforcement resources on the larger and more critical take-overs."¹⁴⁴

Second, and more important, this increase in the threshold for review will not have a significant impact in practice. To substantiate this affirmation, some scholars have pointed out that Investment Canada has never refused an application. If this statistic is significant as such, one must not forget that it does not reveal the whole picture: in practice, an application that will be rejected is withdrawn before a final decision by the agency, as happened with the proposed British Gas acquisition of Bow Valley. Moreover, the published policies in certain sectors preempt, from the outset before any proposal is submitted, any acquisition that is prohibited or would be considerably hindered by the application of those policies. In addition, the very presence of the review mechanism inhibits some viable investments from being contemplated or proposed.

I would rather base my conclusion that the higher threshold is not that meaningful on the fact that the threshold of Can. \$150 million still covers all substantial foreign investments, i.e., the acquisition of the top six hundred Canadian companies, which represent two-thirds of the total assets of the Canadian economy¹⁴⁵ and more than 75 percent of the currently reviewable assets under the ICAI¹⁴⁶ In fact, the prime targets for American takeovers are essentially those top companies; for example, in 1988 the United States invested U.S. \$6.7 billion in acquiring existing businesses in Canada, but the number of such acquisitions was only 17, which amounts to an average of more than U.S. \$400 million per acquisition, much more than the new threshold required for triggering governmental review.¹⁴⁷ Moreover, to these top six hundred Canadian companies still subject to review, one must

¹⁴³ 1986-87 CAN. PARL. DEB., H.C., 33d Parl., 2d Sess. 6200 and 6290 (statements of Lloyd Axworthy).

¹⁴⁴ 2 COMMISSION REPORT, *supra* note 54, at 241; and 3 *id.* at 430.

¹⁴⁵ A. E. SAFARIAN, *supra* note 136, at 3; GOUVERNEMENT DU CANADA, ACCORD DE LIBRE-ÉCHANGE ENTRE LE CANADA ET LES ÉTATS-UNIS: VUE D'ENSEMBLE 32 (1987); MINUTES, *supra* note 60, No. 31, 1986-87, at 32 (statement of Ambassador Gordon Ritchie, Canadian deputy chief negotiator).

¹⁴⁶ Rugman, *supra* note 135, at 9; Rugman, *supra* note 138, at 17.

¹⁴⁷ U.S. Concerns Spend More on Cross-Border Purchases, Wall St. J., June 30, 1989.

add all the businesses involved in the transport, cultural, communications, energy and financial services industries; these key sectors of the Canadian economy are all excluded from the higher threshold.

Finally, it is through investment in these top six hundred Canadian businesses or investment in the excluded sectors of the Canadian economy that the allegedly negative consequences of foreign ownership can manifest themselves to any appreciable degree. Therefore, most U.S. investments are still subject to review, and the underlying rationale for foreign investment review is upheld as well.

Indirect acquisitions of existing businesses. The rationale for foreign investment review is tenuous, at best, as regards indirect acquisitions. True, the phasing out of the review of indirect acquisitions can be regretted, for it was in those cases that commitments regarding employment, research and development, and other matters were more easily negotiated. In conversation with Wall Street lawyers, I learned that in those cases the Canadian part of the larger acquisition was incidental and not important enough to be worth jeopardizing, or even just delaying, the whole transaction; thus, commitments from the investor could be easily extracted by Investment Canada. Nevertheless, the rationale for investment review remains the most tenuous in this context; control flows from one foreigner to another and there is no incidence on Canadian ownership as such. Indeed, it was this feature of the review process that brought so much discredit abroad to Canada's investment policy.

The potential impact of the phasing out of the review of indirect acquisitions is considerably reduced when one considers the actual practice of the review agencies (FIRA and Investment Canada). Such review assumed considerable importance and was used to particular effect mostly in two sectors of the Canadian economy, energy and culture.¹⁴⁸ As seen previously, these sectors are excluded from the changes in the ICA and indirect acquisitions of businesses in these areas will still be subject to review.

Performance requirements. The prohibition of performance requirements and minimum equity ownership will also affect the review of U.S. direct investments. These requirements have been such an integral part of Canada's investment review policy that the government of Ontario, one of the principal opponents to ratification of the FTA, criticized the investment provisions more for the prohibition of performance requirements than for the higher review thresholds:

Canada would no longer be able to request best efforts to source domestically or other measures to encourage foreign investors to contribute to Canadian industrial development. . . . There is evidence to suggest that Canadian and foreign-controlled companies behave differently with respect to research and development expenditures, the extent of local sourcing and export orientation. The investment provisions of the Free Trade Agreement represent a significant departure from past Ca-

¹⁴⁸ A. E. SAFARIAN, *supra* note 136, at 3.

nadian policies aimed at ensuring that direct foreign investment is in the best interests of Canada.¹⁴⁹

The importance of extracting performance requirements and other undertakings from the investor flows from the fact that the suspicious attitude of Canada toward foreign investment really results from concerns about foreign-controlled behavior in different fields: research and development, local sourcing, local management training, export markets. A review agency's purpose, as the then Canadian Ambassador to the United States, Allan Gotlieb, said, is "to determine whether a proposed investment is likely to be of significant benefit to Canada—that is to say . . . [w]ill the investment improve business competition? Will it provide greater and better employment? Will it increase research and development in Canada?"¹⁵⁰ Indeed, these assertions that subsidiaries and domestically owned corporations behave differently "are indicative of the forces that underlie foreign investment review legislation in Canada."¹⁵¹

Nevertheless, it was to be expected that performance requirements would be given up by Canada in negotiating the FTA. They have been a constant source of irritation between the two parties because the U.S. Government and all segments of the U.S. economy consider them to be a "serious trade and investment distorting practice."¹⁵² Canada was thus quite willing, at the outset of the negotiations, to put them on the table.

In so doing, however, Canada by no means gave up everything, as maintained by the government of Ontario. First, besides the exclusion of minimum equity ownership, only trade-related investment measures are prohibited; Canada may still negotiate research and development commitments, technology transfer requirements, world product mandates and employment levels. All of these are significant variables that Investment Canada may want to control and commitments regarding them from prospective investors can have considerable impact. Indeed, several firms have reported that world product mandating has become a key criterion in assessing net benefit to Canada.¹⁵³

Additional evidence that Article 1603 is not a total Canadian surrender to U.S. demands lies in the fact that, of the four measures prohibited, mandatory local sourcing of goods and services had been found to violate Article III(4) of the GATT because it afforded protection to domestic industry,¹⁵⁴

¹⁴⁹ Lavelle, Barrows & Traficante, *The Ontario Government's Perspective on the Canada-U.S. Free Trade Agreement*, 53 BUS. Q., No. 1, 1988, at 12.

¹⁵⁰ Gotlieb, *The Legal Aspects of International Investment: The Canada-U.S. Experience*, 76 ASIL PROC. 47, 51 (1982).

¹⁵¹ Dewhirst, *Canada's Foreign Investment Policies*, in PROCEEDINGS OF THE FIRST ANNUAL WORKSHOP ON U.S.-CANADIAN RELATIONS 52, 52-54 (R. M. Stern ed. 1982).

¹⁵² Bale, *supra* note 15, at 179; see also Stern, *supra* note 44, at 32 and 44.

¹⁵³ Croobell, *The Future of U.S. Direct Investment in Canada*, in REGULATION OF FDI, *supra* note 6, at 165, 175 n.21.

¹⁵⁴ GATT Report, *supra* note 47, at 47-88; see also Grover, *supra* note 7, at 2-4; A. E. SAFARIAN, *supra* note 136, at 4; P. WONNACOTT, *THE UNITED STATES AND CANADA: THE QUEST FOR FREE TRADE* 125 (1987). Note that the panel found that export undertakings were not covered under GATT.

and had already been abandoned by Investment Canada.¹⁵⁵ The legality of requirements of import substitution was also in contention and they, too, had been challenged under the GATT.¹⁵⁶

Excluded sectors. If one wants accurately to assess the impact of the FTA on Canada's ability to regulate U.S. direct investment, one must keep in mind that a significant part of the Canadian economy is excluded from the application of chapter 16, and even from the FTA as a whole. In fact, all the sectors in which Canadian ownership had been deemed so important that a case-by-case approach was found inadequate, and for which clear policies had been adopted and published by the federal Government, were shielded from the changes brought about by the FTA. In 1985, in discussing alternatives to an overall administrative review mechanism for FDI, the Conference Board of Canada pointed out that "there is considerable appeal in the notion of restricting foreign investment review to a designated list of 'sensitive industries' The definition of a sensitive sector has varied over the years, but today, the list would clearly include industries such as transportation, banking, telecommunications, publishing, broadcasting and energy."¹⁵⁷

I am not even speaking here of an alternative to an overall foreign investment review mechanism. Yet all the sectors that the Conference Board identified as sensitive, and that it believed should remain subject to FDI control if the administrative review agency was abolished, are excluded from the changes in the ICA. The United States agreed to the exclusion of cultural industries despite numerous demands by the film and book industries to put an end to the restrictive policies of Canada in that domain. During the congressional debate on ratification of the FTA, the U.S. General Accounting Office published a report at the request of a California senator opposed to the deal showing that Canada had considerable investments in the United States in the book-publishing and cable television industries.¹⁵⁸ The FTA thus leaves in place an asymmetrical situation in which Canada can pursue its cultural policies at home and continue to invest in the United States. Indeed, Telemedia Inc., a large Canadian communications corporation, announced soon after the FTA entered into force that it had just acquired an important New England publishing company.¹⁵⁹

Under Annex 1607.3, the policies of Investment Canada in the uranium and the oil and gas industries were safeguarded, and they will not be affected by the changes in the review process. Canada has maintained quite restrictive policies with regard to foreign control in these industries, even under the Conservative Government of Prime Minister Mulroney. In spite of U.S. efforts to the contrary, Canada will still be able to prevent the sale of a healthy oil firm, to require performance and domestic ownership require-

¹⁵⁵ Rugman, *supra* note 135, at 6.

¹⁵⁶ *Id.* Import substitution was among the practices that the United States raised in its complaint about Canada's administration of FIRA, but the panel did not rule upon it. See note 47 *supra*.

¹⁵⁷ C. BARRETT ET AL., *THE FUTURE OF FOREIGN INVESTMENT IN CANADA* 85 (1985).

¹⁵⁸ PUBLISHERS WEEKLY, May 20, 1988, at 19.

¹⁵⁹ N.Y. Times, Mar. 1, 1989, at C1.



ments for direct and indirect acquisitions in the oil and gas industry, and to limit foreign ownership in the uranium industry.

In the light of all the factors mentioned above, it seems to this author that the changes in the ICA do not have, in and of themselves, such a detrimental impact on Canada's ability to control U.S. direct investment. This conclusion is reinforced when these changes are placed in the correct perspective, i.e., in the broader context of the ability of Canada to regulate, directly or indirectly, the activities of foreign investors within its territory.

Availability of Other Means to Control FDI

It is essential for a proper analysis of the investment provisions of the FTA to remember that Canada's ability to control FDI does not rest solely on the activities of a review agency. The objectives behind the control of FDI can be pursued and promoted through other means, measures and policies that do not necessarily discriminate against foreign investment and do not identify foreign ownership as their specific target. For example, one of the purposes of FDI control is to limit the extent of the foreign presence in the economy. Under the FTA, some tools used to maintain and/or increase Canadian equity ownership can no longer be used, but ownership policies can be pursued otherwise.

Public ownership is one avenue; although not necessarily directed at foreign ownership, it can restrict access to the market by both domestic and foreign firms. Public ownership may encompass a monopoly: under Article 2005 of the FTA, any party may designate a monopoly, subject to the proviso on notification and consultations.¹⁶⁰ Even without the advantage of a monopoly, public ownership can promote Canadian ownership in two different ways: first, indirectly, by exploiting the investor's belief that the market forces may not apply evenly when a publicly owned firm is present (the inherent fear of competing "against what may be favoured public firms"¹⁶¹), which inhibits private firms from entering the market; and second, directly, by preventing the acquisition of Canadian businesses by foreigners—"if it were deemed desirable to reduce the level of foreign ownership and control . . . the government could outbid foreign investors for the assets or subsidize a domestic firm or consortium of domestic firms to make a winning bid."¹⁶²

Nothing in the FTA prevents such a course of action: "in fact, there is no conflict between an FTA and the achievement of any desired level of Canadian ownership and control of any sector."¹⁶³ The FTA actually encourages recourse to public ownership, because of the special regime granted to Crown corporations. Under this regime, which extends not only to those

¹⁶⁰ FTA, *supra* note 2, Art. 2005, paras. 1 and 2; see also text at note 123 *supra*.

¹⁶¹ Safarian, *Government Control of Foreign Business Environment*, in DOMESTIC POLICIES AND THE INTERNATIONAL ECONOMIC ENVIRONMENT 7, 33 (J. Whalley ed. 1985).

¹⁶² Burgess, *Perspectives on Foreign Direct Investment*, in PERSPECTIVES ON A U.S.-CANADIAN FREE TRADE AGREEMENT 191, 208 (R. Stern, P. Trezise & J. Whalley eds. 1987).

¹⁶³ *Id.* at 207-08.

corporations in existence at the time of the Agreement, but—more importantly for our purposes—to those to be created in the future, the eventual resale of the assets acquired could be submitted to conditions of Canadian ownership by the Government. One could even speculate that reducing the level of foreign ownership and control of any sector might be more readily accomplished under the FTA than under previous conditions because it could be financed from the higher real incomes expected to be realized from the FTA.

A second alternative to foreign investment review is to target governmental policies in such a way as to achieve another fundamental objective of the review process, i.e., alleviation of the allegedly negative consequences of foreign ownership:

The issues can be addressed by general tax and expenditure policies, by regulatory bodies addressing all firms, or by research and action on underlying institutional problems.

It is interesting to note that the Gray Report (1972) did not take exception to such an approach. On the contrary, its analysis led to the recommendation that some of the objectives set—for example, to improve net benefits from FDI—could be advanced through changing competition policy, tax policy, tariff policy, research policy and patent policy in ways that advance economic efficiency.¹⁶⁴

Here are a few examples of how these policies can be used.

Long-run profitability of investments in Canada depends on how much capital income is taxed. Therefore, capital formation could be either encouraged or discouraged through tax policy.¹⁶⁵ The only limitation on the use of fiscal policy in the FTA is paragraph 1 of Article 1609, which states that the parties reserve the right to levy any taxes or subsidies, provided they do not involve “arbitrary or unjustifiable discrimination” as to the nationality of the investor. For some, “this appears to allow more leeway than do across-the-board measures.”¹⁶⁶

Minimum export levels, often required under FIRA or the ICA as a way to compensate for the limited export franchises sometimes imposed by parents on their Canadian subsidiaries, are now prohibited by the FTA. World product mandates represent a solution to this problem: the idea is for the subsidiary to specialize in a small number of products and to export a portion of the output to all of the parent’s markets. This policy is already being followed,¹⁶⁷ and it can be encouraged through a system of duty remission schemes, “whereby the subsidiary with a world product mandate is permitted to import required inputs and other products needed to fill out its product line at reduced rates of duty.”¹⁶⁸ Moreover, since Canada has achieved better and

¹⁶⁴ Safarian, *supra* note 161, at 42.

¹⁶⁵ Burgess, *supra* note 162, at 194 n.4.

¹⁶⁶ A. E. SAFARIAN, *supra* note 136, at 6.

¹⁶⁷ Examples of actual cases where Canadian subsidiaries have world product mandates are given in Croobell, *supra* note 153, at 172.

¹⁶⁸ Webb & Zacher, *Canadian Export Trade in a Changing International Environment*, in POLITICAL/ECONOMIC ENVIRONMENT, *supra* note 135, at 85, 130.

more secure access to the U.S. market, world product mandating may even be voluntarily adopted by transnational corporations, for it "may well prove of great value as part of a more general trend towards rationalizing productive facilities along North American lines."¹⁶⁹ The same result can be pursued in a more indirect and general fashion, by adopting a fiscal policy encouraging exports, reinforcing the system of patent protection and using governmental research and development programs to stimulate research and product specialization by units of transnational corporations.

Local sourcing is prohibited by the FTA. However, an increase in domestic content can be achieved through different means, like tariff rebates, as has been done in the past in the automobile industry.¹⁷⁰ The recent modifications in the Canadian intellectual property laws even included a proposal that the right to exclusive use, as well as the period of exclusivity, be contingent on Canadian content.¹⁷¹

Competition policy can also be used to regulate the behavior of foreign investors. The ICA establishes a relationship between investment policy and the Competition Act,¹⁷² the Canadian legislation that deals with antitrust matters: criteria (d) and (f) of the "net benefit" test of the ICA refer to the effect of the investment on competition within Canada, and to its contribution to increasing Canada's ability to compete in world markets. Until recently, no merger approved under FIRA or the ICA had been challenged under the Canadian antitrust laws.¹⁷³ This situation may have reflected "the fact that the Director [of Investigation and Research] works closely with the foreign investment review agency in assessing the 'effect on competition' component of the 'benefit of Canada' test and in designing undertakings to protect against specific risks."¹⁷⁴ The addition of criterion (f), which was not part of the "benefit test" under FIRA, could be interpreted as according priority to the ICA, as it will now be possible "to argue that a proposed merger was beneficial, notwithstanding its increased economic concentration within Canada, if the benefits of size enabled the resulting merged enterprise to better compete in world markets."¹⁷⁵

Two recent cases, however, show that the mandates of the two Acts are very different, and that the proinvestment attitude of Investment Canada may sometimes lead to results detrimental to competition. In 1987 Investment Canada approved the acquisition by Canada Safeway Ltd., a subsidiary of an American supermarket chain, of Woodward's Alberta and British Columbia food stores. Nevertheless, the Director of Investigation and Research required, under the threat of a hearing by the Competition Tribunal on the

¹⁶⁹ 1 COMMISSION REPORT, *supra* note 54, at 243.

¹⁷⁰ P. WONNACOTT, *supra* note 154, at 126. ¹⁷¹ *Id.*

¹⁷² 1986 Can. Stat., ch. 26.

¹⁷³ See Tuomi, *Mergers and Acquisitions in Canada: The Interrelationship between Foreign Ownership and Competition Policy*, 11 CAN. BUS. L.J. 316 (1986).

¹⁷⁴ MacDonald, *Recent Developments in Canadian Competition Law*, 14 INT'L BUS. LAW. 34, 36 (1986). Indeed, the review agency routinely advises the Director of any application. Arnett, *supra* note 25, at 29.

¹⁷⁵ Arnett, *supra* note 25, at 25.

takeover, that Safeway dispose of 12 out of the 23 stores acquired. Safeway agreed.¹⁷⁶ Then, in February 1989, Investment Canada approved the acquisition of Texaco Canada by Imperial Oil Ltd., a subsidiary of Exxon Corp., but the transaction has still not been completed because the Competition Tribunal considers that it will have anticompetitive effects. This finding was arrived at by the Competition Tribunal even though Imperial Oil Ltd. and the Director of Investigation and Research had reached a previous agreement in which Imperial Oil Ltd. committed itself to the divestiture of a substantial portion of its Canadian oil-refining and marketing assets.¹⁷⁷

These two cases are indicative of an increasingly interventionist, if not more independent, application of the competition laws in Canada. Considering the concentrated nature of the Canadian economy,¹⁷⁸ every major investment in more or less any sector could fall under the Competition Act. Of course, the Competition Act cannot be applied in a discriminating fashion against U.S. investors, but it can certainly be used to protect Canada from one of the allegedly negative consequences of FDI, i.e., that oligopolistic or monopolistic foreign-owned firms will work against Canada's interests.¹⁷⁹ Indeed, it was argued in the late seventies that FIRA should be repealed and its important elements integrated into a new competition act.¹⁸⁰

These are only a few examples of policies Canada can develop toward fulfilling the objectives underlying foreign investment review, without incurring the negative consequences of the administrative, discretionary and discriminatory approach characteristic of a review agency. The nondiscriminatory approach was advocated by the MacDonald Commission as an outright alternative to a review agency: "This commission believes that the same tax and regulatory policies applicable to domestic firms should generally govern foreign-controlled firms, except in sectors where cultural or national interests predominate."¹⁸¹

Thus, under the FTA, "Canada more or less retains its present powers to engage in a wide range of industrial policies"¹⁸² and can use "imaginative tax and competition laws rather than discriminatory policies against foreign investment."¹⁸³ The way these elements are manipulated and applied will contribute more to determining the inward flow of direct investment than the investment review process as such: "Under an FTA Canada retains its labor force, natural resource base, public-sector capital, institutional arrangements, exchange rate, tax provisions, and monetary policy. . . . [T]hese

¹⁷⁶ Jappe, *The Canadian Competition Act: A Leap Forward*, 22 INT'L LAW. 1071, 1086 (1988).

¹⁷⁷ Fafan, *Imperial's New Texaco Takeover Proposal Called Anti-Competitive by Dealers, Union, Globe & Mail* (Toronto), Dec. 8, 1989, at B3; *Final Review Set on Texaco Canada Sale to Exxon Unit*, Wall St. J., Feb. 27, 1989, at C17; *Imperial Oil to Sell Certain Assets, Cites Antitrust Concerns*, Wall St. J., June 30, 1989, at C13.

¹⁷⁸ 2 COMMISSION REPORT, *supra* note 54, at 216 ff.

¹⁷⁹ A. E. SAFARIAN, *supra* note 136, at 6.

¹⁸⁰ See Reuber & Wilson, *Merger Policy Proposals: An Evaluation*, in CANADIAN COMPETITION POLICY 260 (J. R. Pritchard et al. eds. 1979).

¹⁸¹ 2 COMMISSION REPORT, *supra* note 54, at 326.

¹⁸² A. E. SAFARIAN, *supra* note 136, at 6.

¹⁸³ Rugman, *supra* note 138, at 17.

basic elements can be combined wisely or foolishly—and how they are combined will be central in determining the climate for investment.”¹⁸⁴

Moreover, this course of action could force Canada to achieve greater cohesion among the various components that make up industrial policy, of which foreign investment policy is itself an integral part. Greater coordination would in turn result in more efficient foreign investment controls, for these have the greatest impact when they are “as consistent as possible with overall industrial policy goals”¹⁸⁵ and “applied within the framework of a well-developed and articulated industrial strategy.”¹⁸⁶

Existing policies geared to foreign-owned firms fail to attack the basic reasons for poor industrial performance, they involve important macroeconomic costs when they do reduce foreign ownership and they invite retaliation. . . . [This] suggests that Canada should be shifting more to general policies designed to improving the performance of all firms Whether it is competition policy, tax policy, expenditure policies such as research support, or foreign trade policies, such generalized policies offer ways of altering the basic market and cost environment in which both foreign-owned and Canadian-owned MNEs operate.¹⁸⁷

If this analysis stopped with the above demonstration that the investment provisions of the FTA have not significantly altered Canada’s ability to control U.S. direct investment, it would be possible to say that Canada’s objective at the outset, i.e., to use investment as a limited bargaining tool to gain U.S. concessions in other areas, was achieved even more successfully than expected. However, I believe it is possible to go further and say, as Professor Alan Rugman argues, that “Canada is the big winner on investment,”¹⁸⁸ not only because of the limited impact of Canada’s concessions in chapter 16, but also because Canada was able to secure an open door for its direct investment in the United States, a valuable achievement in itself.

CANADA’S GAIN: ASSURED INVESTMENT ACCESS TO THE U.S. MARKET

Most of the commentators who have analyzed the investment provisions of the FTA have focused on the concessions Canada granted to U.S. investors. The United States obtained changes in the investment climate in Canada without yielding any actual changes in the legal environment for Canadian investment in the United States. Yet these commentators tend to forget that the FTA has perpetuated a highly asymmetrical situation: the Canadian restrictive policies coexist with the far more liberal regime regulating FDI in the United States. Therein lies the deal for Canada: the U.S. commitment that could well turn out to be the most far-sighted provision of the FTA from the Canadian point of view—secured access to the U.S. investment market.¹⁸⁹

¹⁸⁴ Burgess, *supra* note 162, at 205; *see also* A. E. SAFARIAN, *supra* note 136, at 8; C. BARRETT ET AL., *supra* note 157, at 80.

¹⁸⁵ C. BARRETT ET AL., *supra* note 157, at 72.

¹⁸⁶ *Id.* at 60.

¹⁸⁸ Rugman, *supra* note 138, at 17.

¹⁸⁷ Safarian, *supra* note 161, at 47–48.

¹⁸⁹ Nelson, *supra* note 96, at 49.

As explained in part I above, the main impact of the FTA on FDI in the United States was to freeze existing legislation as of the time the FTA entered into force, and to grant prospective national treatment to Canadian investment in the United States. Consequently, no matter what restrictive policies the United States chooses to espouse in the future concerning FDI, they will generally not apply to Canada. Numerous factors demonstrate that this guaranteed open-door policy of the United States for future years will be of great value to Canada.

First, recently Canadian investment in the United States has vastly increased, which means that Canada has an interest, *per se*, in an open international investment environment. Second, it is important, as a matter of Canadian economic policy, to keep the U.S. door open because Canadian investment in the United States does benefit the Canadian economy. Finally, the value of the American commitment takes on its full meaning when seen in the context of the present climate for FDI in the United States; American public opinion is bound to bring about a legislative response that will be detrimental to foreign investors' interests, just as it has done in the past with trade protectionism.

Importance of Open Access

Canada is a big investor in the United States. It is common wisdom that the United States is the biggest investor in Canada; common wisdom also tells us that Canada is basically U.S. property. However, the numbers seem to tell a different story and show that the bilateral investment relationship between the two countries has undergone profound change in the past 15 years. In 1975 Canada's stock of direct investment in the United States was evaluated at Can. \$5.5 billion, which represented a bit less than 20 percent of the value of the stock of U.S. direct investment in Canada. By 1986, following an average annual rate of increase of Canadian direct investment in the United States of more than 20 percent, compared with only 7 percent for American direct investment in Canada, Canadian investment in the United States, which was valued at Can. \$40 billion, amounted to nearly 60 percent of the value of American investment in Canada.¹⁹⁰

An even more staggering statistic is that Canada, since 1983, has invested more in the United States, in absolute figures, than the United States in

¹⁹⁰ STATISTIQUE CANADA, *BILAN DES INVESTISSEMENTS INTERNATIONAUX DU CANADA* (1985); A. RUGMAN, *OUTWARD BOUND: CANADIAN DIRECT INVESTMENT IN THE UNITED STATES* 4 (1987); Rugman, *supra* note 135, at 9. Note that there is a considerable discrepancy between these numbers and the American figures regarding the stock of Canadian investment in the United States. For example, in 1985 the estimate by Canada of its stock of direct investment in the United States was U.S. \$25 billion, while the corresponding U.S. figure amounts to only U.S. \$16 billion. However, this discrepancy may be due more to different accounting methods than to a dramatically different appreciation of the reality. A. RUGMAN, *supra*, at 59 ff.; *Mixed Signals on Who's Buying Whom*, CAN. BUS., No. 7, 1988, at 11. Others blame the inadequacy of the U.S. system of collection of information. H.R. REP. NO. 1216, *supra* note 33; Ricks, *The Future of Foreign Direct Investment in the United States*, in *REGULATION OF FDI*, *supra* note 6, at 177, 183. Unless otherwise indicated, only Canadian figures will be used below.

Canada.¹⁹¹ For example, according to the U.S. Department of Commerce, in 1988 the United States invested U.S. \$6.7 billion in Canada; Canada's direct investment in the U.S. economy during the same period reached U.S. \$10.4 billion.¹⁹² If the present trend continues, by the early 1990s, Canada will have as much direct investment in the United States as the other way around. This is how the *New York Times* described Canada's aggressive push southward:

American investment has long been strong in Canada. . . . Now Canada . . . is the fourth-largest foreign investor in the United States. For decades Canada worried about becoming the 51st state. Now Tennessee, seeking to attract Canadian investment, advertises itself as the "11th province." Every week brings major new Canadian investment: Robert Campeau's celebrated slugfest to control Federated Department Stores or Conrad Black's quiet accumulation of nearly four dozen newspapers. Toronto's Ken Thomson owns an additional 110 newspapers in the United States. Garth Drabinsky's Cineplex controls 1,500 American movie screens. Olympia & York, run by Toronto's Reichmann brothers, is Manhattan's largest commercial landlord, controlling 25 million square feet of prime office space in the borough—one square foot for every Canadian. Canadian Pacific, Northern Telecom, Bombardier, Seagram, and other Canadian companies control thousands of jobs in both countries. Several American banks, ranging from Chicago's mammoth Harris Bankcorp to the First National Bank of rural Barrington, Ill., are controlled by Canadians. Canadian jewelers, druggists, clothing designers and outlets, cable television operators and insurance companies have successfully marched south. . . . Canadian developers, in league with Canada's small fraternity of national banks, rebuilt much of several American downtowns. . . . Often Canadian money quietly bankrolls American takeovers.¹⁹³

These numbers alone should convince one that Canada has as great a stake in keeping access to the U.S. investment market as the United States does in having a liberal regime in Canada. One might even say that "the Americans are probably more nervous about our companies taking over their industry than vice versa."¹⁹⁴ However, it has been pointed out that this considerable increase in Canadian investment in the United States was a response to protectionist feelings; now that the FTA has reduced the importance of the problem, the reasoning goes, Canadian investment should be kept within Canada's borders, so as to stimulate domestic economic development. "To date, the Canadian government has not put policies in place to stem outflows of investment, despite complaints from organized labour, the New Democratic Party and other groups that Canadian jobs are being exported because of investment outflows."¹⁹⁵

¹⁹¹ MINUTES, *supra* note 60, No. 30, 1986–87, at 23 (statement of Pat Carney); and *id.*, No. 48, 1986–87, at 35 (statement of the Vice Premier of Saskatchewan, Eric Bernston).

¹⁹² *Foreign Investment in '88 Rose to Record \$65 Billion*, Wall St. J., May 31, 1989, at B10 (U.S. figures) [hereinafter *Foreign Investment in '88*].

¹⁹³ Malcolm, *U.S.-Canadian Trade Outpacing the Treaty*, N.Y. Times, July 18, 1988, at D1, D5.

¹⁹⁴ MINUTES, *supra* note 60, No. 43, 1986–87, at 21 (statement of Thomas Waterlord, CEO of the Mining Association of British Columbia).

¹⁹⁵ Finlayson, *supra* note 135, at 72.

Thus, economic nationalists try to have it both ways: by arguing for the restriction of both inward and outward FDI, they sound more like proponents of economic autarchy, an outdated and even reactionary doctrine, given the global interdependence of the modern world. Agreeing to the principle of national treatment was far from a one-way concession by Canada: the high proportion of Canadian direct investment abroad located in the United States (71 percent, or Can. \$40 billion out of a total of Can. \$56 billion in 1986) means that "we have as much to gain as we have to lose, if the rule fails."¹⁹⁶ In fact, the national interest is more than served by the FTA because Canada does have it both ways: the FTA upholds discriminatory treatment for U.S. investors in Canada but grants secure access to Canadian investors in the United States.

Benefits flowing from Canadian investment in the United States. Just as FDI in Canada brings benefits to the home country of the investor, so does Canadian investment abroad. Canadian outward FDI is an important element in facilitating and promoting the economic development of Canada. Expressed as a proportion of FDI in Canada, Canadian direct investments abroad increased from 25 percent in 1974 to 67 percent in 1986.¹⁹⁷ "This trend toward increasing Canadian investment abroad suggests that our policy towards inward investment must take into account our national interest in securing equitable reciprocal treatment for Canadians investing abroad."¹⁹⁸

First, establishment in the foreign country may be the only way to enter a market in general. Tariff and nontariff barriers may be serious impediments to entering a particular market, as happened with the U.S. market in the 1980s, when the increased trade deficit led to highly protectionist trade policies. Even though the FTA may reduce this motive as regards Canadian investment in the United States, nontariff barriers remain that can prevent Canadian access to a particular market. For example, under the Buy American Act,¹⁹⁹ the Government is generally required to confine its purchases to goods made in the United States. Goods manufactured by foreign-owned businesses, however, qualify as American under the Act. Investment can also be used to escape the application of U.S. trade remedies laws, which have frequently been used in the past by U.S. producers to harass Canadian competitors. If the risk of such abuse has been reduced by the FTA, it has not been totally removed. Therefore, Canadian investment in the United States is a way to circumvent these and other barriers.

Ultimately, the fear of protectionism may be only a minor factor in foreign direct investment abroad;²⁰⁰ "far more important are marketing pressures."²⁰¹ Being present in the market often educates a firm in local tastes

¹⁹⁶ MINUTES, *supra* note 60, No. 37, 1986-87, at 56-57 (statement of R. Lipsey, of the C. D. Howe Institute).

¹⁹⁷ At the end of 1986, Canadian FDI abroad was valued at Can. \$56 billion, compared to Can. \$83 billion for FDI in Canada. Richards, *Tendances récentes dans la position de l'investissement direct au Canada*, L'OBSERVATEUR ÉCONOMIQUE CANADIEN, February 1988, at 27.

¹⁹⁸ 2 COMMISSION REPORT, *supra* note 54, at 234.

¹⁹⁹ 41 U.S.C. §§10a-10d (1982).

²⁰⁰ MINUTES, *supra* note 60, No. 45, 1986-87, at 58 (statement of Prof. Bruce Wilkinson, University of Alberta).

²⁰¹ Druckner, *supra* note 38, at 10.

and specifications, which results in greater opportunities for product differentiation, since it puts the firm in a position "to target specific market niches in different countries."²⁰² Thus, "direct investment often is in markets producing nonhomogeneous goods, such as sophisticated consumer and producer durables for which local specification and design and a reputation for servicing are important selling points."²⁰³

Being close to its customers and having a physical presence in the domestic market may even be the only way a producer can maintain its market share. Otherwise, one loses the intimate knowledge of the intangibles that characterize a particular market. This is exactly what happened in the 1970s to Volkswagen in the United States, where "generally the best way to sell . . . is as an American."²⁰⁴ Volkswagen had tried, without success, to persuade the German unions to permit it to manufacture cars in the United States, but "they were not going to allow 'the exportation of German jobs.' When the American car market changed a few years later, after the first oil crisis, Volkswagen had lost its 'feel' for the market and the 10% of the market that Volkswagen had is now held by the Japanese."²⁰⁵

In addition, the absence of a presence within the market, as such, may become a severe handicap because of the nationalistic behavior of the particular market. This applies especially to the United States: "Les Américains ne vous laisseront pas prendre leur marché si vous ne vous installez pas chez eux."²⁰⁶

Market access through exports may also be made difficult by natural transactional costs. Transportation costs may be so high in comparison to the relative value of the product that foreign investment is the only way to sell in the domestic market. As a matter of fact, a significant proportion of the industries that are currently being subjected to foreign takeovers in the United States are those in which transportation costs make exports from the home market noncompetitive.²⁰⁷ And foreign sales may incur informational or other costs that can be reduced by familiarity with the market and local contact.²⁰⁸

Moreover, even if the FTA presumably removes the need to jump political borders, "the incentives for internationalization remain."²⁰⁹ Operating production facilities in various countries while maintaining an integrated planning system will result in economies of scale.²¹⁰

Internationalization through equity ownership instead of licensing may also enhance the ability of a firm to exploit its competitive advantage.²¹¹ A

²⁰² A. RUGMAN, *supra* note 190, at 13.

²⁰³ Burgess, *supra* note 162, at 204.

²⁰⁴ *The Silent Canadian Presence*, FIN. POST, Jan. 18-24, 1988, at 1.

²⁰⁵ Druckner, *supra* note 38, at 10.

²⁰⁶ A. Ghetler, Secretary-Treasurer of Northwear Fashions, of Montreal, which sells 75% of its output in the United States, quoted in Jenish, *Qui a peur du libre-échange?*, L'ACTUALITÉ, November 1988, at 68, 69.

²⁰⁷ Fierman, *The Selling of America (Cont'd)*, FORTUNE, May 23, 1988, at 54, 55 and 61.

²⁰⁸ A. RUGMAN, *supra* note 190, at 10.

²⁰⁹ *Id.* at 18.

²¹⁰ *Id.* at 13.

²¹¹ C. BARRETT ET AL., *supra* note 157, at 22.

transnational corporation usually possesses a firm-specific advantage; that advantage, typically an intangible, may flow from research and development or any other expertise, such as marketing or managerial skills. Production and marketing through subsidiaries "may protect the knowledge advantage from premature dissipation"²¹² and may well maximize its potential.²¹³

This consideration is especially imperative for Canadian transnational corporations. The firm-specific advantages of most of these firms lie in "exclusive marketing skills, networks of distributors, and long-standing relationships,"²¹⁴ which can be developed and used efficiently only through a physical presence in the U.S. market.

Thus, in the end, investment in the United States is more than a substitute for trade; it is a stimulus to trade. As a Canadian commentator has noted: "measures that liberalize trade will also tend to encourage investment. It is well established empirically that most direct investment takes place between countries that trade large amounts with each other rather than between countries that trade very little."²¹⁵ The postwar era has witnessed the appearance and tremendous growth of the transnational corporation, which has become the prime vehicle for international investment and economic integration. Trade no longer takes place strictly in response to competitive advantage; increasingly, international trade occurs between related parties, especially between international firms and their affiliates,²¹⁶ and nonmarket considerations are very important in determining intracorporate flows.²¹⁷ It has been estimated that "[a]t least one-third of the world trade in manufactured goods may now be intra-company trade."²¹⁸ The prominence of the transnational corporation in international trade is vividly exemplified by the U.S.-Canada trading relationship: intrafirm sales, i.e., sales between affiliated companies of a holding group, have been estimated as constituting nearly 70 percent of all trade in manufactured products between the two countries,²¹⁹ and account for 76 percent of Canada's exports to the United States.²²⁰ Investment thus becomes a vehicle and a stimulus for the home country's exports. One reason cited by Canadian companies for investing in the United States is the very possibility of promoting exports from the Canadian parent through the U.S. subsidiary.²²¹ "We should not be alarmed at such foreign direct investment by Canadian firms. Other nations have been doing this for many years because they have known that it is an excellent way to develop markets for parts and components made in their countries."²²²

In light of these considerations, the Canadian economy as a whole benefits from direct investment in the U.S. market. Moreover, investment in the United States does not imply a transfer of jobs from Canada. After all,

²¹² A. RUGMAN, *supra* note 190, at 18.

²¹³ Safarian, *supra* note 161, at 13-14.

²¹⁴ A. RUGMAN, *supra* note 190, at 18.

²¹⁵ Burgess, *supra* note 162, at 204.

²¹⁶ Stairs & Winham, *Canada and the International Political/Economic Environment: An Introduction*, in *POLITICAL/ECONOMIC ENVIRONMENT*, *supra* note 135, at 1, 4.

²¹⁷ Webb & Zacher, *supra* note 168, at 129.

²¹⁸ Druckner, *supra* note 38, at 10.

²¹⁹ Rugman, *supra* note 138, at 14.

²²⁰ Webb & Zacher, *supra* note 168, at 129.

²²¹ A. RUGMAN, *supra* note 190, at 34.

²²² MINUTES, *supra* note 60, No. 45, 1986-87, at 58 (statement of Prof. Bruce Wilkinson).

investment in the U.S. market is principally motivated by the desire for access to the U.S. market. Employment by U.S. subsidiaries does not amount to jobs lost to Canadian workers, "since the jobs would not have existed had the Canadian multinationals not secured access to the U.S. market."²²³

Actually, jobs are also created at home. Experience shows that Canadian direct investment abroad "does not typically involve the production of standardized products but rather the design and processing of Canadian-made components and raw materials into finished and semi-finished products suitable for local market conditions,"²²⁴ which, as mentioned earlier, translates into increased exports, hence increased employment for Canadian workers. The benefits flowing from this increase in exports can even be seen from a macroeconomic point of view: as a result of the activities of Canadian multinationals operating there, Canada enjoys a trade surplus with the United States that has averaged over Can. \$3 billion annually for the past decade.²²⁵ The home country also benefits "through the repatriation of profits and the expansion of head office employment."²²⁶

Indeed, even admitting, for the sake of argument, that jobs are lost because of the manufacturing activities in the host country, there is at least no *net* loss, as employment opportunities in that case merely shift from blue-collar workers, employed by the export industry, to professionals and highly skilled manpower:

Investing abroad in a multinational affiliate primarily generates employment for educated people in the home country And as one developed country after another shifts its supply from semi-skilled or unskilled machine operators to people with long years of education, investment abroad is the way in which it can both optimize its human resources and create the jobs a developed country needs.²²⁷

Outward investment also brings benefits to Canada by helping firms spread their firm-specific advantages, whether they lie in research and development or in managerial or marketing skills, over a larger base than the domestic market, reducing the average cost and increasing their return.²²⁸ In the end, "a great deal of wealth is created and sizable amounts of it are returned,"²²⁹ which in turn will contribute to Canada's welfare by increasing demand for labor.

Finally, in the long run, investment in the U.S. market may help bring about diversification of Canada's trade patterns. The U.S. market is the most accessible one for a Canadian firm; but as firms experience the phenomenon of internationalization, develop new products and learn to adapt to a different market from their home base, they will mature and "may eventually

²²³ A. RUGMAN, *supra* note 190, at 46.

²²⁴ Burgess, *The Impact of Trade Liberalization on Foreign Direct Investment Flows*, in CANADA-UNITED STATES FREE TRADE, *supra* note 62, at 193, 198.

²²⁵ Rugman, *supra* note 138, at 14; see also Nelson, *supra* note 96, at 51.

²²⁶ MINUTES, *supra* note 60, No. 45, 1986-87, at 58 (statement of Prof. Bruce Wilkinson).

²²⁷ Druckner, *supra* note 38, at 10.

²²⁸ A. RUGMAN, *supra* note 190, at 43.

²²⁹ *Id.* at 45.

become vehicles for the global diversification that Canadian trade policy has so far failed to secure."²³⁰ "What we should have been shocked at is not that Canadians were investing in the U.S., but that it had taken them so long to realize that they are capable of doing this and it is good business for the home country for them to do so."²³¹

These, then, are the benefits that flow to the Canadian economy from its direct investment abroad. When one knows that more than 70 percent of Canada's outward investment is in the United States, that the export industry accounts for more than 30 percent of Canada's gross national product, and that of those exports the United States absorbs more than 75 percent, one can appreciate the potentially high costs and negative consequences that any restrictive U.S. policy on foreign direct investment could have. Protection from this eventuality is exactly what was achieved through the FTA; the United States is now committed to an open-door policy for Canadian investment.

Present Climate in the United States regarding FDI

Before the Americans get upset at the growing amount of foreign ownership in their country and before they go through the trauma we went through in the 1970s about foreign ownership, we have from the deal national treatment of our investment. . . . We are becoming a major exporter of capital and we have a growing stake in the rest of the world's capital. The national treatment rules of international capital are worth having.²³²

Indeed, the future looks gloomy for foreign investment in the United States, since American public opinion and Congress are increasingly aware of the considerable rise in FDI in the country.²³³ The public now sees FDI as a threat to the very nature of American society and numerous demands to control, limit and even prohibit FDI have been made.²³⁴ Knowing that pub-

²³⁰ *Id.*

²³¹ MINUTES, *supra* note 60, No. 45, 1986-87, at 58 (statement of Prof. Bruce Wilkinson).

²³² *Id.*, No. 37, 1986-87, at 56 (statement of R. Lipsey).

²³³ Before 1973, FDI in the United States had been, for all practical matters, latent and its value was estimated at only U.S. \$14 billion. In 1988 total FDI in the United States was evaluated at U.S. \$327 billion, nearly five times the amount at the beginning of the decade. The annual increase in the value of FDI in the United States was 12% in 1985, 13% in 1986, 19% in 1987, and 24% in 1988, which shows that the increase is far from leveling off. For a review and analysis of the evolution of the stocks of FDI in the United States since 1973, see, *inter alia*, Bale, *supra* note 33, at 33; Ricks, *supra* note 190, at 180; Vila, *supra* note 33, at 5; Note, *International Investment Survey Act: The High Cost of Knowledge*, 14 LAW & POL'Y INT'L BUS. 481 (1981-82); Wessel, *U.S. Position as World's Largest Debtor Worsened by Almost \$100 Billion in 1987*, Wall St. J., July 15, 1988, at 4; *Foreign Direct Investment in U.S. Grew 13% in 1986*, Wall St. J., June 25, 1987, at 60; Work, *Have They Checked the Deed to Mount Rushmore Lately?*, U.S. NEWS & WORLD REP., Aug. 8, 1988, at 48; Gumbel & Sease, *Unwelcome Mat: Foreign Firms Build More U.S. Factories, Vex American Rivals*, Wall St. J., July 24, 1987, at 1; *Foreign Investment in '88*, *supra* note 192; Fierman, *supra* note 207, at 55-56.

²³⁴ In a general survey poll, a majority of Americans were found to be in favor of laws restricting FDI in U.S. business and real estate; more important, 43% of the respondents said they would be likelier to vote for a candidate that would promote legislation discouraging

lic opinion can be a strong influence on the political process in the United States, Congress is bound to react. In fact, it has already done so by adopting, in 1988, the Exon-Florio provision granting presidential authority to halt a foreign takeover if the investment affects the national security of the United States. Since the United States has always defined the scope of its national security interests broadly, one can appreciate that the provision gives the Executive wide discretion and carries considerable potential for the regulation and restriction of foreign investment.²³⁵ The provision has already had some impact,²³⁶ and it is slowly transforming the Pentagon, as one official said, into "the ultimate takeover defense."²³⁷

Congress's desire to regulate foreign investment led to the presentation of another bill, the Foreign Ownership Disclosure Act of 1989 (FODA).²³⁸

foreign ownership of U.S. firms. Mossberg, *Most Americans Favor Laws to Limit Foreign Investments in U.S., Poll Finds*, Wall St. J., Mar. 8, 1988, at 60. This desire to limit foreign investment is catching on even with leaders of the business and academic community. See, e.g., Fierman, *supra* note 207; Gumbel & Sease, *supra* note 233, at 6; Butler, *U.S. Policy Toward Foreign Investment in the United States and Recent Developments Affecting Foreign Investment*, in *FDI IN THE U.S.*, *supra* note 33, at 3, 3; M. & S. TOLCHIN, *BUYING INTO AMERICA: HOW FOREIGN MONEY IS CHANGING THE FACE OF OUR NATION* (1988); C. PRESTOWITZ, *TRADING PLACES* (1988); Nash, *Impasse Persists on Investment by Foreigners*, N.Y. Times, Apr. 5, 1988, at D2; Malone, *Fear and Xenophobia in Silicon Valley*, Wall St. J., Feb. 23, 1987, at 24.

²³⁵ Indeed, when this measure was first presented, the presidential authority would have applied to any foreign takeover that would have "threatened essential commerce which affects national security." See Langley, *Panel's Measure Lets President Ban Foreign Takeovers*, Wall St. J., June 17, 1987, at 4. However, as a result of a compromise between the administration and Congress, the words "essential commerce" were deleted, but with the understanding that national security would be broadly defined. See Langley, *White House Trade Conferees Reach Accord*, Wall St. J., Mar. 28, 1988, at 3. The sponsor of this provision in the House, Representative James Florio of New Jersey, said that national security would be defined in a broad sense that might include, e.g., oil, machine tools and even tires; Senator Exon of Nebraska, the sponsor of the measure in the Senate, added that a viable national defense cannot exist "if we end up with foreign ownership and control of key defense-related production industries and technologies." Tolchin, *Bill Would Curb Foreign Companies in U.S. Takeovers*, N.Y. Times, Mar. 26, 1988, at 1; see also 134 CONG. REC. H905 (daily ed. Mar. 30, 1988) (statement of Rep. Florio). In a country where defense contracts represent such a large part of government procurement, and where all major companies, in whatever field of activity they operate, can be expected to have some sort of contractual relationship with the Pentagon, this interpretation of the provision would confer very broad discretion on the President.

For the provision, see note 35 *supra*.

²³⁶ For example, in a deal where neither company was U.S. owned, Consolidated Gold Fields PLC was able to persuade the Department of Defense to review the hostile bid made by Minorco, S.A., which led to a revised bid by Minorco to meet U.S. concerns. See Pasztor & Lachica, *Pentagon Is Handed Growing New Defense Role: Policing U.S. Corporate Takeovers From Abroad*, Wall St. J., Mar. 8, 1989, at A16. In another case, the Committee on Foreign Investment in the United States, the interagency committee in charge of making recommendations to the President under the Exon-Florio provision, made a negative finding on a proposed acquisition by a Japanese undertaking of General Ceramics Inc., a U.S. \$30-million-a-year ceramics manufacturer, which led to the complete withdrawal of the offer. See Tolchin, *Agency on Foreign Takeovers Wielding Power*, N.Y. Times, Apr. 24, 1989, at D6.

²³⁷ Quoted by Pasztor & Lachica, *supra* note 236, at A16.

²³⁸ The bill was introduced in the House by Representative Bryant on Jan. 3, 1989. See H.R. 5, 101st Cong., 1st Sess. (1989); 135 CONG. REC. H36 (daily ed. Jan. 3, 1989). It was introduced

FODA is an example of the type of measure Congress could adopt in the near future to restrict FDI, and is proof of Canada's farsightedness in securing unfettered access to the U.S. investment market. FODA purports to set up a far more comprehensive mechanism for the disclosure of foreign investment than the one now in place under the International Investment Survey Act of 1976 (IISA),²³⁹ and would affect all foreign investors with a stake of 5 percent or more in a U.S. business or property whose assets are valued in excess of U.S. \$5 million or whose sales exceed U.S. \$10 million a year. Any such foreign investor would have to register his interest with the Department of Commerce; the information provided would include the identity, nationality and other personal characteristics of the investor, the size of the acquisition and its price, and a description of the property to be acquired. Those with a controlling interest of more than 25 percent in a business with U.S. \$20 million or more in assets or sales would be required to disclose information that directly relates to the enterprise, such as a balance sheet, an income statement and numerous other financial statements, the location of U.S. facilities, and the names, compensation and business dealings of company directors and officers. These disclosure obligations would apply whether the investor purchased the business or started from scratch. Reports would have to be filed yearly, with heavy fines in case of failure. An important point to note is that, contrary to the IISA, FODA, if adopted, would require all information collected to be made available to the public; furthermore, the Department of Commerce would be obliged to facilitate access to the information thus collected.

This bill was originally presented as section 703 of the 1988 Omnibus Trade Bill, and, as such, was approved by the House; but strong opposition by the administration led to its exclusion from the final version of the Omnibus Trade and Competitiveness Act of 1988.²⁴⁰ In the waning days of the

in the Senate by Senator Harkin on Jan. 31, 1989. See S. 289, 101st Cong., 1st Sess. (1989); 135 CONG. REC. S854-56 (daily ed. Jan. 31, 1989).

²³⁹ 22 U.S.C. §§3101, 3101 note, 3103, 3104 (1982). This Act requires the disclosure of direct investments by foreign persons that control 10% or more of a U.S. business; reports filed must identify the foreign investor, specify the location and nature of the investment, and provide certain financial information. The information acquired remains confidential and is disclosed only in the aggregate for statistical and informational purposes. See *House Hearings*, *supra* note 33, at 172 (statement of Michael Butler).

²⁴⁰ On Apr. 18, 1988, to avoid a presidential veto, §703 was completely dropped from the trade bill. 134 CONG. REC. H9582 (daily ed. Oct. 5, 1988) (statement of Rep. John Bryant). For an overview of the heated debate that surrounded this measure, see, e.g., Langley, *Senate Trade Bill Retains Refunds for Sugar Firms*, Wall St. J., July 26, 1987, at 44; *Trade Move in Deadlock*, N.Y. Times, Feb. 17, 1988, at D17; Tolchin, *Opposition Mounting to Disclosure Proposal*, N.Y. Times, Mar. 14, 1988, at D2; Tolchin, *Bill Would Curb Foreign Companies in U.S. Takeovers*, N.Y. Times, Mar. 26, 1988, at 1; Langley & Mossberg, *White House Trade Conferees Reach Accord*, Wall St. J., Mar. 28, 1988, at 3; Roberts, *Reagan Asks for Changes in Congress Trade Bill*, N.Y. Times, Mar. 29, 1988, at D2; Nash, *supra* note 234, at D2; Farnsworth, *Democrats Withdraw Trade Deal*, N.Y. Times, Apr. 15, 1988, at D1; Farnsworth, *Wide Effect Seen in U.S. Trade Fight*, N.Y. Times, Apr. 18, 1988, at D1; Langley, *Foreign Disclosure Is Pushed by Wright Risking Veto of Massive Trade Measure*, Wall St. J., Apr. 18, 1988, at 2; Farnsworth, *Congress Split on Disclosure Rule*, N.Y. Times, Apr. 19, 1988, at D1.

100th Congress, the House adopted the Foreign Ownership Disclosure Act of 1988,²⁴¹ which was essentially a restatement of section 703 of the Omnibus Trade Bill; however, this bill never reached the Senate.²⁴² On January 3, 1989, the measure was again presented to the House as the Foreign Ownership Disclosure Act of 1989. A vote on it was postponed following strong protests by the Bush administration.²⁴³

Not only Congress, but also state legislatures are gearing up for the effort to restrict FDI. When Britain's Beazer PLC launched a bid for Koppers Co., Pennsylvania suspended Shearson Lehman Hutton Inc., an equity partner in the deal, from consideration for state business, which resulted, inter alia, in the cancellation of a U.S. \$150 million bond issue.²⁴⁴ An Ohio law passed in 1988, in an attempt to help Federated Department Stores fight off Robert Campeau's bid, stated that all foreign takeovers would be postponed until state officials could assess their economic impact and approve the transaction.²⁴⁵ This piece of legislation was eventually declared unconstitutional, but other states have tried the same thing; Wisconsin, for instance, rushed a similar law through its legislature in the wake of the bid by Australian brewer Alan Bond for Helleman Brewing Company.²⁴⁶ And all across the United States, states are trying to restrict ownership of real estate by foreigners, especially Japanese.²⁴⁷

It is in this light that the investment provisions of the FTA reveal their worth to Canadian investors. Had Robert Campeau launched his bid after the entry into force of the FTA, the review process set up by the state of Ohio, or by any other state for that matter, would not have applied to him, because of the national treatment principle under Article 1602(1), which binds states and provinces alike. Likewise, state restrictions on ownership of real estate will not prevent Olympia & York and other Canadian real estate developers from pursuing their aggressive push below the 45th parallel.

Indeed, FODA, if it is eventually adopted by Congress, might not even apply in its present form to Canadian investors. Such a measure, because it would be imposed only on foreign investors and not on Americans, violates the national treatment principle and does not fall under the scope of Article 1604 of the FTA on monitoring, which provides:

1. Each Party may require an investor of the other Party who makes or has made an investment in its territory to submit to it routine infor-

²⁴¹ H.R. 5410, 100th Cong., 2d Sess. (1988).

²⁴² Legislative Summary, 44 CONG. Q. 3138 (1988).

²⁴³ Oreskes, *House Speaker Delays Vote on Foreign Investor Rules*, N.Y. Times, Feb. 17, 1989, at D16; Birnbaum, *Wright Angers Some With Call for Vote On More Disclosure by Foreign Investors*, Wall St. J., Feb. 17, 1989, at A16.

²⁴⁴ Langley, *Protectionist Attitudes Grow Stronger in Spite of Healthy Economy*, Wall St. J., May 16, 1988, at 1.

²⁴⁵ Johnson, *More U.S. Companies Are Selling Operations to Foreign Concerns*, Wall St. J., Feb. 24, 1988, at 1, 12; Langley, *supra* note 244.

²⁴⁶ Langley, *supra* note 244.

²⁴⁷ *Id.*; 134 CONG. REC. H2254 ff. (daily ed. Apr. 20, 1988) (statement of Rep. Bentley); and *id.* at H3916 (June 2) (statement of Rep. Stark); Matthews, *East Buys West: Foreign Ownership on Rise*, Wash. Post, May 28, 1988.

mation respecting such investment solely for informational and statistical purposes. The Party shall protect such business information that is confidential from disclosure that would prejudice the investor's competitive position.

2. Nothing in paragraph 1 shall preclude a Party from otherwise obtaining or disclosing information in connection with the non-discriminatory and good faith application of its laws.

First of all, it cannot be said that the information to be filed under FODA is "routine" or that it is solely for "informational and statistical purposes." For example, furnishing financial statements, as required by the proposed bill, goes beyond what is considered to be "routine," and the information itself is so itemized and detailed that it cannot be solely for statistical or informational purposes. In addition, the possibility of extensive disclosure of the information acquired under the Act violates the requirement of confidentiality under Article 1604; and paragraph 2 of the article is not applicable, for the disclosure system is inherently discriminatory.

Could the measure fall under the "prudential, fiduciary, health and safety, and consumer protection" exception to the principle of national treatment in paragraph 8 of Article 1602? Numerous arguments support a negative answer to this question. At the outset, one could argue that the exception does not apply, since a specific provision already deals with the extent to which monitoring provisions may contravene the principle of national treatment. Even assuming that paragraph 8 is applicable, one could point out that this provision demands that the measures upheld be of "equivalent effect" to the treatment granted to domestic investors; this requirement is not met, since there is no similar system for U.S. investors. The disclosure provision under the U.S. securities laws could not be deemed to place domestic investors in an equivalent position because they apply only to publicly traded companies, while FODA covers all U.S. businesses, whether publicly traded or not.

Finally, national security cannot be invoked. National security is not mentioned in paragraph 8 of Article 1602, but it is defined in Article 2003. Even though a national security exception is usually an agreed-upon and automatic feature of any investment or trade treaty, Canada persuaded the United States to accept a much more restrictive definition of what constitutes national security than is customary. Article 2003, entitled "National Security," provides:

Subject to Articles 907 and 1308 [irrelevant for our purposes], nothing in this Agreement shall be construed:

(a) to require any Party to furnish or allow access to any information the disclosure of which it considers contrary to its essential security interests;

(b) to prevent any Party from taking any action which it considers necessary for the protection of its essential security interests,

(i) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods, materials and services as is

carried on directly or indirectly for the purpose of supplying a military establishment,

(ii) taken in time of war or other emergency in international relations, or

(iii) relating to the implementation of national policies or international agreements relating to the non-proliferation of nuclear weapons or other nuclear explosive devices; or

(c) to prevent any Party from taking action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

Obviously, by no stretch of the imagination could the disclosure system fit into this very restrictive definition of national security. It might be said in response that this definition does not seem exhaustive; however, since the measure already violates a provision of the FTA, it can be saved only by an explicit exception, and Article 2003 does not provide one.

In fact, Article 2003 could be invoked by Canada if the Exon-Florio provision is applied to a Canadian investor. This measure applies to Canada because it is encompassed by the grandfather clause, having been adopted before the entry into force of the FTA.²⁴⁸ However, the FTA could affect a determination by the U.S. administration that a takeover by a Canadian company threatens national security. Considering the restrictive definition of national security under Article 2003 in concert with the nullification and impairment clause of Article 2011, one could argue that an appreciably broader definition of national security used to prohibit the takeover would "cause[] nullification or impairment" of "a benefit reasonably expected to accrue" to Canada under the FTA. Moreover, a recently proposed change in the Exon-Florio provision that seeks to decrease the evidentiary threshold necessary for a finding of threat to U.S. national security would not be applicable to an acquisition by a Canadian investor because the change is not safeguarded by the grandfather clause.²⁴⁹

It thus seems clear that the investment provisions of the FTA do have great significance for Canadian investment in the United States. The fact that their impact on legislation restricting FDI in the United States can already be identified constitutes the best evidence possible that Canada, far from having surrendered unilaterally to American demands with regard to investment, was able to secure some advantages of its own. Moreover, Canada's secured access to the U.S. investment market is no mere speculative gain, but real protection against a probable reversal by the United States of its traditionally liberal policy toward inward foreign direct investment, protection that could well prove to be the most farsighted achievement of Canada during the FTA negotiations.

CONCLUSION

In the introduction, I pointed out that the overall objective of this discussion would be to demonstrate that the investment provisions of the Canada-

²⁴⁸ FTA, *supra* note 2, Arts. 1607 and 201.

²⁴⁹ S. 1379, §127, 101st Cong., 1st Sess. (1990).

United States Free Trade Agreement were to the advantage of both parties and that Canada, contrary to common wisdom, was in fact a winner in that regard. In the ensuing pages, I explained that in exchange for certain modifications in its own regime of regulation of FDI, which will not unduly hamper its control, Canada was able to secure an advantage that could soon be of tremendous importance: secure investment access to the United States. As the U.S. trade deficit keeps growing, and as foreign money enters all sectors of the U.S. economy, Congress will be subjected to increasing pressure from public opinion to limit FDI. Indeed, such pressure has already been exerted, even though the foreign-controlled assets in the economy represent only 2 percent of the total corporate assets on U.S. soil!

That Canada can be seen as the victor on FDI, when it has traditionally considered itself the victim of American imperialism, says a lot, not only about the FTA itself, but also about the way Canada has matured recently. Shaking off the attitude of the 1970s, when economic nationalism was the order of the day and anti-Americanism fashionable, Canada seems to have completely reoriented its foreign economic policy. The FTA is built, in all its provisions, on one fundamental concept, the principle of national treatment; this shows that Canada no longer sees itself as the eternal victim that must be protected from the detrimental impact of U.S. policies, but more as a partner that can profit from partaking in the largest bilateral economic relationship in the world.

Indeed, Canada has shown, during the debate on the FTA, that it has matured as a nation and may have finally found its own identity. Beyond any economic benefit it will eventually bring, the FTA may thus have a profound impact on the future of Canada as a whole and may signal the beginning of a new—and much hoped-for—era for the entire Canadian society.

U.S. LAW ENFORCEMENT ABROAD: THE CONSTITUTION AND INTERNATIONAL LAW, CONTINUED

By Andreas F. Lowenfeld*

In the October 1989 issue of this *Journal*, I wrote a brief essay concerning the U.S. Constitution and law enforcement abroad.¹ I called attention to the case of Fawaz Yunis, a Lebanese national who was arrested on the high seas by U.S. officers and brought to the United States for trial on charges of aircraft hijacking and hostage taking. Within the space constraints of the *Journal's* issue commemorating two centuries of the Constitution, I was able to discuss only one of the questions illustrated by the *Yunis* case—the question of jurisdiction over crimes committed by aliens abroad. My conclusion, in brief, was that a general reliance on passive personality as the basis for jurisdiction—i.e., the U.S. nationality of victims of the offense—was of doubtful validity under the Constitution, but that jurisdiction based on legislation enacted in implementation of international conventions widely adhered to probably was constitutional.² The *Yunis* case raises two other issues that I believe are of continuing interest: (1) to what extent do the constitutional and statutory restraints on U.S. law enforcement officers apply abroad? and (2) does the so-called *Ker-Frisbie* rule, according to which a court in the United States may try a person brought before it for a crime over which it has jurisdiction—regardless of how the accused came to be before the court—remain valid and persuasive in the last decade of the 20th century? I want to explore these questions here, bearing in mind that the two questions are related to each other, as well as to the question of jurisdiction to prescribe discussed in the earlier article. Before embarking on the analysis, I want to set forth again in somewhat greater length the saga of Fawaz Yunis, as well as that of two other persons recently seized abroad by authority of the United States for trial in the United States.

I. THREE ARRESTS

A. *Fawaz Yunis*

Mr. Yunis was a citizen of Lebanon. On the morning of June 11, 1985, he and four associates, armed with assault rifles and explosive grenades,

* Of the Board of Editors. I want to acknowledge the encouragement, as well as research assistance, of Arif Ali, New York University School of Law '90. I also want to thank Ms. Carol Alpert and Ms. Elizabeth Evans of the New York University Law Library for help in adding modern technology to my ancient research techniques. My colleague Professor Anthony G. Amsterdam was of enormous assistance to me in connection with the discussion of the Fourth Amendment, and of criminal procedure generally.

¹ Lowenfeld, *U.S. Law Enforcement Abroad: The Constitution and International Law*, 83 AJIL 880 (1989).

² *Id.* at 884–90. I exclude from this conclusion jurisdiction based solely on the presence of the accused in the United States where that presence, as in the *Yunis* case, was involuntary.

stormed a Boeing B-727 aircraft of Royal Jordanian Airlines (Alia), which was preparing to take off from Beirut International Airport on a flight to Amman. The hijackers demanded to be flown to Tunis, where a summit conference of the Arab League was in progress. However, the Tunisian authorities twice refused the plane permission to land, and eventually the plane returned to Beirut, having briefly stopped to refuel in Larnaca, Cyprus, and Palermo, Sicily. Ultimately, some 30 hours after the assault began, the hijackers wired the plane with explosives and permitted the passengers and crew to leave the plane; Yunis then read a statement for radio and television on the need to expel the Palestinians from Lebanon. Shortly after Yunis finished the statement, his associates fired their machine guns at the plane, and it exploded. Yunis then left the airport with his confederates without being arrested. Some 50-60 passengers on Flight 402 had boarded the aircraft before the attack began. All survived, including three United States citizens.

Yunis was not, of course, the most important terrorist on the U.S. wanted list. He had not murdered a wheelchair-ridden American tourist aboard the *Achille Lauro*,³ nor, apparently, had he been involved in the hijacking, a few days after his own attack in Beirut, of TWA Flight 847, in which a U.S. Navy diver was killed. But Yunis apparently was viewed by U.S. law enforcement authorities as an important player in the world of Middle East terrorism, and he was living openly in Beirut—in other words, he was a “viable target.”⁴ Yunis was charged with hostage taking, aircraft hijacking and destruction of an aircraft.⁵ Some time in the fall of 1986, the White House Sub-Group on Terrorism decided to try to apprehend Fawaz Yunis and bring him to the United States for trial, preferably without consultation or cooperation with any other state. Not only was Yunis to be brought to the United States, but all legal requirements were to be followed, so that he could be tried before an American court without procedural defects that might taint the prosecution or lead to suppression of evidence.

In the event, Yunis was lured from Lebanon to Cyprus by a friend of his named Jamal Hamdan, then living in Cyprus, who had been enlisted as an informer by the U.S. Drug Enforcement Administration and later by the CIA. On several trips to Cyprus, where he stayed in Hamdan's apartment in Larnaca, Yunis talked about his various activities, including the hijacking of the Jordanian airliner. All of the conversations between Yunis and his friend were recorded by U.S. agents. Hamdan regularly received funds from his handlers, for the apartment, for night life with Yunis in Larnaca, and eventually for a weekend together at the Sheraton Hotel in Limassol, on the south coast of the island. From there, Hamdan told Yunis, they would take a speedboat to a rendezvous with a yacht, where they would meet “Joseph,” a big-time drug dealer who could offer “big money” to the two of them for

³ For a scholarly discussion of that episode, see A. CASSESE, *TERRORISM, POLITICS AND LAW* (1989).

⁴ See *Taking Terrorists*, U.S. NEWS & WORLD REP., Sept. 12, 1988, at 26, 28.

⁵ 18 U.S.C. §§ 1203(b), 32(a) and (b). For a description of these statutes and discussion of U.S. jurisdiction over the offenses in question, see my earlier article, 83 AJIL at 884-92.

carrying out some assignments. Yunis and Hamdan made the trip on the speedboat and linked up with the yacht in international waters. "Joseph," however, turned out to be an Arabic-speaking FBI agent, who, after offering Yunis a beer, kicked his feet out from under him, handcuffed him, and put him in leg irons.

Within an hour Yunis was transferred at a prearranged point from the yacht to a U.S. Navy communications ship, the *Butte*. For four days the *Butte* steamed from the eastern Mediterranean to meet up with the U.S. aircraft carrier *Saratoga*, at sea in international waters near the Balearic Islands in the western Mediterranean.⁶ A helicopter transferred Yunis and his FBI escorts from the *Butte* to the *Saratoga*; within minutes after landing on the deck of the *Saratoga*, Yunis, the FBI agents and a Navy doctor were put aboard a Navy S-3 antisubmarine twin-engine jet, which flew nonstop in 13 hours (with two in-flight refuelings) to Andrews Air Force Base just outside Washington, D.C.

In the five days between his seizure aboard the yacht and his arrival at Andrews, Yunis had been knocked to the deck of the yacht, causing both of his wrists to be fractured; strip searched, handcuffed, and shackled with leg irons; kept for four days in a small room aboard the *Butte* without a window or air conditioning; briefly interviewed (with an interpreter) by FBI agents, who advised him that he had all the rights of a U.S. citizen (an interesting point considering arguments to be discussed hereafter⁷); and interrogated in nine sessions over the four days, a written summary of which he signed after making only one minor change.⁸ Once Yunis was in the United States, he was promptly brought before a U.S. magistrate for arraignment.

The arrest of Yunis was carried out pursuant to a warrant issued by a U.S. magistrate, directed to "FBI or any authorized law enforcement official," with the box "district of arrest" left blank; no warrant was requested or issued for any of the investigative activities in Cyprus; and so far as appears, no effort was made to inform the Government of Cyprus or to solicit its cooperation. Indeed as is evident, elaborate planning enabled most of the operation to be conducted outside the territorial limits of any state.

B. *Juan Ramón Matta-Ballesteros*

Mr. Matta was a citizen of Honduras, and, until the events here described, was a resident of the capital of that country, Tegucigalpa.⁹ He was under

⁶ The *Saratoga* was the same ship from which U.S. fighter planes had taken off to divert to Sicily the Egypt Air flight carrying the men who had attacked the Italian cruise ship *Achille Lauro* in October 1985. Eventually, one of the terrorists involved in that assault was sentenced by Italian courts to 30 years in prison for the murder of the American tourist in a wheelchair, and several of the other terrorists received lesser terms. The alleged ringleader, known as Abu Abbas, was, however, released by Italian authorities and is believed to be still at large.

⁷ See section II *infra*.

⁸ See *United States v. Yunis*, 681 F.Supp. 909, 914-15 (D.D.C. 1988).

⁹ The spelling of his name varies, and he is also known as Mata (or Matta) del Pozo. For present purposes, I shall refer to him as Matta. The uncontroverted facts are taken from *Matta-Ballesteros ex rel. Stolar v. Henman*, 697 F.Supp. 1040, 1041-42 (S.D. Ill. 1988). The

indictment on various narcotics charges in California and Arizona, as well as on a charge of having escaped from a federal prison camp at Elgin Air Force Base in 1971. Early in the morning of April 5, 1988, Matta received a frantic call from his wife that his house was being surrounded by Honduran soldiers. He returned home and identified himself to the Honduran troops, whereupon a Toyota pickup truck pulled up and two men arrested him, put a black hood over his head, and pushed him onto the floor in the back seat of the pickup truck. Matta claimed later that a large number of United States agents were present at his house; the U.S. Government said it was only four members of the U.S. Marshals Service. Matta claimed that he was seized by American agents in civilian clothing; the United States asserted that the arrest was made by Honduran officers.¹⁰ It is uncontroverted that a U.S. Deputy Marshal drove the pickup truck to an air base an hour and a half away. There Matta was put aboard an airplane, flown to the United States, and taken to the U.S. penitentiary at Marion, Illinois. Matta alleged that he was severely beaten and burned by electric stun guns during the trip from his house to the air base, and again during the flight from the air base to the United States, all the time with the hood on his head. The U.S. Government denied these allegations.

Thus, the undisputed facts are that Matta was taken from his home by force, put aboard an aircraft, and transported in custody to the United States without resort to procedures under the extradition treaty between Honduras and the United States.¹¹ The controverted facts concern the degree of involvement by U.S. agents in the original arrest—bystanders, collaborators, joint venturers, or principals—and the degree of brutality, if any, to which Matta was subjected during the ride on the truck and the airplane.¹² Though the arrest of Matta apparently provoked anti-American riots and an attack on the American Embassy in Tegucigalpa,¹³ the Government of Hon-

controverted facts here set forth are drawn from that case, *id.* at 1042-43, as well as briefs in litigation in federal courts in Illinois, Florida and California. See also *Matta-Ballesteros ex rel. Stolar v. Henman*, 697 F.Supp. 1036 (S.D. Ill. 1988), *aff'd*, 896 F.2d 255 (7th Cir. 1990); *United States v. Matta-Ballesteros*, 700 F.Supp. 528 (N.D. Fla. 1988).

¹⁰ Assistant Secretary of State Elliott Abrams, expressing the U.S. administration's satisfaction at having caught Matta, said, "This could not have happened without General Regalado [the chief of the Honduran armed forces] and it was a brave thing to do." N.Y. Times, Apr. 6, 1988, at A1, cols. 2-3, and 8, cols. 1-6.

¹¹ Treaty for the Extradition of Fugitives from Justice, Jan. 15, 1909, Honduras-United States, 37 Stat. 1616, TS No. 569, 8 Bevans 892; plus Supplemental Extradition Convention, Feb. 21, 1927, 45 Stat. 2489, TS No. 761, 8 Bevans 903, 85 LNTS 491.

¹² The decision of the district court in Illinois denying habeas corpus quotes the report of the medical examination given to Matta upon his arrival at the Marion Penitentiary. 697 F.Supp. at 1042. The prisoner evidently showed signs of a struggle, with numerous abrasions and black-and-blue marks. Whether the evidence rises to the level of torture is hard to tell.

¹³ See N.Y. Times, Apr. 8, 1988, at A1, col. 1. According to the dispatches in the *Times*, the U.S. Consulate in Tegucigalpa was set afire and at least four people were killed and two wounded during a riot sparked by the expulsion of Matta. Two hundred antiriot officers and fire fighters moved in to quell violence among a crowd of 1,500 protesters, shouting "Matta sí, gringos no." The demonstration was described as the worst anti-American riot ever in Hon-

duras made no protest, and raised no assertion that its sovereignty had been violated. Whether the arrest of Matta had been coordinated at political level between the Governments of the United States and Honduras, or reflected merely an agreement among local officers, is unclear.¹⁴

C. *René Martín Verdugo-Urquidez*

Mr. Verdugo was a citizen of Mexico and a resident of Mexicali, Mexico, although he possessed a U.S. alien registration "green card."¹⁵ He, too, was sought on a variety of charges involving the import of narcotics into the United States, and he was also suspected of complicity in the murder in Mexico of an American Drug Enforcement Administration officer in February 1985. On the basis of a tip from an informant that Verdugo planned to transport several tons of marijuana into the United States, the DEA had filed a complaint against him in August 1985, and the U.S. District Court for the Southern District of California had issued a warrant for his arrest. Though Verdugo apparently traveled frequently to the United States, U.S. law enforcement officers were unable to locate him, and sought the assistance of Mexican officers. The Mexican officers advised the U.S. Marshals Service that Verdugo could be arrested by Mexican officers in Mexico, provided there was an outstanding U.S. warrant for his arrest. The U.S. officers showed their Mexican colleagues the arrest warrant. On January 24, 1986, while driving his car in Baja California, Mexico, Verdugo was stopped by six Mexican police officers, ordered from his car, handcuffed, and placed in the back seat of the Mexican officers' unmarked car. The Mexican officers forced Verdugo to lie face down on the car seat, and drove for two hours to the Mexican-American border. When they arrived at the border, they removed Verdugo from their car and walked him to where the U.S. marshals waited. The marshals placed Verdugo under arrest and delivered him to the custody of DEA agents in Calexico, California, who in turn delivered him to a prison in San Diego.

Verdugo's counsel challenged the jurisdiction of the district court on the ground that Verdugo's presence had been unlawfully obtained. When the

duras, traditionally a close ally of the United States. For more on the riots, which U.S. Attorney General Meese said were inspired by the international drug cartel, but diplomats in Honduras said reflected resentment of strong-arm tactics by the U.S. Government, see *N.Y. Times*, Apr. 10, 1988, §1, at 16, cols. 1-6; *id.*, Apr. 11, 1988, at A11, cols. 1-6; *id.*, Apr. 13, 1988, at A10, cols. 1-6. For more on Matta himself, see *Seized Honduran: Drug Baron or Robin Hood?*, *id.*, Apr. 16, 1988, at 4, cols. 1-6.

¹⁴ Compare RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §432(2) (1987) [hereafter RESTATEMENT]:

A state's law enforcement officers may exercise their functions in the territory of another state only with the consent of the other state, given by duly authorized officials of that state.

¹⁵ The facts here set forth are taken from the decision in *United States v. Verdugo-Urquidez*, 856 F.2d 1214, 1215-17 (9th Cir. 1988), *cert. granted*, 109 S.Ct. 1741 (1989), based on findings by Judge Lawrence Irving in the district court.

court rejected that argument on the basis of the *Ker-Frisbie* rule,¹⁶ however, Verdugo did not pursue an appeal on this issue. What the litigation in the *Verdugo-Urquidez* case focused on, and what the Supreme Court reviewed, concerned the events following the arrest.

On January 25, 1986, the day after Verdugo had been arrested, a team of four DEA agents drove from Calexico (U.S.) to Mexicali (Mexico), where they went with the local comandante of the Mexican Federal Judicial Police (MFJP); together the DEA and MFJP officers searched Verdugo's residence in Mexicali, as well as his beach house in San Felipe, on the Gulf of California, two hours away by car. The search produced a tally sheet that, apparently, disclosed amounts and dates of sales of marijuana smuggled into the United States by Verdugo.

Verdugo's counsel moved to suppress the evidence seized from his residence in Mexico, on the ground that it was the fruit of an unlawful search—i.e., a search of the accused's residence without a warrant, in violation of the Fourth Amendment to the United States Constitution. The district court found (1) that the search had been a "joint venture" between American and Mexican law enforcement officers; (2) that if the Fourth Amendment applied, the search without a warrant was unlawful; and (3) that the Fourth Amendment did apply, although the search took place outside the United States and Verdugo was an alien.¹⁷ It was the third point that the U.S. Government challenged most vigorously, and that is most relevant to the questions raised in this article.

II. THE LAWFULNESS OF THE ARRESTS: AGAIN BEYOND TERRITORIALITY

In the course of the hearings on what became 18 U.S.C. §2331, entitled "Terrorist acts abroad against United States nationals,"¹⁸ the sponsor of that section, Senator Arlen Specter, engaged in an interesting debate with the Legal Adviser of the State Department, Abraham Sofaer.¹⁹ Senator Specter had argued, in his own testimony, in favor of "self-help" by the United States when terrorist offenders were known to be in states, such as Lebanon, that could not or would not arrest, let alone punish or extradite, known terrorists.²⁰ Sofaer found this troubling:

In general, I would say that seizure by U.S. officials of terrorist suspects abroad might constitute a serious breach of the territorial sovereignty of a foreign state, and could violate local kidnaping laws Such acts might also be viewed by foreign states as violations of international law and incompatible with the bilateral extradition treaties that we have in force with those nations.²¹

¹⁶ See section III *infra*.

¹⁷ Memorandum Decision and Order, No. 86-0107-JLI-CRIM (S.D. Cal. Feb. 5, 1987) (J. Lawrence Irving, J.).

¹⁸ Discussed and quoted in part in my earlier article, 83 AJIL at 890-91.

¹⁹ *Bill to Authorize Prosecution of Terrorists and Others Who Attack U.S. Government Employees and Citizens Abroad: Hearing Before the Subcomm. on Security and Terrorism of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. (1985) [hereafter *Senate Terrorism Hearing*].

²⁰ *Id.* at 31.

²¹ *Id.* at 63.

The Legal Adviser pointed out that it was not only impotent states such as Lebanon that declined to extradite persons wanted by other states as terrorists. "Can you imagine," he asked the Senator, "us going into Paris and seizing some person we regard as a terrorist . . . ? [H]ow would we feel if some foreign nation—let us take the United Kingdom²²—came over here and seized some terrorist suspect in New York City, or Boston, or Philadelphia, . . . because we refused through the normal channels of international, legal communications, to extradite that individual?"²³

Senator Specter kept pushing, and in particular kept up his contention that under the Supreme Court's holding in *Ker v. Illinois*²⁴ a century ago, it is lawful to take custody of a person anywhere in the world and bring him to the United States for trial. To his credit, Sofaer said in his prepared statement that it would be wrong to extrapolate from *Ker* and the more recent affirmation of the holding in that case in *Frisbie v. Collins*²⁵ that seizures of persons abroad by United States officials are themselves perfectly legal.²⁶ Finally, as the Senator kept pressing,²⁷ the Legal Adviser yielded a bit:

[O]nly after all the legal channels are exhausted, . . . and only in the kind of case where the interests of the United States have been determined through the proper executive processes at the highest level to require some kind of self-help measure, would that be appropriate in my judgment.²⁸

The *Yunis* case avoided the problem debated by the Senator and the Legal Adviser, by using only guile, and not force on the target until he was well out of the territory or the territorial sea of Cyprus or any other state. In the

²² The reference was to several instances in which U.S. courts had rejected requests to extradite members of the Irish Republican Army sought for murder and assault by Great Britain. See, e.g., *In re Mackin*, Mag. No. 80 Cr. Misc. 1 (S.D.N.Y. 1981); *In re McMullen*, Mag. No. 3-78-1899 MG (N.D. Cal. May 11, 1979); both reprinted in *Extradition Act of 1981: Hearing Before the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 140, 294 (1981); *In re Doherty*, 599 F.Supp. 270 (S.D.N.Y. 1984).

²³ *Senate Terrorism Hearing*, note 19 *supra*, at 63.

²⁴ 119 U.S. 436 (1886). The *Ker* case and the "*Ker-Frisbie*" rule are discussed at p. 460 *infra*.

²⁵ 342 U.S. 519 (1952). The Supreme Court, in an opinion by Justice Black, wrote: "There is nothing in the Constitution that requires a court to permit a guilty person rightfully convicted to escape justice because he was brought to trial against his will." *Id.* at 522. For a discussion of this case, see section III(B) *infra*.

²⁶ *Senate Terrorism Hearing*, *supra* note 19, at 69.

²⁷ *Id.* at 80-81.

²⁸ *Id.* at 81. Senator Specter, in the floor debate on the bill in February 1986, said in perhaps somewhat of an overstatement: "Before the hearing concluded, Judge Sofaer and I had agreed that such measures should be taken as a last resort, with extreme caution as an extraordinary step, being aware of the sensitive nature, and only after a decision at the highest level." 132 CONG. REC. S1384 (daily ed. Feb. 19, 1986).

On January 19, 1986, the *New York Times* had published an article, quoted by Senator Specter, in which Sofaer was reported as saying he would support "seizure" of fugitives in other countries if the chances for success were reasonable. "He acknowledged that such a move would violate international law," the article reported, "but said there were legitimate arguments in favor of 'bending' the rules in extraordinary circumstances." N.Y. Times, Jan. 19, 1986, at A1, col. 4.

Matta and *Verdugo* cases, the problem was also apparently avoided, though as already mentioned, the level and authority of the consent by the territorial sovereign remains in doubt.²⁹ It is evident that acting under authority of the United States on foreign soil contrary to the will of the foreign state is wrong under international law; but silence or even consent by a foreign state cannot make right what is not right, either under the international law of human rights or—the present focus—under the U.S. Constitution.

The correct principle, in my view, is that any action under authority of the United States is subject to the Constitution. If U.S. law enforcement officers act in a foreign state, they must of course observe the laws of the foreign state.³⁰ But neither the high seas nor foreign soil can free a U.S. law enforcement officer from the restraints on official behavior imposed by the United States Constitution.³¹ Not everyone, it turns out, agrees.

One might have thought that the issue had been settled in *Reid v. Covert*,³² a case arising out of the court martial of an American serviceman's wife charged with killing her husband at a U.S. air base in England. Justice Black wrote for the plurality of the Supreme Court:

The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution. When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land.³³

However, Mrs. Covert was an American citizen, and Justice Black's statement emphasizes this fact. The argument persists that the constitutional limitations on governmental actions apply within the United States, regardless of the nationality of the affected persons;³⁴ and apply abroad with regard to U.S. nationals; but do not—or at least not fully—apply to action abroad under authority of the United States with respect to aliens.

In *Yunis* and *Matta*, the U.S. Government conceded or stipulated that the Constitution was applicable, but argued (thus far successfully) that it had not

²⁹ The court of appeals decision in *Verdugo*, 856 F.2d 1214 (9th Cir. 1988), does not discuss the level of the decision to make the arrest, which was carried out entirely by Mexican police, at the request of U.S. officials. The subsequent search was authorized on the American side by the local DEA agents, without either authorization by a judge or magistrate, or approval by the U.S. Department of Justice. *Id.* at 1216 n.2. On the Mexican side, the search seems to have been authorized by the Director General of the Judicial Police (MFJP), but efforts to contact the Attorney General's office were unsuccessful. However, the local representative of the Attorney General's office apparently did give his consent to the search. *See id.* at 1226.

³⁰ *See, e.g.,* RESTATEMENT, *supra* note 14, §433(1)(b).

³¹ Again the *Restatement* is in accord, though with the qualification "generally." *See* §721 and comment *b*; also §722 comment *m* and Reporters' Note 16. As appears in the discussion that follows, however, this view is not universally shared and may, in fact, be in jeopardy.

³² 354 U.S. 1 (1957).

³³ *Id.* at 5–6. Justices Frankfurter and Harlan, in separate concurrences, made substantially similar statements. *Id.* at 56 and 66.

³⁴ Indeed, with respect to illegal or undocumented aliens, see *Plyler v. Doe*, 457 U.S. 202 (1982).

been violated.³⁵ In *Verdugo*, the issue was sharply contested: the majority of the court of appeals held that all of the Bill of Rights, including the Fourth Amendment, is applicable to action by U.S. law enforcement officers, and a strong dissent contended that at least the Fourth Amendment, concerning arrest, search, and seizure, does not protect aliens outside the nation's borders. It is this case that has made its way to the Supreme Court, with the Solicitor General supporting the view of the dissenting judge in the court of appeals.³⁶

To summarize two learned opinions that between them occupy 35 pages in the *Federal Reports*, Judge Thompson for the majority in *Verdugo* held that the Bill of Rights, including the constraints of the Fourth Amendment, attaches to any law enforcement by United States officers, and that once the target of the enforcement action—here a search of his residences—is in the United States (regardless of how he came in), he has all the rights to challenge the conduct of the U.S. officers that a U.S. citizen would have, including resort to the exclusionary rule. Thus, the search of the accused's home without a warrant or "exigent circumstances" is unlawful, even though it took place in Mexico, and the evidence gathered in the search must be suppressed.³⁷

Judge Wallace, in dissent, made an argument that to me was astonishing. Judge Wallace argued that "the people" protected by the Constitution, and in particular, "the people" whose right to be secure in their persons, houses, paper, and effects against unreasonable searches and seizures, and against warrants issued without probable cause, are only citizens of the United States and noncitizens in respect to occurrences within the United States.³⁸ "[S]ome measure of allegiance to the United States," he wrote, "as evidenced by citizenship or residency, is the quid pro quo for receiving the privilege of invoking our Bill of Rights as a check on the extraterritorial actions of United States officials."³⁹ Of course, Judge Wallace conceded, *Verdugo* is entitled to a fair judicial trial, i.e., to the protection of the Fifth and Sixth Amendments. *Verdugo* could not be denied a trial by jury, or the opportunity to retain counsel, or the right to confront witnesses against him. But, the judge argued, *Verdugo*'s brief involuntary presence in this country does not invest him with the protection of the *Fourth Amendment*: "Absent an intention to form bonds with the United States, no constitutional compact can be fairly implied."⁴⁰ "We the people," in other words, who met in Phila-

³⁵ On October 4, 1989, Yunis was sentenced to 30 years in prison. In response to Yunis's plea that he was a Lebanese citizen tricked into leaving his country and then kidnaped, Judge Aubrey E. Robinson, Jr., said, "I'm nothing but a trial judge in one federal court. I don't run the universe, and I have nothing to do with international affairs." *Wash. Post*, Oct. 5, 1989, at A39, cols. 1-3.

³⁶ The Supreme Court's decision in *Verdugo*, which came down after the completion of this article, is discussed in a Coda to the article, pp. 491-93 *infra*.

³⁷ *United States v. Verdugo-Urquidez*, 856 F.2d at 1217-19, 1229-30.

³⁸ The principle that as to conduct in the United States, "the Constitution is not confined to the protection of citizens" had been established with respect to the Fourteenth Amendment more than a century ago in *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886).

³⁹ 856 F.2d at 1236 (Wallace, J., dissenting).

⁴⁰ *Id.* at 1238.

delphia in 1787 "in Order to form a more perfect Union and to secure the Blessings of Liberty to ourselves and our Posterity" do not include Mr. Verdugo, nor presumably Messrs. Yunis or Matta.⁴¹ Not being part of the compact that surrendered some rights to secure others, nonresident alien targets of U.S. law enforcement have no *standing*, no *right* to challenge the actions of the U.S. Government.

Judge Wallace pointed out that the word "people," which he traced to the Preamble to the Constitution, is used in the First, Second, Ninth and Tenth (in addition to the Fourth) Amendments, whereas the Fifth Amendment speaks of "no person" and "any person," and the Sixth Amendment speaks of "the accused."⁴² But clearly the issue runs deeper. It seems doubtful that the drafters of the Bill of Rights meant to distinguish between "people" and "persons"; and there is no evidence that they considered the territorial reach of the guarantees they were proposing, or that they made any effort to distinguish in this respect between one amendment and another.⁴³ The question is whether the Bill of Rights is to be seen as a constraint on all law enforcement by authority of the United States wherever carried out, or merely as a shield for citizens of the United States (plus those whose status is close enough to the intended beneficiaries to be assimilated to them, such as permanent residents). My view, like that of the majority of the court of appeals in *Verdugo*, as well as the court of appeals in *Yunis*⁴⁴ and the majority

⁴¹ U.S. CONST., Preamble. It is perhaps of interest that at one stage of the development of its report on the draft constitution, the Committee of Detail used the phrase "We the People of and the States of New Hampshire, Massachusetts, Rhode Island," etc. Subsequently, the "and" was dropped, but when the Committee of Style took up the phrase it was worried that not all the states would ratify the Constitution, or would ratify it by the time it entered into effect upon approval by nine states. The solution was to eliminate the list of states and simply begin the Preamble: "We, the People of the United States." See M. FARRAND, *THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES* 190-91 (1913). Farrand adds, "what other motives may have been at work, we have no record." For textual confirmation, compare 2 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 565 (text of Preamble as referred to the Committee of Style), with *id.* at 590 (text as reported by the Committee of Style) (M. Farrand ed. 1911).

⁴² 856 F.2d at 1239 (Wallace, J., dissenting). The argument is repeated in the Brief for the United States to the Supreme Court in *United States v. Verdugo-Urquidez*, No. 88-1353, at 25-26.

⁴³ I do not claim to have made a thorough search of the drafting history of the Bill of Rights. But to take one persuasive source, Madison, in introducing the Bill of Rights into the House of Representatives on June 8, 1789, speaks throughout of the liberty of the *people* or the rights of the *people* as if that word were the plural of person. See 1 *ANNALS OF CONGRESS* 424-50 (J. Gales ed. 1834).

The Virginia Declaration of Rights of 1776 also speaks generally of the rights of the people, but section 10, which states that general warrants "are grievous and oppressive" and may fairly be considered an antecedent of the Fourth Amendment, uses the word "person or persons." For detailed history of the amendment and its antecedents, see N. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES*, esp. at 79-105 (1937); J. LANDYNSKI, *SEARCH AND SEIZURE AND THE SUPREME COURT* 19-48 (1966).

⁴⁴ *United States v. Yunis*, 859 F.2d 953, 957 (D.C. Cir. 1988) (stipulation); and expressly in concurring opinion of Judge Mikva, *id.* at 970-71.

of federal appeals courts,⁴⁵ is that in an era when the activities of the United States extend far beyond what the Framers could have contemplated, the correct interpretation is the former, i.e., that the focus of the Bill of Rights is on the actions of the Government, not on the residence or nationality of the beneficiaries.⁴⁶

For the most part the two views of the Bill of Rights overlap; when they do not, as when the Government acts against a nonresident alien abroad, the theory makes a difference. In *Yunis*, the target of the search and seizure was abroad, and thus by Judge Wallace's test there would have been no need to comply with the procedures designed to protect an accused's rights under the Constitution.⁴⁷ In *Verdugo*, one sees the weakness of criteria based on territoriality: is a search of an accused's home to be judged by the location of the home, or by the location of the accused at the time of the search? Whether the subject is conflict of laws, or international law, or constitutional law, answers to such questions should not divert attention from the underlying values.

A little-known corner of American jurisprudence concerns cooperation between U.S. and foreign law enforcement officers. Assuming that United States officials are bound by U.S. constitutional standards, most courts have held that these standards—and particularly the pretrial constraints of the Fourth Amendment—do not apply to the conduct of foreign officials acting in their own countries, unless it can be shown that the foreign officials were acting as agents or joint venturers with the United States or its officers.⁴⁸ The origins of this rule can be traced to the period between *Weeks v. United States*,⁴⁹ decided in 1914, which established the rule that evidence gathered by federal officials in violation of the Fourth Amendment must be excluded, and *Mapp v. Ohio*,⁵⁰ decided in 1961, which applied the exclusionary rule to searches conducted by state officials. *Weeks* made it necessary in many instances to determine whether a given search was a "joint venture" between state and federal officials, in which case the fruits of the search were inadmissible,⁵¹ or whether the fruits of a state-led search were offered to the federal authorities "on a silver platter," in which case they could be admitted and a

⁴⁵ See *United States v. Yunis*, 681 F.Supp. at 917 n.14; see also, e.g., *United States v. Peterson*, 812 F.2d 486, 489 (9th Cir. 1987).

⁴⁶ Judge Mansfield in *United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974), discussed in section III(C) *infra*, saw the debate differently: "Like the Fifth Amendment guarantee of due process, the Fourth Amendment refers to and protects 'people' rather than 'areas,' . . . or 'citizens' . . ." *Id.* at 280.

⁴⁷ In the actual case, the court of appeals examined the charge that Yunis's constitutional rights had been violated, but concluded that they had not been. Accordingly, it reversed that part of the district court's decision that suppressed Yunis's confession. 781 F.Supp. at 921-29. The D.C. Circuit agreed that the conduct of the Government was subject to measure by the standards of the Constitution, thus disagreeing with the position of Judge Wallace and the Solicitor General.

⁴⁸ See, e.g., *Stonehill v. United States*, 405 F.2d 738 (9th Cir. 1968), *cert. denied*, 395 U.S. 960 (1969); *Brulay v. United States*, 383 F.2d 345 (9th Cir.), *cert. denied*, 389 U.S. 986 (1967); and other cases cited in RESTATEMENT, *supra* note 14, §433 Reporters' Note 1.

⁴⁹ 232 U.S. 383 (1914).

⁵⁰ 367 U.S. 693 (1961).

⁵¹ See, e.g., *Byars v. United States*, 273 U.S. 28 (1927).

federal conviction based on the evidence could stand⁵²—unless the silver platter had been readied in advance and the state agents could be said to have acted on behalf of the federal authorities.⁵³ In the federal/state context, these distinctions have been obsolete since *Mapp*,⁵⁴ in the international context, they remain in effect, though in individual cases, such as the *Matta* and *Verdugo* cases here recounted, the distinctions between joint venture, agency, and incidental relations among United States and foreign law enforcement officers often are unconvincing, even as they were in the United States in the half-century between *Weeks* and *Mapp*.⁵⁵

The exclusionary rule—i.e., the rule that the fruits of an unlawful search may not be admitted in evidence—has of course never been popular with law enforcement officers, and a respectable body of opinion, including former Chief Justice Burger, would prefer other means to promote compliance with the Fourth Amendment.⁵⁶ This is not the place to take sides in the continuing debate concerning the exclusionary rule as interpreted and applied in the United States.⁵⁷ The focus here is only on the question of restraints on U.S. law enforcement officers carrying out their duties outside the United States. My basic contention is that if American police (state or federal) may not engage in break-ins and stomach pumping to enforce the law in California,⁵⁸ they may not do so abroad. And if they may not search a home without a warrant in Calexico, they may not, in my submission, do so in Mexicali.

This is not to say that what is unlawful in San Jose, California on one day is necessarily unlawful in San José, Costa Rica on another. The authors of the Fourth Amendment proscribed only *unreasonable* searches, and conditions may not be precisely alike from day to day or place to place. It is not difficult, however, to conclude that arrests or searches upon general warrants are ordinarily unacceptable. As to arrests of particular individuals, one might urge that the additional complications of operation in foreign countries—with or without the cooperation of local authorities—should call for supervi-

⁵² See *Lustig v. United States*, 338 U.S. 74 (1949).

⁵³ See *Gambino v. United States*, 275 U.S. 310 (1927). For a concise discussion of these cases, see 1 W. LAFAVE, *SEARCH AND SEIZURE* §1.1 (2d ed. 1987).

⁵⁴ Indeed, the silver platter doctrine had been rejected by the Supreme Court a year before *Mapp* was decided. See *Elkins v. United States*, 364 U.S. 206 (1960). The silver platter doctrine remains relevant to searches conducted by private parties, such as industrial security officers or private guards. See, e.g., *United States v. Jacobsen*, 466 U.S. 109, 113 (1984).

⁵⁵ In addition to the decisions cited at note 48 *supra*, see, e.g., *United States v. Morrow*, 537 F.2d 120 (5th Cir. 1976), *cert. denied*, 430 U.S. 956 (1977); *United States v. Marzano*, 537 F.2d 257 (7th Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977); *United States v. Peterson*, 812 F.2d 486 (9th Cir. 1987).

⁵⁶ See the Chief Justice's statement, in dissent, in *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 415 (1971), that the exclusionary rule is "both conceptually sterile and practically ineffective." It is fair to add that later in the same opinion, Chief Justice Burger writes, "I do not propose that we abandon the suppression doctrine until some meaningful alternative can be developed." *Id.* at 420.

⁵⁷ See generally "The Exclusionary Rule under Attack," 1 W. LAFAVE, *supra* note 53, §1.2; Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349 (1974).

⁵⁸ Cf. *Rochin v. California*, 342 U.S. 165 (1952).

sion by a "neutral and detached magistrate" in all cases at the outset.⁵⁹ For the time being, I urge only that existing restraints on law enforcement by U.S. officers be applied when they act abroad to the same extent as when they act in their own country. That means, as I understand it, that an arrest for a felony without a warrant may be sustained only if there is opportunity for a prompt determination by a judicial officer of probable cause—i.e., reasonable grounds to believe that a felony has been committed by the person arrested.⁶⁰ As the leading case of *Gerstein v. Pugh* teaches, "the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest."⁶¹ The three cases described in section I, as well as the numerous cases of kidnapping discussed in the next section, fail to meet this prerequisite, or meet it only by the assertion (one cannot even call it a technicality) that the arrest takes place upon the prisoner's arrival in the United States, while the prior seizure, custody, and whatever happened in between does not count—usually for either Fourth or Fifth Amendment purposes.⁶²

The argument for applying the Fourth Amendment (if at all) more loosely to official U.S. conduct abroad is well stated in *Brulay v. United States*, involv-

⁵⁹ Compare the requirement called for by the RESTATEMENT, *supra* note 14, §442, that transnational discovery requests in civil actions be made not by counsel directly, but only upon court order.

⁶⁰ See generally 1 W. LAFAVE, *supra* note 53, §3.1(b).

⁶¹ 420 U.S. 103, 114 (1975).

⁶² There are two additional reasons that it might be appropriate to construe the Fourth Amendment as requiring a judicial determination of probable cause before an arrest abroad, even though a postarrest judicial determination is all that is required in the case of a felony arrest within the United States.

First, the principal reason of policy for allowing felony arrests (unlike searches) to be made upon probable cause without a warrant in domestic cases is that occasions for arrest frequently arise without forewarning to the officer, evolve out of fast-breaking situations encountered in the daily round of police activity, and involve suspects who may get away and thereafter avoid apprehension if the officer delays long enough to seek a warrant. These circumstances are so commonly characteristic of the ordinary felony arrest that it has been deemed appropriate to "authorize warrantless public arrests on probable cause rather than encumber criminal prosecutions with endless litigation with respect to the existence of exigent circumstances, whether it was practicable to get a warrant, whether the suspect was about to flee, and the like." *United States v. Watson*, 423 U.S. 411, 423-24 (1976). Felony arrests abroad, by contrast, almost never arise out of adventitious encounters between suspects and law enforcement officers as the officers pursue their daily rounds; they are planned operations, necessarily arranged in advance, with ample time to seek a warrant in virtually all cases.

Second, the Supreme Court has recognized that the degree of Fourth Amendment justification required for police activity that intrudes upon the privacy or security of the individual varies with the gravity of the intrusion. *E.g.*, *Winston v. Lee*, 470 U.S. 753 (1985). One notable application of this principle has been the allowance of brief "stops," less extensive than full-blown arrests, on "reasonable suspicion" rather than probable cause. Compare *Terry v. Ohio*, 392 U.S. 1 (1968) (stop and frisk on street on basis of reasonable suspicion permitted), with *Hayes v. Florida*, 470 U.S. 811 (1985) (transportation from home to police station for fingerprinting without probable cause disallowed). Surely, the intrusion upon the privacy and security of an individual when he is taken into custody abroad and transported to the United States to face criminal charges, rather than being brought before the nearest magistrate, is as much greater than that of an ordinary arrest as the intrusiveness of a stop is less than that of an ordinary arrest. See *Amsterdam*, note 57 *supra*, at 392.

ing prosecution in the United States of a man arrested without a warrant in Tijuana, Mexico, apparently on a tip from U.S. agents, and questioned intermittently for 14 hours in a Mexican police station:

Neither the Fourth nor the Fourteenth Amendments are directed at Mexican officials and no prophylactic purpose is served by applying an exclusionary rule here since what we do will not alter the search policies of the sovereign Nation of Mexico.⁶³

The statement may just fit *Brulay*. In some other cases, the narration leaves the reader wondering whether the U.S. officers were really just on-lookers without any control, when the effort was clearly directed at bringing the suspect to the United States for prosecution.⁶⁴ If, as I have argued above and the majority of courts of appeals have held, U.S. officials are bound by the constraints of the Constitution wherever they act, should the inquiry not be directed to *their* conduct, rather than engaging in unconvincing *ex post facto* analysis of which country's officers had the lead role in a given operation? In *Matta*, for instance, it is clear that a U.S. officer drove the truck in which the suspect was taken away, and that U.S. officers supplied and operated the aircraft that brought him to the United States. If a warrant for arrest could be issued in *Yunis*,⁶⁵ why not in *Matta*? And if no "neutral and detached magistrate" would issue such a warrant and the operation did not make provision for a prompt probable cause determination by a judicial officer after the arrest, it seems not unreasonable to suggest that the operation should not be undertaken, because it is unacceptable under the Constitution.⁶⁶

The argument was made in *Verdugo* on behalf of the prosecution that there was no point seeking a warrant for a search in Mexico, since such a warrant

⁶³ 383 F.2d 345, 348 (9th Cir.), *cert. denied*, 389 U.S. 986 (1967).

⁶⁴ See, e.g., *United States v. Marzano*, 537 F.2d 257, 269-71 (7th Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977), involving the location by two FBI agents in the Cayman Islands of a man wanted for bank robbery in Chicago. The account in the decision states that the FBI agents accompanied the local police superintendent while the latter made the arrest and put the suspect on a plane to Miami.

⁶⁵ See Lowenfeld, note 1 *supra*, at 881.

⁶⁶ Compare Justice Frankfurter's opinion for a unanimous Supreme Court in *Mallory v. United States*, 354 U.S. 449, 454 (1957), involving the arrest of a suspect early in the afternoon in the District of Columbia, detained for several hours without advice or warnings at police headquarters, and not sought to be brought before a magistrate until he had confessed, late in the evening:

The scheme for initiating a federal prosecution is plainly defined. The police may not arrest upon mere suspicion but only on "probable cause." The next step in the proceeding is to arraign the arrested person before a judicial officer as quickly as possible so that he may be advised of his rights and so that the issue of probable cause may be promptly determined. The arrested person may, of course, be "booked" by the police. But he is not to be taken to police headquarters in order to carry out a process of inquiry that lends itself, even if not so designed, to eliciting damaging statements to support the arrest and ultimately his guilt.

The case involved interpretation of the Federal Rules of Criminal Procedure rather than the Constitution itself. The point, however, is clear: a planned arrest must be seen as a whole, and is only acceptable when all of its parts comply with the rules.

would be a "dead letter" in Mexico.⁶⁷ The majority got around that argument, but perhaps not as persuasively as it might have done. I would not regard a warrant issued by a U.S. magistrate directed to U.S. officers to conduct a search in Mexico or an arrest in Honduras as a dead letter—still-born, in Judge Wallace's phrase.⁶⁸ I would urge, rather, that such a warrant issued by a U.S. magistrate should be regarded as a *necessary*, though not a *sufficient*, condition for participation by U.S. officers in searches or arrests in foreign states.

In *Verdugo*, the Mexican officers said they would not help with the arrest of the suspect until they were satisfied that the U.S. agents had a warrant for his arrest. That seems correct behavior on the part of the Mexican officers. The Honduran officers in *Matta* did not, apparently, have similar compunctions; nor did the Mexican officers in respect to the search of Verdugo's residences. My submission is that a double authorization is the way that the laws and values of both countries—sovereignty, human rights, civil liberty, orderly law enforcement—can be protected, without the police of either state hiding under the cloaks of the officials of the other country.

Judge Wallace, in *Verdugo*, wrote:

When United States agents act abroad, they act at the pleasure of the host government. As guests acting under another's auspices, they are hardly in a position to demand that a foreign government recognize the force of our Constitution in its own land with respect to its own people.⁶⁹

That statement, I submit, misses the point. The question is not whether United States officers can require foreign law enforcement officers acting within their own country to comply with all the requirements of the U.S. Constitution or the Federal Rules of Criminal Procedure. The question is whether U.S. officers may act in a foreign state free from the restraints of United States law. Nothing says that U.S. officers are required to assist foreign law enforcement officers beyond what they have been authorized to do by their own law and by a United States judge or magistrate.

At the close of his brief to the Supreme Court in *Verdugo*, the Solicitor General put forward a fallback position that needs to be considered. Even if the Fourth Amendment applies abroad, he argued, United States agents conducting investigations in a foreign country should "at most be bound by the more flexible Fourth Amendment requirement of reasonableness."⁷⁰ If I understand the argument, it is that the presumption that a warrantless search (or arrest) in a home is unreasonable⁷¹ should not apply to arrests abroad, but that some more relaxed criteria, such as those involving search of a schoolgirl's pocketbook by the principal⁷² or demand for a ship's manifest by a Coast Guard officer⁷³ should apply to U.S. law enforcement officers

⁶⁷ *Verdugo*, 856 F.2d at 1229–30.

⁶⁸ *Id.* at 1249 (Wallace, J., dissenting).

⁶⁹ *Id.* at 1248.

⁷⁰ Brief for the United States, *supra* note 42, at 39.

⁷¹ See *Payton v. New York*, 445 U.S. 573 (1980).

⁷² *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

⁷³ *United States v. Montoya de Hernandez*, 473 U.S. 531 (1985). Both of these cases are cited in the Solicitor General's brief.

working abroad. The argument has a certain appeal: as suggested earlier, it may well be that some searches or seizures that would be regarded as unreasonable if carried out in the United States would not be so regarded in a foreign context. I doubt, however, that there should be any generalized relaxation of presumptions or precedents. The way to deal with the Solicitor General's proposition is by construction of the term "unreasonable," just as in the case of a customs search or a school search. I would hope, however, that this did not mean leaving the "dirty work" to local police officers (who may or may not be in the pay of the United States) and relying, as the next section shows, on a general absence of any deterrence focused on the way in which a prisoner is brought to the United States.

The debate can be carried to any level of sophistication—legal, technical, geographical. It may for instance be argued (though the argument was not made in *Verdugo* or the other cases that have addressed the question) that the Fourth Amendment only restrains invasions of the privacy of those who have a reasonable expectation of privacy.⁷⁴ Thus, to come back to the debate between the Senator and the Legal Adviser,⁷⁵ does anyone in Beirut (or Tegucigalpa) have the expectation of being protected by the shield that the United States Constitution interposes between the Government's activity and the individual? My answer would be a counterquestion: Does anyone in Beirut or Tegucigalpa have a reasonable expectation of being searched, arrested, molested and prosecuted by the United States of America?

More generally, as discussed in my prior article, the activity of U.S. law enforcement officers outside the United States depends—must depend—on express or implied grants of authority under the Constitution. Once the verbal distinctions between one part of the Bill of Rights and another are discarded, it seems inconceivable that the Constitution grants power to the Government in the main body of the Constitution, without the corresponding restraints on the exercise of that power contained in the Bill of Rights. I would be ashamed if the attempt to confine the Fourth Amendment to the territorial boundaries of the United States prevailed; I would be more comfortable, more confident that my government understands the enduring values, if the U.S. Government gave up (or were ordered to give up) the recurring attempts to rely on the allegation that U.S. officers were just bystanders, or played merely a subordinate role in a search or seizure, when the object of the exercise, understood from the beginning, was prosecution in the United States. Overall, I would hope that the Government would look upon constitutional prescriptions not as limitations to be avoided if possible, but as values to be honored and given effect.

III. *MALE CAPTUS* . . .

Whether or not it is correct that some of the constraints of the U.S. Constitution can be shed like an overcoat when officers of the United States pass the frontiers of the Republic, the question remains whether the Constitution

⁷⁴ Compare, e.g., *Smith v. Maryland*, 442 U.S. 735, 735–740 (1979).

⁷⁵ See text at notes 18–28 *supra*.

prohibits action abroad by U.S. officers to seize suspects and bring them by force to the United States for prosecution. A layman might ask, why this complicated circumlocution? The question is whether the United States may engage in kidnaping. Since kidnaping is clearly a crime under the law of the United States,⁷⁶ but the answer to the question as of 1990 is far from clear, it seems preferable to avoid loaded words, at least until the concluding section of this article.

For one who, like this writer, comes to the subject from international law and conflict of laws, rather than from a career in criminal procedure, the fruits of research have been surprising and discouraging. One might have thought that if the unlawful seizure of documents or weapons leads to annulment of the search, i.e., to suppression of the evidence seized, the unlawful seizure of a person would also lead to annulment of the seizure, i.e., release of the person arrested or reversal of the resulting conviction. That, however, has not been the jurisprudence of the U.S. Supreme Court. The rule seems to be that evidence seized in an illegal arrest will not be admitted, but that the prosecution of the person arrested may proceed.⁷⁷ One way to restate the rule is to say that while an arrest may be unlawful and indeed unconstitutional, the exclusionary rule applies only to evidence, not to persons.⁷⁸ The rule seems to apply equally to arrests without a warrant where a warrant should have been obtained as it does to abduction, and equally to abduction within the United States as to abduction from a foreign country.

A. *Ker v. Illinois*

Interestingly enough, the question whether an illegal arrest deprives the trial court of jurisdiction was first raised in the U.S. Supreme Court in an international kidnaping case, and in fact in a case involving—or rather evading—an extradition treaty. *Ker v. Illinois*,⁷⁹ decided more than a century ago, started with an application by the governor of Illinois to the Secretary of State to request the extradition from Peru of one Frederick M. Ker, who was wanted in Illinois on charges of larceny and embezzlement from a Chicago bank. The Secretary agreed, and President Arthur issued an extradition warrant directing the U.S. Acting Consul at Lima to procure the surrender of Mr. Ker, in accordance with the Treaty of Extradition between the United States and Peru of 1870.⁸⁰ The surrender was to be made to a Mr. Henry G. Julian, a Pinkerton agent hired by the bank, as messenger. According to the papers before the Supreme Court,

⁷⁶ 18 U.S.C. §1201 (1988).

⁷⁷ See 1 W. LAFAYE, *supra* note 53, §1.9 and sources there cited, some of which are discussed hereafter.

⁷⁸ The evidence may consist not only of physical objects such as an invoice or a gun, but also of statements made by the person unlawfully arrested, incriminating herself or another person. See, e.g., *Wong Sun v. United States*, 371 U.S. 471 (1963).

⁷⁹ 119 U.S. 436 (1886).

⁸⁰ Sept. 12, 1870, 18 Stat. 719, TS No. 719, 10 Bevans 1052 (entered into force July 27, 1874).

the said Julian, having the necessary papers with him, arrived in Lima, but, without presenting them to any officer of the Peruvian government, or making any demand on that government for the surrender of Ker, forcibly and with violence arrested him, placed him on board the United States vessel *Essex*, in the harbor of Callao, kept him a close prisoner until the arrival of that vessel at Honolulu, where, after some detention, he was transferred in the same forcible manner on board another vessel, to wit, the *City of Sydney*, in which he was carried a prisoner to San Francisco, in the State of California.⁸¹

As soon as he arrived in San Francisco, Ker was turned over by order of the governor of California to an agent of the governor of Illinois, who took him, still a prisoner, to Chicago, where the process of the Cook County Criminal Court was served on him. Thereafter, Ker was tried and convicted, notwithstanding his challenge to the jurisdiction of the court.

Ker had two contentions, both in the Illinois courts and in the U.S. Supreme Court. He argued, first, that he had not received due process of law; and second, that by virtue of his residence in Peru he had acquired a "positive right" that he could be forcibly removed from that country only in accordance with the extradition treaty. Both of these arguments, it seems to me, have force by today's values, if not by those of the late 19th century. I would not, in other words, regard what the Court said in 1886 as the last word on the subject. In fact, the Court rejected both arguments, in a unanimous opinion written by Justice Samuel Miller. On the first point, the Court said:

The "due process of law" here guaranteed is complied with when the party is regularly indicted by the proper grand jury in the State court, has a trial according to the forms and modes prescribed for such trials, and when, in that trial and proceedings, he is deprived of no rights to which he is lawfully entitled. We do not intend to say that there may not be proceedings previous to the trial, in regard to which the prisoner could invoke in some manner the provisions of this clause of the Constitution, but, for mere irregularities in the manner in which he may be brought into the custody of the law, we do not think he is entitled to say that he should not be tried at all for the crime with which he is charged in a regular indictment.⁸²

On the second point, the Court said:

There is no language in this treaty, or in any other treaty made by this country on the subject of extradition, of which we are aware, which says in terms that a party fleeing from the United States to escape punishment for crime becomes thereby entitled to an asylum in the country to

⁸¹ 119 U.S. at 438. The brief for Ker before the Supreme Court adds more details:

that Julian and others arrested Ker in Lima, where he resided, on April 3, 1883, without any authority in law; that they immediately carried him to Callao and forcibly placed him on the U.S. man-of-war *Essex*, and confined him there until May 10th; that the *Essex* then brought him to Honolulu, and he was kept on board, in the harbor, several weeks until July 2d, when he was forced to go from the *Essex*, by the officers thereof and Julian, on board of the "City of Sidney" and carried to San Francisco, where he arrived July 9, 1883.

⁸² 119 U.S. at 440.

which he has fled; indeed, the absurdity of such a proposition would at once prevent the making of a treaty of that kind. It will not be for a moment contended that the government of Peru could not have ordered Ker out of the country on his arrival, or at any period of his residence there. If this could be done, what becomes of his right of asylum?

Nor can it be doubted that the government of Peru could of its own accord, without any demand from the United States, have surrendered Ker to an agent of the State of Illinois, and that such surrender would have been valid within the dominions of Peru. It is idle, therefore, to claim that, either by express terms or by implication, there is given to a fugitive from justice in one of these countries any right to remain and reside in the other; and if the right of asylum means anything, it must mean this.⁸³

As to the treaty itself:

Julian, in seizing upon the person of Ker and carrying him out of the territory of Peru into the United States, did not act nor profess to act under the treaty. In fact, that treaty was not called into operation, was not relied upon, was not made the pretext of arrest, and the facts show that it was a clear case of kidnapping within the dominions of Peru, without any pretence of authority under the treaty or from the government of the United States.⁸⁴

Would the *Ker* case have come out differently if the Government of Peru had protested?⁸⁵ One is tempted to say yes, in light of some recent cases in which the courts have responded to the charge by the accused that international law has been violated by saying it was up to the state whose sovereignty

⁸³ *Id.* at 442.

⁸⁴ *Id.* at 443. The Court added a curious afterthought:

The question of how far his forcible seizure in another country, and transfer by violence, force, or fraud, to this country, could be made available to resist trial in the State court, for the offence now charged upon him, is one which we do not feel called upon to decide, for in that transaction we do not see that the Constitution, or laws, or treaties, of the United States guarantee him any protection. . . .

However this may be, the decision of that question is as much within the province of the State court, as a question of common law, or of the law of nations, of which that court is bound to take notice, as it is of the courts of the United States. And though we might or might not differ with the Illinois court on that subject, it is one in which we have no right to review their decision.

Id. at 444.

⁸⁵ It is fair to point out that when Julian arrived in Peru in the spring of 1883, that country was engaged in the last years of the War of the Pacific (1879–1883), which ended with the Treaty of Ancon of Oct. 20, 1883, confirming defeat and massive loss of territory for Peru (and Bolivia) and a major victory for Chile.

In fact, what was left of the Peruvian Government was in Arequipa, in the mountains 85 miles from Lima. The Peruvian capital was under military occupation by Chilean forces under the command of Admiral Patricio Lynch. Evidently, Lynch had no interest in upholding Peruvian sovereignty, and may even have aided the messenger/detective in putting Ker aboard the American warship. For more on the strange facts of the *Ker* case, see Fairman, *Ker v. Illinois Revisited*, 47 AJIL 678, 684–85 (1953), based in part on the brief to the Supreme Court by the Attorney General of Illinois.

was violated to raise the issue.⁸⁶ But on the same day that *Ker* was decided, the Supreme Court also handed down its decision in *United States v. Rauscher*,⁸⁷ in which the question was whether a prisoner extradited to the United States from a foreign country had the right to challenge the scope of his prosecution apart from possible claims by the country from which he was extradited. In *Rauscher*, an officer aboard a United States merchant vessel had been extradited from Great Britain pursuant to the Webster-Ashburton Treaty of 1842⁸⁸ on a charge of murder of a crew member on the high seas, but had subsequently been tried on a charge of assault and infliction of cruel and unusual punishment.

The Supreme Court, also in an opinion by Justice Miller (but not unanimously), held that the accused had the right to raise the question, and could not lawfully be tried for any offense other than the one for which he was extradited. There is no record of intervention by Great Britain in the *Rauscher* case, but the Supreme Court's opinion notes diplomatic exchanges in two other cases⁸⁹ in which the British, in contrast to the view of the American Secretary of State, had insisted on what we now call the doctrine of specialty⁹⁰ as a rule of international law.⁹¹ Chief Justice Waite dissented, on the ground that

[i]f either country should use its privileges under the treaty to obtain a surrender of a fugitive on the pretence of trying him for an offence for which extradition could be claimed, so as to try him for one for which it could not, it might furnish just cause of complaint on the part of the country which had been deceived, but it would be a matter entirely for adjustment between the two countries, and which could in no way enure to the benefit of the accused except through the instrumentality of the government that had been induced to give him up.⁹²

But the majority held that a treaty is the law of the land, and—I believe correctly⁹³—held that individuals could invoke the treaty's protections. In *Ker*, by contrast, the Court concluded that the treaty could give no rights to an individual, when it had not even been applied.⁹⁴ That conclusion, in my view, was the flaw in *Ker* at the time, and even more a century later, when both our concepts of due process and our understanding of individual rights under international law are much more developed.⁹⁵

⁸⁶ See, e.g., the discussion of the *Argoud* case at notes 166–69 *infra*.

⁸⁷ 119 U.S. 407 (1886).

⁸⁸ Aug. 9, 1842, 8 Stat. 576, TS No. 119, 12 Bevans 82. The extradition provision is Article X.

⁸⁹ 119 U.S. at 415–17.

⁹⁰ See, for a brief statement, RESTATEMENT, *supra* note 14, §477.

⁹¹ 119 U.S. at 415.

⁹² *Id.* at 435–36 (Waite, C.J., dissenting).

⁹³ Compare RESTATEMENT, *supra* note 14, §477 comment b.

⁹⁴ I almost wrote invoked, but that term, which might fit *Matla* and *Verdugo*, does not fit *Ker*, since the President and the Secretary of State had issued a requisition under the treaty, which (in the prewireless days) they had entrusted to the messenger, who, as we saw, did not deliver it but, rather, took matters (and the prisoner) into his own hands.

⁹⁵ It is interesting that the Court itself suggested that if *Ker* had been brought to the United States under the extradition treaty with Peru, "it seems probable . . . that he might have

Of course, the two cases decided on December 6, 1986, can be distinguished—one prisoner having been brought to the United States under an extradition treaty, the other without resort to the applicable extradition treaty.⁹⁶ But there is more than an irony in the fact that on the same day the Supreme Court held *male captus, bene detentus* and *bene captus, male detentus*.

With respect—and I am far from the first to say so⁹⁷—the opinion in *Ker* is unconvincing. Justice Miller himself seems to have had some doubts, for at the end of the opinion he wrote that neither the prisoner nor the Government of Peru was left without remedy.

[O]n demand from Peru, Julian, the party who is guilty of [kidnaping], could be surrendered and tried in its courts for this violation of its laws.⁹⁸ The party himself would probably not be without redress, for he could sue Julian in an action of trespass and false imprisonment, and the facts set out in the plea would without doubt sustain the action.⁹⁹

That, of course, is the standard argument against the exclusionary rule, which may have been fresh in 1886,¹⁰⁰ but seems much less so today.¹⁰¹

B. *From Ker to Frisbie . . . and Beyond?*

I have dwelt on *Ker v. Illinois* in so much detail because it is the only Supreme Court case, so far as I am aware, that addresses abduction abroad, and because the other pillar of the "*Ker-Frisbie*" rule¹⁰² arose out of a purely

successfully pleaded that he was extradited for larceny, and convicted . . . of embezzlement" (119 U.S. at 443)—i.e., the same defense raised successfully by Rauscher.

⁹⁶ Fairman, note 85 *supra*, at 682–83, points out also that *Rauscher* came to the Supreme Court on a certificate of division of opinion from the U.S. circuit court; thus the Supreme Court could pass on "any question which occurred on the trial." *Ker* came up from a state supreme court, with a more limited scope of review. Compare Rev. Stat. §790 (1875), comparable to 28 U.S.C. §1257(3) (review of state court judgments), with Rev. Stat. §693 (1875), comparable to 28 U.S.C. §1254(3) (certification from federal courts of appeal).

⁹⁷ See, e.g., Dickinson, *Jurisdiction Following Seizure or Arrest in Violation of International Law*, 28 AJIL 231 (1934); Garcia-Mora, *Criminal Jurisdiction of a State over Fugitives Brought from a Foreign Country by Force or Fraud: A Comparative Study*, 32 IND. L.J. 265 (1952); Morgenstern, *Jurisdiction in Seizures Effected in Violation of International Law*, 29 BRIT. Y.B. INT'L L. 265 (1952); O'Higgins, *Unlawful Seizure and Irregular Extradition*, 36 BRIT. Y.B. INT'L L. 279 (1960). See also Harvard Research in International Law, Draft Convention on Jurisdiction with Respect to Crime, Art. 16, 29 AJIL 435, 442, 623–32 (Supp. 1935), which would have provided that "no State shall prosecute or punish any person who has been brought within its territory . . . by recourse to measures in violation of international law or international convention without first obtaining the consent of the State or States whose rights have been violated by such measures."

⁹⁸ Compare *Kear v. Hilton*, 699 F.2d 181 (4th Cir. 1983), concerning extradition to Canada of bounty hunters who had kidnaped a Canadian citizen charged with real estate fraud in Florida, and statements about the case by the U.S. Secretary of State and Attorney General on that case reproduced in 78 AJIL 207 (1984).

⁹⁹ *Ker v. Illinois*, 119 U.S. at 444. The paragraph continues: "Whether he could recover a sum sufficient to justify the action would probably depend upon moral aspects of the case, which we cannot here consider." *Id.*

¹⁰⁰ The first significant Fourth Amendment case had been decided only a few months earlier. *Boyd v. United States*, 116 U.S. 616 (1886).

¹⁰¹ See 1 W. LAFAVE, *supra* note 53, §1.2; Amsterdam, *supra* note 57, esp. at 429–30.

¹⁰² *Frisbie v. Collins*, 342 U.S. 519 (1952), discussed at notes 106–17 *infra*.

domestic incident and is thus not really relevant to the subject of this article—law enforcement by U.S. officers abroad. If, as I have argued, the *Ker* case is flawed—at least by present standards—the intervening cases that have cited *Ker* and fused it with an essentially domestic rule ought not to stand in the way of a reexamination of a case that was problematic even for its authors.

Two years after the decision in *Ker*, the Supreme Court considered the case of a man wanted in Kentucky on a murder charge who had been kidnaped in West Virginia and forcibly returned to Kentucky for trial. In fact, in the ironically entitled case of *Mahon v. Justice*,¹⁰³ the petition was brought initially by the governor of West Virginia, asserting that his state's law had been violated in the kidnaping, and that the only appropriate sanction would be return of the prisoner. The Supreme Court was not moved. "The jurisdiction of the court in which the indictment is found," Justice Field wrote for the Court, "is not impaired by the manner in which the accused is brought before it."¹⁰⁴ Or, in Latin, *male captus, bene detentus*.¹⁰⁵

The issue did not come back to the Supreme Court for more than 60 years. In *Frisbie v. Collins*,¹⁰⁶ a prisoner serving a life sentence in Michigan for murder asserted in a federal habeas corpus petition that while he was living in Chicago, he had been kidnaped by the Michigan police and taken to Michigan for trial. The district court dismissed the petition, but the Court of Appeals for the Sixth Circuit reversed and remanded the case for rehearing, on the ground that the Federal Kidnaping Act,¹⁰⁷ adopted since *Ker* and *Mahon*, had changed the rule that a state could constitutionally try and con-

¹⁰³ 127 U.S. 700 (1888). Mr. Justice was in fact the warden of the Kentucky prison where Mahon was being held.

¹⁰⁴ *Id.* at 708.

¹⁰⁵ Justice Bradley, with Justice Harlan concurring, dissented:

In my opinion the writ of *habeas corpus* was properly issued, and the prisoner, Mahon, should have been discharged and permitted to return to West Virginia. . . . It is undoubtedly true that occasional instances of unlawful abduction of a criminal from one State to another for trial, have been winked at; and it has been held to be no defence for the prisoner on his trial. Such precedents are founded on those which have arisen where a criminal has been seized in one country and forcibly taken to another for trial, in the absence of any international treaty of extradition. It is obvious that such cases stand on a very different ground. It is there a question between independent nations bound by no ties of mutual obligation on the subject, and at liberty to adopt such means of redress and retaliation as they please. But where an extradition treaty does exist, and a criminal has been delivered up under it, he cannot, without violating the treaty, be tried for any other crime but that for which he was delivered up. *United States v. Rauscher*. . . . It is true that in the same volume is found the case of *Ker v. Illinois*, . . . in which it was held not to be a good plea to an indictment, that the prisoner was kidnapped from Peru, with which country we had an extradition treaty. But this was because . . . the prisoner himself cannot set up the mode of his capture by way of defence, if the State from which he was abducted makes no complaint. Peru made none.

But this is not such a case. The State from which Mahon was abducted has interposed

Id. at 715-17 (Bradley, J., dissenting).

¹⁰⁶ 342 U.S. 519 (1952).

¹⁰⁷ 18 U.S.C. §1201.

vict a defendant after acquiring jurisdiction by force.¹⁰⁸ In a disappointingly brief opinion by Justice Black,¹⁰⁹ the Supreme Court reversed:

This Court has never departed from the rule announced in *Ker v. Illinois* No persuasive reasons are now presented to justify overruling this line of cases.¹¹⁰ There is nothing in the Constitution that requires a court to permit a guilty person rightfully convicted to escape justice because he was brought to trial against his will.

. . . . In considering whether the law of our prior cases has been changed by the Federal Kidnaping Act, we assume . . . that the Michigan officers would have violated it if the facts are as alleged. This Act prescribes in some detail the severe sanctions Congress wanted it to have. Persons who have violated it can be imprisoned for a term of years or for life; under some circumstances violators can be given the death sentence. We think the Act cannot fairly be construed so as to add to the list of sanctions detailed a sanction barring a state from prosecuting persons wrongfully brought to it by its officers. It may be that Congress could add such a sanction. We cannot.¹¹¹

Congress has in fact legislated on the subject, concerning arrests abroad, as is discussed below.¹¹² Taking the Court up on its own terms, however, the opinion is surprising, particularly since it was decided only a few weeks after *Rochin v. California*,¹¹³ the case in which the Supreme Court reversed a conviction for possession of morphine on the ground that the administration of a stomach pump to the accused to discover the evidence of the crime was "conduct that shocks the conscience," and that to uphold the conviction in these circumstances "would be to afford brutality the cloak of law."¹¹⁴ A number of critics of the *Frisbie* decision agreed with Professor Austin Scott, Jr., that "the brutality involved in kidnapping is not far removed in degree from the brutality of the stomach pump."¹¹⁵ The *Harvard Law Review*, in its annual Supreme Court Review, wrote: "It is arguable that there should be no constitutional difference between a trial using reliable evidence brutally obtained and a proceeding against a defendant brutally obtained."¹¹⁶ Nevertheless, the *Frisbie* case has remained the law of the land, and in a case having nothing to do with the question of kidnaping, the Court has (in passing) reiterated its continued adherence to the rule that illegal arrest or detention does not void a subsequent prosecution.¹¹⁷

¹⁰⁸ *Collins v. Frisbie*, 189 F.2d 464 (6th Cir. 1951).

¹⁰⁹ After disposing of a question about availability of federal habeas corpus, the discussion of the issue here considered runs to less than a page in the official reports, including a summary of the reasoning of the court of appeals.

¹¹⁰ In addition to *Ker* and *Mahon*, the Court cited *Lascelles v. Georgia*, 148 U.S. 537 (1893), and *In re Johnson*, 167 U.S. 120 (1897), both domestic cases.

¹¹¹ 342 U.S. at 522-23.

¹¹² See section IV(A) *infra*.

¹¹³ 342 U.S. 165 (1952).

¹¹⁴ *Id.* at 172, 173.

¹¹⁵ A. Scott, Jr., *Criminal Jurisdiction of a State over a Defendant Based upon Presence Secured by Force or Fraud*, 37 MINN. L. REV. 91, 98 (1953).

¹¹⁶ *The Supreme Court 1951 Term*, 66 HARV. L. REV. 89, 127 (1952).

¹¹⁷ See *Gerstein v. Pugh*, 420 U.S. 103, 119 (1975), discussed at note 61 *supra*. See also *United States v. Crews*, 445 U.S. 463, 477, 478 (1980) (Powell, J., and White, J., concurring separately) (in-court identification by victim of assailant upheld, though earlier lineup identification not supported by probable cause).

Thus, it is probably fair to say that *Ker v. Illinois* is still law (although I do not think it is "good law"). Nothing in this history suggests, however, that the Supreme Court has reconsidered international kidnaping since 1886, or that it has reconsidered the effect on the *Ker* rule of the massive changes in the application of the Fourth and Fifth Amendments domestically and in the perception of individual human rights internationally. As Justice Black observed in *Reid v. Covert*¹¹⁸ about *In re Ross*,¹¹⁹ I wonder whether it is not time to conclude that the *Ker* case "should be left as a relic from a different era."¹²⁰

C. Shocking the Conscience

1. Twenty years after *Frisbie v. Collins*, a panel of the U.S. Court of Appeals for the Second Circuit, sitting in New York, heard the appeal by one Francisco Toscanino from a conviction and sentence on a charge of conspiracy to import narcotics into the United States.¹²¹ Toscanino was a citizen of Italy residing, as he claimed, in Montevideo. In his appeal, Toscanino asserted, and offered to prove, that he had been lured from his home in Montevideo by a telephone call made at the direction of a Mr. Hermadia, a member of the Montevideo police who, according to Toscanino, was acting (*ultra vires*) as a paid agent of the U.S. Government; that when he and his wife arrived at the place designated in the phone call, Hermadia and six associates knocked him unconscious with a gun and threw him into Hermadia's car; that, bound and blindfolded, he was driven to the Uruguay-Brazil border. Further, that somewhere near the border, after changing cars, a group of Brazilians acting at the behest of the U.S. Government took custody of his (still blindfolded and bound) body and brought him to Porto Alegre, where he was held incommunicado for eleven hours and deprived of all food and water; that thereafter, he was brought to Brasília, where he was interrogated and tortured for 17 days in the presence and with the participation of a member of the U.S. Bureau of Narcotics; that he was given nourishment intravenously in just the amount needed to keep him alive; and so on . . . , with details of fingers pinched with metal pliers, alcohol flushed into his eyes

¹¹⁸ See text at note 32 *supra*.

¹¹⁹ 140 U.S. 453 (1891). The case involved a British national serving as a seaman aboard a U.S. flag vessel, charged with murdering a ship's officer while the ship was at anchor in Yokohama harbor. Ross was tried in Japan by a U.S. consular court consisting of the Consul General and four associates—but no jury—and his conviction was unanimously upheld by the Supreme Court:

By the Constitution [Justice Field wrote for the Court] a government is ordained and established "for the United States of America," and not for countries outside of their limits. The guarantees it affords . . . apply only to citizens and others within the United States, or who are brought there for trial for alleged offences committed elsewhere, and not to residents or temporary sojourners abroad.

Id. at 464.

¹²⁰ 354 U.S. at 12. See generally Henkin, *The Constitution as Compact and as Conscience: Individual Rights Abroad and at Our Gates*, 27 WM. & MARY L. REV. 11, esp. at 18-24 (1985).

¹²¹ *United States v. Toscanino*, 500 F.2d 267 (2d Cir.), *reh'g denied*, 504 F.2d 1380 (2d Cir. 1974).

and nose, and electrodes attached to his earlobes, toes and genitals. Finally, after 19 days, Toscanino alleged, he woke up in the United States, and was arrested and brought to an Assistant U.S. Attorney.¹²²

The U.S. Government neither confirmed nor denied the allegations, claiming they were immaterial to the district court's power to proceed, and the district court, relying on *Ker* and *Frisbie v. Collins*, denied all of Toscanino's motions. The court of appeals, in an opinion by Judge Mansfield, looked at *Ker* and *Frisbie* in the light of the "due process revolution"¹²³ and particularly in light of *Rochin v. California*¹²⁴ and *Mapp v. Ohio*.¹²⁵ Quoting from its recent decision in a case involving the creation and execution of a criminal conspiracy by the U.S. Government in an effort to expose corruption in a state district attorney's office,¹²⁶ Judge Mansfield wrote:

Society is the ultimate loser when, in order to convict the guilty, it uses methods that lead to decreased respect for the law. . . .

In light of these developments [in the protection of the rights of the accused] we are satisfied that the "Ker-Frisbie" rule cannot be reconciled with the Supreme Court's expansion of the concept of due process, which now protects the accused against pretrial illegality by denying to the government the fruits of its exploitation of any deliberate and unnecessary lawlessness on its part. Although the issue in most of the cases forming part of this evolutionary process was whether evidence should have been excluded . . . , [w]here suppression of evidence will not suffice, . . . we must be guided by the underlying principle that the government should be denied the right to exploit its own illegal conduct, . . . and when an accused is kidnapped and forcibly brought within the jurisdiction, the court's acquisition of power over his person represents the fruits of the government's exploitation of its own misconduct. Having unlawfully seized the defendant in violation of the Fourth Amendment, . . . the government should as a matter of fundamental fairness be obligated to return him to his *status quo ante*.

Faced with a conflict between the two concepts of due process, the one being the restricted version found in *Ker-Frisbie* and the other the expanded and enlightened interpretation expressed in more recent decisions of the Supreme Court, we are persuaded that to the extent that the two are in conflict, the *Ker-Frisbie* version must yield.¹²⁷

"If distinctions are necessary," the court added, "*Ker* and *Frisbie* are clearly distinguishable" ¹²⁸ But it was clear that the court of appeals

¹²² *Id.* at 269-70.

¹²³ *Id.* at 272 (quoting Griswold, *The Due Process Revolution and Confrontation*, 119 U. PA. L. REV. 711 (1971)).

¹²⁴ 342 U.S. 165 (1952). See text at note 113 *supra*.

¹²⁵ 367 U.S. 643 (1961).

¹²⁶ *United States v. Archer*, 486 F.2d 670, 674-75 (2d Cir. 1973), an opinion by Judge Friendly, quoting at length from Justice Brandeis's famous dissent in *Olmstead v. United States*, 277 U.S. 438, 484-85 (1928).

¹²⁷ 500 F.2d at 274-75.

¹²⁸ *Id.* at 277. The distinctions were the allegation of violation of international treaties, in particular Article 2(4) of the United Nations Charter and Article 17 of the Charter of the Organization of American States.

thought that *Ker* and *Frisbie* did not comport with prevailing concepts of due process and international human rights.

2. Had *Toscanino* gone to the Supreme Court and been affirmed, *Ker-Frisbie* might have gone the way of the many other due process decisions that were cast aside in the decades after World War II. But rather than building on Judge Mansfield's opinion, succeeding decisions in the Second Circuit and other courts of appeals retreated from *Toscanino*. The majority of courts seem to have shared the opinion of the writer of a case comment in the *Harvard Law Review*:

Refusing to exercise jurisdiction is far more drastic a step than, say, excluding evidence produced by the illegal arrest; it completely deprives the state of the opportunity to present its case. *Ker* and *Frisbie* reflect a judgment not that due process is limited to the guarantee of a fair trial, but that interstate or international abduction is not misconduct sufficiently egregious to justify releasing the defendant.¹²⁹

Two cases in the Second Circuit shortly after *Toscanino* show the difficulty in meeting the *Toscanino* test. The first one involved one Julio Juventino Lujan, a citizen of Argentina.¹³⁰ Lujan and eight others (including *Toscanino*) had been indicted by a federal grand jury in New York and a warrant had been issued, directed to "any special agent of the Drug Enforcement Agency or U.S. Marshal," to bring him before the District Court for the Eastern District of New York. Lujan alleged that he was a licensed pilot; that he had been hired by a Mr. Duran to fly him to Bolivia from Argentina; that Duran had in fact been hired by U.S. agents to lure Lujan to Bolivia; and that as soon as he landed in Bolivia he was taken into custody by Bolivian police, who were acting not at the direction of their own superiors but as paid agents of the United States. Further, Lujan alleged that he had been held in Bolivia for six days, then put on a plane to New York, where he was promptly arrested.

Thus, Lujan's case was different from *Toscanino* in two important ways. First, there had been a warrant issued by a U.S. judicial officer, which was apparently not true in *Toscanino*; second, Lujan did not allege physical torture. But as in *Toscanino*, Lujan alleged that he had been forcibly removed from a foreign country, without having been charged in that country or going through the procedures prescribed for extradition.¹³¹ The court of appeals, through a panel composed of two of the same judges who had heard *Toscanino* but in an opinion by Judge Irving Kaufman, explained that the court did not mean everything that had been read into the *Toscanino* decision:

¹²⁹ Case Comment, *United States v. Toscanino*, 88 HARV. L. REV. 813, 816 (1975). For a different view, see 50 N.Y.U. L. REV. 681 (1975).

¹³⁰ *United States ex rel. Lujan v. Gengler*, 510 F.2d 62 (2d Cir.), cert. denied, 421 U.S. 1001 (1975). The reason for the peculiar citation form is that Lujan appealed from the denial of a petition for habeas corpus. Gengler was the Superintendent of the Federal Detention Headquarters in New York City.

¹³¹ There was an extradition treaty between the United States and Bolivia, Treaty of Extradition, Apr. 21, 1900, 32 Stat. 1857, TS No. 399, 5 Bevans 735 (entered into force Jan. 22, 1902).

[I]n recognizing that *Ker* and *Frisbie* no longer provided a carte blanche to government agents bringing defendants from abroad to the United States by the use of torture, brutality and similar outrageous conduct, we did not intend to suggest that *any* irregularity in the circumstances of a defendant's arrival in the jurisdiction would vitiate the proceedings of the criminal court. . . .

. . . . It requires little argument to show that the government conduct of which [Lujan] complains pales by comparison with that alleged by Toscanino. Lacking from Lujan's petition is any allegation of that complex of shocking governmental conduct sufficient to convert an abduction which is simply illegal into one which sinks to a violation of due process.¹³²

Judge Anderson, who had concurred in the result in *Toscanino*, concurred again, to make the point that *Toscanino* had "rest[ed] solely and exclusively upon the use of torture and other cruel and inhumane treatment" and that the majority of active members of the court of appeals, in denying the Government's motion for rehearing, had "rejected the proposition that a kidnapping of a foreign national from his own or another nation and his forcible delivery into the United States against his will, but without torture, would itself violate due process."¹³³ That conclusion, suggesting that there is terrible kidnapping, accompanied by torture, and "not so bad" kidnapping, as in *Lujan* (and presumably in *Ker*), cannot, of course, be derived from Judge Mansfield's opinion in *Toscanino*. One might suggest that kidnapping is by definition carried out by use of force, and nice or even not-so-bad kidnapping is improbable, not to say a contradiction in terms. Moreover, as the *Yunis* and *Matta* cases described at the beginning of this article illustrate, once an abduction takes place beyond the bounds of legal restraint, it is very difficult to draw the line between merely rough police treatment and unacceptable cruelty. But the *Lujan* case seems thus far to have prevailed, and "mere kidnapping" by the U.S. Government is condoned by U.S. courts, and apparently by the Government as well.¹³⁴

3. A few months after the decision in *Lujan*, still another kidnapping case came before the Second Circuit, this time with Judge Mansfield again sitting

¹³² 510 F.2d at 65-66. Fifteen years later, in a letter to the editor stimulated by a court ruling that seemed, as he said, to pit the judiciary against the Presidency in the "war on drugs," Judge Kaufman wrote:

Even in "war," there are rules—as formulated in the Constitution.

Blind efficiency should never become the ultimate goal of a constitutional democracy. . . . While it is nice to have the trains run on time, it is equally important that national policy goals be implemented constitutionally.

N.Y. Times, Dec. 11, 1989, at A22, col. 4.

¹³³ 510 F.2d at 69 (Anderson, J., concurring). The published report gives no reason for the denial of the petition for rehearing en banc; Judge Mulligan dissented from the denial of rehearing in a brief opinion in which one other judge concurred. *United States v. Toscanino, on petition for rehearing*, 504 F.2d 1380 (2d Cir. 1974).

¹³⁴ See section IV(B) *infra*.

and writing for the court. In *United States v. Lira*,¹³⁵ the prisoner, also charged with narcotics offenses, alleged that he had been arrested at the home of his common law wife in Santiago, Chile, taken to a local police station, and there blindfolded, beaten, strapped nude to a box spring, tortured with electric shocks, and questioned about the whereabouts of an alleged co-conspirator. After four days at the police station, Lira alleged, he was taken to the Chilean Naval Prison, where he was held about three weeks, during which he was beaten and tortured and further interrogated. About two months after his arrest, he alleged, he was forced to sign a decree expelling him from Chile, and was put on a plane to New York, accompanied by two U.S. DEA agents and eight Chilean policemen.

Thus from the point of view of the prisoner, Lira's story sounded much like that of Toscanino. But as the court of appeals observed,

the evidentiary hearing produced no proof that representatives of the United States participated or acquiesced in the alleged misconduct of the Chilean officials.¹³⁶

Though one of the DEA agents who had accompanied Lira on the plane to New York testified that, indeed, Lira had been arrested at the request of DEA, and that the U.S. Government had requested the expulsion order,¹³⁷ the court of appeals wrote:

[T]he record fails to reveal any substantial evidence that Chilean police were acting as agents of the United States in arresting or mistreating [Lira] or that United States representatives were aware of such misconduct.¹³⁸

Counsel for Lira argued that even if direct involvement by the U.S. Government in the torture could not be proven, the United States should nevertheless be held vicariously responsible, since the DEA request had "placed the matter in motion." The court rejected the argument:

Unlike *Toscanino*, where the defendant was kidnapped from Uruguay in defiance of the laws of the country, here the Government merely asked the Chilean Government to arrest and expel [Lira] in accord with its own procedures. . . . The DEA can hardly be expected to monitor the conduct of representatives of each foreign government to assure that a request for extradition or expulsion is carried out in accordance with American constitutional standards. . . . Since our Government has no control over the foreign police, extension of *Toscanino* to the present case would serve no purpose.¹³⁹

Taking *Lujan* and *Lira* together, it is evident that the promise of Judge Mansfield's earlier opinion was not likely to be fulfilled. A U.S.-managed

¹³⁵ 515 F.2d 68 (2d Cir.), cert. denied, 423 U.S. 847 (1975).

¹³⁶ *Id.* at 70.

¹³⁷ The opinion of the court states, in a footnote, that extradition was not a viable alternative because under the United States-Chile Extradition Treaty, Apr. 17, 1900, 32 Stat. 1850, TS No. 407, 6 Bevans 543 (entered into force June 26, 1902), a Chilean national could not be extradited by Chile.

¹³⁸ 515 F.2d at 70-71.

¹³⁹ *Id.* at 71.

kidnaping without torture would pass; a kidnaping accompanied by torture without proof of a dominant United States role would also pass.¹⁴⁰ Though there have been a good many abductions from foreign countries carried out, sponsored, assisted, or inspired by the United States Government, and a number in which various forms of torture or other unacceptable police conduct has been alleged, no case is known in which *Toscanino* has been followed.¹⁴¹

If Judge Mansfield retreated somewhat from the ringing declarations of the *Toscanino* case, Judge Oakes, who had sat on all three of the abduction cases but wrote only in *Lira*, sought to put the cases in perspective:

While I concur in the result [in *Lira*], I find the case more troublesome perhaps than does the majority. . . . I agree that this case falls—just barely—on the *Lujan* rather than the *Toscanino* side of the line. But since this is the third case in our court of DEA abduction from abroad, and we were told on argument that there were six more likely to come before us, one is led to wonder whether, by giving further countenance to this kind of conduct by law enforcement agents, we are forgetting the admonitions . . . of the judicial lions of the past—[Brandeis, L. Hand, Frankfurter]. . . .

. . . . [R]egardless of the abstract doctrine *Ker* and *Frisbie* are said to stand for, we can reach a time when in the interest “of establishing and maintaining civilized standards of procedure and evidence,” we may wish to bar jurisdiction in an abduction case as a matter not of constitutional law but in the exercise of our supervisory power To my mind the Government in the laudable interest of stopping the international drug traffic is by these repeated abductions inviting exercise of that supervisory power in the interests of the greater good of preserving respect for law.¹⁴²

D. *Male Captus and International Law*

Three only loosely connected strands form the basis for the contention that state-sponsored abduction violates international law. The most basic proposition, which does not need elaborate development here, is that any exercise of law enforcement by one state on the territory of another is a violation of the latter's *sovereignty*.¹⁴³ Consider, for instance, a hypothetical

¹⁴⁰ In fact, *Toscanino* himself, on remand, failed to meet this burden, which is perhaps not surprising, since if he is to be believed, he was blindfolded at all relevant times. See *United States v. Toscanino*, 398 F.Supp. 916 (E.D.N.Y. 1975). See also *United States v. Cordero*, 668 F.2d 32 (1st Cir. 1981).

¹⁴¹ For citation to cases attempting to challenge arrests or convictions on the basis that the accused was abducted from abroad, see RESTATEMENT, *supra* note 14, §433 Reporters' Note 3; 28 A.L.R. Fed. 685 (1975 & Supp. 1989); 1 W. LAFAVE, *supra* note 53, §1.9(a) n.18.

¹⁴² 515 F.2d at 72–73 (Oakes, J., concurring).

¹⁴³ See generally F. A. Mann, *Reflections on the Prosecution of Persons Abducted in Breach of International Law*, in INTERNATIONAL LAW AT A TIME OF PERPLEXITY 407 (Y. Dinstein ed. 1989), reprinted in MANN, FURTHER STUDIES IN INTERNATIONAL LAW 339 (1990). Of course, this proposition is not pertinent to a seizure on the high seas, which is evidently why Yunis was lured to the yacht beyond the territorial waters of Cyprus. See pp. 445–46 *supra*.

case inspired by the day's news as these lines were written. On November 30, 1989, Alfred Herrhausen, the most important banker in the Federal Republic of Germany, was assassinated in his automobile by a sophisticated explosive apparently set off by breaking a beam of light.¹⁴⁴ Suppose suspicion turns to persons who find their way to the United States. No doubt if the West German Government submitted a request for extradition supported by evidence of probable cause, United States authorities would obtain a warrant to arrest the suspects, and would initiate the process of extradition,¹⁴⁵ subject to the suspects' right to counsel and a judicial hearing.¹⁴⁶ Suppose, however, that the West German Government, concerned with the opportunity for delay and even the possibility of failure inherent in the American legal processes,¹⁴⁷ sent its own agents to, say, Philadelphia to grab the suspects and put them aboard a plane bound for the Federal Republic. Would not the United States Government, as well as the press and public, be outraged—justifiably outraged? The outrage would be justified, in the first instance by the clear violation by the German Government, whether acting through its police, special agents, or even hired American thugs, of the sovereignty of the United States of America.¹⁴⁸

The second argument is based on the proposition that *extradition treaties* not only serve the interests of states in law enforcement but also provide safeguards for persons whose arrest and transfer is sought. To continue with the hypothetical scenario based on the assassination of Alfred Herrhausen, suppose that, instead of acting on its own, the West German police proposed a deal to the FBI that it would arrest the suspects and put them on a Luft-hansa plane, and that thereafter the German authorities would take over. May the FBI accept such a proposal? May a U.S. judge or magistrate issue a warrant authorizing acceptance of the proposal? I believe the answer to both of these questions is no, based on a blend of constitutional and international law. The United States Supreme Court said half a century ago in *Factor v. Lauber-heimer*¹⁴⁹ that "the principles of international law recognize no right to extradition apart from treaty"¹⁵⁰ and, as we saw, the Court had held in the *Rauscher* case¹⁵¹ that a person extradited pursuant to a treaty could insist on compliance with the treaty. This may not be the same as saying there is a

¹⁴⁴ N.Y. Times, Dec. 1, 1984, at A1, cols. 3-4.

¹⁴⁵ See Extradition Treaty, United States-Federal Republic of Germany, June 20, 1978, 32 UST 1485, TIAS No. 2794, 223 UNTS 3.

¹⁴⁶ For a brief summary of the procedures when the United States is the requested state, partly statutory and partly constitutionally required, see RESTATEMENT, *supra* note 14, §478.

¹⁴⁷ See, e.g., *In re Doherty*, note 22 *supra*, refusing a request for extradition on a charge of murder of a British Army officer, on the ground that the act charged was a political offense.

¹⁴⁸ It seems hardly necessary to adduce a citation; but for the sake of completeness, see, e.g., 1 L. OPPENHEIM, INTERNATIONAL LAW 295 & n.1 (H. Lauterpacht 8th ed. 1955):

A State must not perform acts of sovereignty in the territory of another State. [text]

It is therefore a breach of International Law for a State to send its agents to the territory of another State to apprehend persons accused of having committed a crime. [note]

¹⁴⁹ 290 U.S. 276 (1933).

¹⁵⁰ *Id.* at 287.

¹⁵¹ See text at notes 87-96 *supra*.

right not to be extradited apart from treaty, but the Supreme Court said that as well, a few years after *Factor*, in *Valentine v. United States ex rel. Neidecker*,¹⁵² though on the basis of U.S., rather than international, law.¹⁵³ While states (other than the United States as requested state) do from time to time extradite fugitives without a treaty on the basis of reciprocity, the argument is that when an extradition treaty is in force between two states, then as a matter of international law the provisions of the treaty must be followed: it is generally understood that (1) state *A* may not extradite a person to state *B* for an offense not covered by the treaty;¹⁵⁴ the assertion here (not universally accepted) is that (2) state *A* may not deliver a person to state *B* apart from procedures of the treaty, simply by calling the process something other than extradition.¹⁵⁵

The third argument is based on the proposition that forcible abduction carried out by a state is a violation of *international human rights law*. None of the international human rights declarations or conventions has yet stated this proposition expressly; but, for instance, the Universal Declaration of Human Rights¹⁵⁶ states that "[n]o one shall be subjected to arbitrary arrest, detention or exile,"¹⁵⁷ and the International Covenant on Civil and Political Rights¹⁵⁸ provides that "[n]o one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."¹⁵⁹ The Human Rights Committee established pursuant to the Covenant, and authorized by the Optional Protocol to the Covenant¹⁶⁰ to hear complaints of individuals, did hold in one case that abduction of a Uruguayan refugee from Argentina by Uruguayan security and intelligence forces constituted a violation of Article 9 of the Covenant. It followed, the

¹⁵² 299 U.S. 5 (1936).

¹⁵³ To be precise, the Supreme Court said that "the Constitution creates no executive prerogative to dispose of the liberty of the individual. . . . [T]he legal authority does not exist save as it is given by act of Congress or by the terms of a treaty. . . ." *Id.* at 9. Since the first extradition statute of 1848, U.S. legislation has always read substantially as does the present version, conferring on the Secretary of State the authority to extradite a fugitive, but "only during the existence of any treaty of extradition with such foreign government." 18 U.S.C. §3181 (1988). See also *id.* §3184.

¹⁵⁴ Accord RESTATEMENT, *supra* note 14, §475(a) and comment *c* thereto.

¹⁵⁵ I believe this argument would be sufficient to conclude that neither the FBI nor the magistrate could accept the proposition suggested in the text. In addition, an arrest may be made, and a warrant may issue, only upon probable cause that an offense has been committed against the law of the United States. That would not be true in the case of the German banker murdered in Frankfurt.

¹⁵⁶ GA. Res. 217A (III), UN Doc. A/810, at 71 (1948). The United States was a principal sponsor of the Universal Declaration.

¹⁵⁷ *Id.*, Art. 9. See also Art. 3 (right to security of person) and Art. 5 (no one shall be subjected to torture or to cruel, inhuman or degrading treatment).

¹⁵⁸ Dec. 16, 1966, 999 UNTS 171, reprinted in 6 ILM 368 (1967). As of year-end 1989, over 80 states were parties to the Covenant; the United States had signed but not ratified it.

¹⁵⁹ *Id.*, Art. 9(1). See also Art. 7 (no degrading treatment); Art. 9(3) (anyone arrested shall be brought promptly before a judge); Art. 9(4) (right to challenge lawfulness of detention before a court); Art. 10(1) (all persons deprived of their liberty shall be treated with humanity).

¹⁶⁰ Optional Protocol to the International Covenant on Civil and Political Rights, note 158 *supra*, 999 UNTS at 302, 6 ILM at 383.

Committee held, that the state was under an obligation to provide effective remedies, including immediate release and permission to leave the country.¹⁶¹

Though these arguments seem fairly straightforward, they have succeeded only intermittently, and usually in a semipolitical, semilegal context, i.e., where state *A* did not want to pick one more fight with state *B*. For instance, in the 1930s, Nazi agents lured one Berthold Jacob-Solomon, a former German journalist, from France to Basel, Switzerland, and abducted him from there to Germany to be tried for treason. The Swiss Government protested and succeeded in having the matter submitted to an arbitral tribunal under the Swiss-German Treaty of Arbitration and Conciliation. After receiving the Swiss *mémoire*, but before the case was adjudicated, the German Government decided to abandon the arbitration, to return Mr. Jacob to Switzerland, and to discipline the kidnapers.¹⁶²

More recently, a Mr. Abrahams, claiming to be a refugee who had been granted asylum in the Bechuanaland Protectorate, brought a habeas corpus petition before a South African court, alleging that he had been kidnaped at gunpoint by six persons of whom two were South African police, and brought forcibly to South West Africa, where he was formally arrested on a charge under the Suppression of Communism Act.¹⁶³ The court referred to the "clear precedent . . . that once there is a lawful detention, the circumstances of the arrest and capture are irrelevant," but took note that at the outset of the proceedings the representative of the Government had read a statement to the effect that in order to preserve friendly relations with neighboring states, the Minister of Justice had decided to return the petitioner and his companions to Bechuanaland.¹⁶⁴

Most of the cases of state-sponsored kidnaping,¹⁶⁵ however, seem to have come out like that of Antoine Argoud, an ex-colonel in the French Army who had joined the Secret Army (OAS) that plotted in the early 1960s to frustrate President de Gaulle's efforts to end the war between France and Algeria by granting independence to Algeria.¹⁶⁶ In 1961 Argoud had been sentenced to death *in absentia* by a French military court, for illegal political activities. In 1963 he was located in a hotel in Munich, and was brought back forcibly to France, where he was spotted in a van, handcuffed and with his

¹⁶¹ Views of Human Rights Committee on Complaint of López, July 29, 1981, 36 UN GAOR Supp. (No. 40) at 176-84, UN Doc. A/36/40 (1981).

¹⁶² See Preuss, *Kidnapping of Fugitives from Justice on Foreign Territory*, 29 AJIL 502 (1935); Preuss, *Settlement of the Jacob Kidnapping Case*, 30 AJIL 123 (1936).

¹⁶³ S. Africa Act 44 of 1950, now known as Internal Security Act 44 of 1950.

¹⁶⁴ *Abrahams v. Minister of Justice*, [1963] 4 S. Afr. L. Rep. 542, 544-49 (Cape Prov. Div. 1963).

¹⁶⁵ For a list of such cases, see RESTATEMENT, *supra* note 14, §432 Reporters' Note 2; also articles cited at note 97 *supra*. For a discussion of more recent cases, see Sponsler, *International Kidnapping*, 5 INT'L LAW. 27 (1979); Findlay, *Abducting Terrorists Overseas for Trial in the United States: Issues of International and Domestic Law*, 23 TEX. J. INT'L L. 1 (1988).

¹⁶⁶ *Re Argoud*, 1964 Bull. Crim. 420, 1965 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 935, 45 ILR 90, 92 JOURNAL DE DROIT INTERNATIONAL PUBLIC [Clunet] 93 (1965) (Cass. Crim. June 4, 1964).

face swollen. He was immediately taken into custody and tried by a special Court of State Security, which convicted him and sentenced him to life imprisonment for insurrection. On his appeal to the Supreme Court of France (Cour de cassation), Argoud contended, *inter alia*, that he had been kidnaped in contravention of international law. The court of first instance had rejected the claim, on the basis of a declaration by the French Ministry of Foreign Affairs that no communication had been received from the Government of the Federal Republic of Germany. The court had said: "The individual who claims to be injured . . . lacks the right or capacity to plead in judicial proceedings a violation of international law, *a fortiori* when the State concerned makes no claim."¹⁶⁷

Two days later, the defense offered in evidence an official representation by the German authorities, but the court refused to accept the submission.¹⁶⁸ The Cour de cassation found that the Court of State Security had erred in rejecting the information about a representation from the Federal Republic; however, the error was without significance:

[E]ven accepting that Argoud had been abducted on the territory of the Federal Republic of Germany in violation of the rights of that country and of its sovereignty, it would be for the Government of the injured State alone to complain and demand reparation.

The accused has no capacity to plead a contravention of the rules of public international law and could not claim to find in them a personal basis for immunity from judicial proceedings.

Finally, the circumstances in which an accused person who is the subject of a lawful prosecution and has been apprehended on a lawful warrant for arrest and handed over to justice, even if they constituted an infringement of the criminal law or the traditional principles of our law, are not of a character—however deplorable they may appear—to entail of themselves the nullity of the prosecution.¹⁶⁹

Thus, the *Argoud* case came out very much like *Ker v. Illinois* in regard to the claims of the prisoner that he has been brought before the court by abduction from another country: (1) if the foreign state does not protest, the court says that only states can raise claims of violation of international law; (2) if the foreign state does protest, the court suggests that reparations may be due to the other state, but the breach of international law does not deprive the court of jurisdiction over the prisoner. Considerations of international human rights law are usually lost in the shuffle.¹⁷⁰

¹⁶⁷ 92 Clunet at 96, 45 ILR at 94.

¹⁶⁸ One can only speculate about why the note from the Federal Republic arrived so late. The Bundestag (Parliament) had debated the *Argoud* case on Nov. 6, 1963, and by agreement of all parties had requested that the West German Government demand the return of Argoud to Germany. See Doebling, *Restitutionsanspruch, Asylrecht und Auslieferungsrecht im Fall Argoud*, 25 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 209, 210 (1965).

¹⁶⁹ 92 Clunet at 100, 45 ILR at 97-98.

¹⁷⁰ Professor Doebling, note 168 *supra*, at 216-21, raises the question whether the *Argoud* case could be seen as a disguised extradition, and if so whether extradition through legal channels would have been possible in view of Argoud's political activities. None of the American cases here discussed raise that problem.

I do not want here to explore what Professor Schachter has called the "basic antinomies" between the international legal system built on the sovereignty of nation-states and the growing recognition that individuals are entitled to certain rights as a matter of international law that may not lawfully be abridged by states in exercise of their sovereign jurisdiction.¹⁷¹ I want only to point out that in the present context the assertions of violation of national sovereignty and violations of human rights coincide. What *Ker*, *Argoud* and similar cases going back to *Ex parte Scott*¹⁷² demonstrate is far from affording justification for kidnaping by authority of a state, as suggested, for instance, by Senator Specter.¹⁷³ What these cases illustrate, whether looked at from the point of view of jurisdiction, or standing, or remedy, is that the technique developed under the U.S. Constitution of deterring official misconduct by voiding an arrest or conviction has no counterpart (dare one say "as yet") in international law or state practice.

The argument here pressed in terms of U.S. constitutional law would, I submit, reinforce international law in two respects: *first*, building on the approach taken in *Toscanino* would fill a gap in available remedies for breach of international law; and *second*, even as the *Ker* case has served as an example and a kind of justification for the practice of other states, so, if the United States were to declare international abduction no longer acceptable, the courts and governmental authorities of other states might well follow.¹⁷⁴ Were that to happen, the practice of states might over time approach—at least in this area—more closely their professed norms and, one may venture to say, their consensus. Surely *male captus, bene detentus* is not one of the principles that expresses the aspirations of international law, or that inspires adherence to that law.

IV. THE SEVERAL VOICES OF WASHINGTON

A. Congress as Conscience

It may come as a surprise to a public bombarded with headlines about the "war on drugs" and the "war on terrorism" that Congress has been far from enthusiastic about extraterritorial arrests and abductions. In 1976, following a report by Senator Mike Mansfield about activities by U.S. DEA agents in Thailand (and shortly after the decisions in *Toscanino*, *Lujan* and *Lira* described in section III(C) above), Congress adopted an amendment to the Foreign Assistance Act of 1961 reading as follows:

¹⁷¹ See Schachter, *International Law in Theory and Practice: General Course in Public International Law*, 178 RECUEIL DES COURS 9, ch. XV, esp. at 329–30 (1982 V).

¹⁷² 9 E. & C. 446, 109 Eng. Rep. 166 (K.B. 1829).

¹⁷³ See text at notes 18–28 *supra*.

¹⁷⁴ It is interesting, for example, that the Constitutional Court of the Federal Republic of Germany (Bundesverfassungsgericht), in a recent case involving the abduction from France to Germany of a person accused of tax evasion, cited *Ker* and *Lujan* in reaching the conclusion that there is no general rule of international law that may be derived from the practice of states to the effect that an unlawfully abducted person may not be tried—at least if the state from which the prisoner has been abducted does not protest and demand his return. 39 NEUE JURISTISCHE WOCHENSCHRIFT 1427 (1986) (Fed. Const. Ct. July 17, 1985).

[§481](c) (1) Notwithstanding any other provision of law, no officer or employee of the United States may engage or participate in any direct police arrest action in any foreign country with respect to narcotics control efforts.¹⁷⁵

In its report on the Mansfield Amendment, the Senate Foreign Relations Committee wrote:

In adopting this restriction, the Committee seeks to reconcile two important U.S. interests; motivating foreign governments to cooperate to the fullest degree in stopping drugs from reaching the U.S. and avoiding excessive U.S. intervention in the internal affairs of other nations. The range of actions carried out by U.S. narcotics agents overseas covers a wide spectrum—from the innocuous (exchanging information and intelligence) to the clearly objectionable (actions involving the use of force and actions involving arrest of foreign nationals).

It is the Committee's intent that "police action," as used in this provision, is meant to prohibit U.S. narcotics agents abroad from engaging in actions involving the use of force and actions involving the arrest of foreign nationals—whether unilaterally (acting on their own) or as members of teams involving agents or officials of other foreign governments. And more broadly, it is the Committee's intent that the Drug Enforcement Administration and Chiefs of U.S. diplomatic missions overseas exercise special care to insure that U.S. narcotics agents overseas not engage in any types of actions in which there is a reasonable risk of embroiling the U.S. in the internal affairs of other countries by tending to lead them into situations involving the use of force or the arrest of foreign nationals.¹⁷⁶

Two years later, the Mansfield Amendment was further amended by adding:

No such officer or employee may interrogate or be present during the interrogation of any United States person arrested in any foreign country with respect to narcotics control efforts without the written consent of such person.¹⁷⁷

¹⁷⁵ Sec. 481(c) of the Foreign Assistance Act of 1961 as amended, 22 U.S.C. §2291(c), as enacted by §504(b) of the International Security Assistance and Arms Export Control Act of 1976, Pub. L. No. 94-329, 90 Stat. 764. When the bill was first passed by Congress, President Ford vetoed it, on the ground that "the bill would seriously obstruct the exercise of the President's constitutional responsibilities for the conduct of foreign affairs." 12 WEEKLY COMP. PRES. DOC. 828 (May 7, 1976). There is no indication that this view pertained to the Mansfield Amendment. When the amendment was included in a revised Arms Export Control Act, the President approved it and it became law.

¹⁷⁶ SENATE COMM. ON FOREIGN RELATIONS, INTERNAL SECURITY ASSISTANCE AND ARMS EXPORT CONTROL ACT, REPORT ON S. 2662, S. REP. NO. 605, 94th Cong., 2d Sess. 55 (1976), reprinted in 1976 U.S. CODE CONG. & ADMIN. NEWS 1378.

¹⁷⁷ Added by Pub. L. No. 95-384, §3, 92 Stat. 730 (1978). The Senate Report specified that "[t]he term 'U.S. person' is intended to signify (1) a citizen of the United States or (2) any alien lawfully admitted to the United States for permanent residence." SENATE COMM. ON FOREIGN RELATIONS, THE INTERNATIONAL SECURITY ASSISTANCE ACT OF 1978, REPORT ON S. 3075, S. REP. NO. 841, 95th Cong., 2d Sess. 13 (1978).

Thus, U.S. officers were precluded from participating in the arrest of *any* person outside the United States, regardless of nationality or residence; they could participate in an interrogation abroad, but (absent consent) only of a nonresident alien.

Congress tinkered with section 481 several times in the 1980s, and substantially rearranged it in 1986,¹⁷⁸ but the essence of the Mansfield Amendment remained intact.¹⁷⁹ The Report of the House Foreign Affairs Committee on the 1986 revisions states:

The committee continues to believe that the Mansfield amendment inhibits the ability of U.S. officials, particularly DEA agents, to carry out their duties overseas. However, the committee also recognizes that the presence of U.S. officials at narcotics arrest actions can be a sensitive political issue which may have an impact on bilateral relations.¹⁸⁰

The history of the Mansfield Amendment suggests that it was primarily concerned with foreign relations, which in this connection evidently are closely bound up with the issue of national sovereignty, the first of the three elements of the concerns of international law discussed in the previous section of this article.¹⁸¹ But Congress understood the relation between the Mansfield Amendment and the constraints of American criminal procedure, as shown by the following brief exchange at the House Committee markup of the 1986 amendments:

MR. CHRISTOPHER SMITH: . . . [N]o officer or employee of the United States may interrogate or be present during the interrogation of any U.S. person who has been arrested without written consent. Could the author explain the rationale behind that?

CHAIRMAN FASCELL: Unfortunately there have been cases that led to that language, which is the present law.

MR. LAWRENCE SMITH: We kept that portion of it. There is—was then when Mansfield first introduced it, and there is now a significant fear that American law enforcement officers would be placed in very compromised positions in certain foreign countries where their methods are generally not up to our constitutional standards. And we cannot be placed in a position where we are criticized because an arrested defendant may not be accorded what is otherwise our known constitutional rights. That is one of the problems.

MR. LAWRENCE SMITH: It is not the U.S. citizens we are concerned about. It is that there are major arrests made of foreign nationals in

¹⁷⁸ 22 U.S.C. §2291(c)(1)–(6), enacted by Pub. L. No. 99-570, §2009, 100 Stat. 32 (1986).

¹⁷⁹ One new feature of the 1986 version of the Mansfield Amendment was a provision authorizing the Secretary of State to waive the prohibition on participation by U.S. officers in a direct police arrest if he determined that application of the provision "would be harmful to the national interest of the United States." 22 U.S.C. §2291(c)(2) as it read from 1986 to 1989. That provision was repealed in the 1989 amendment, note 187 *infra*.

¹⁸⁰ HOUSE COMM. ON FOREIGN AFFAIRS, INTERNATIONAL NARCOTICS CONTROL ACT OF 1986, REPORT ON H.R. 5352, H.R. REP. NO. 798, 99th Cong., 2d Sess. 10 (1986).

¹⁸¹ See pp. 472–73 *supra*.

foreign countries who may not be given the same Miranda rights and attorney's rights, and the violation of their civil liberties may not—it is not something that our people should be involved in in that regard.¹⁸²

Several efforts have been made to repeal the Mansfield Amendment or to deprive it of its force. Senator DeConcini, for instance, sought to replace the prohibitions in the amendment by an authorization "to engage or participate in any direct police arrest action in any foreign country with respect to narcotics control or any interrogation in connection with such efforts," subject only to such regulations as the head of the agency may prescribe.¹⁸³ He argued that the Mansfield Amendment is an impediment to law enforcement, and that his amendment "would take the shackles off our drug enforcement agents in foreign countries, while at the same time directing our civilian law enforcement agencies to promulgate appropriate regulations to assure proper conduct of our individual agents overseas."¹⁸⁴ But none of these arguments have been persuasive to Congress as a whole. In 1989 the Mansfield Amendment was again revised, to provide that a provision enacted in 1986¹⁸⁵ to make clear that U.S. officers were not prohibited from *assisting* foreign officers who are making an arrest—the story in *Matta and Verdugo*, as well as in *Lujan*, *Lira* and numerous other cases¹⁸⁶—would be applicable only with the approval of the United States chief of mission in the country where the arrest was being carried out.¹⁸⁷

* * * *

Of course, the history here recounted is not conclusive on either the constitutional or the international law argument. And as at least one appellate court has pointed out, Congress did not provide any sanctions or relief for persons arrested in contravention of the Mansfield Amendment.¹⁸⁸ The his-

¹⁸² HOUSE COMM. ON FOREIGN AFFAIRS, 99TH CONG., 2D SESS., MARKUP ON H.R. 5352, at 10–11 (Comm. Print 1986). As the further exchange points out, the prohibition on presence of a U.S. officer at an interrogation, present 22 U.S.C. §2291(C)(5), applies by its terms only to "United States persons" (*see* note 177 *supra*); it is thus not conclusive on the issue discussed in section II of this paper. My point in quoting the exchange is only to illustrate that Congress was well aware of the sometimes conflicting pull of crime control and international and constitutional law.

¹⁸³ *See* 131 CONG. REC. S6145 (daily ed. May 15, 1985).

¹⁸⁴ *Id.*

¹⁸⁵ 22 U.S.C. §2291(c)(1), second sentence, as enacted in 1986, note 179 *supra*.

¹⁸⁶ *See*, e.g., the cases cited in RESTATEMENT, *supra* note 14, §433 Reporters' Note 1.

¹⁸⁷ 22 U.S.C. §2291(c)(2), enacted by Pub. L. No. 101–231, §15, 103 Stat. 1954, 1963–64 (1989).

¹⁸⁸ *United States v. Zabaneh*, 837 F.2d 1249, 1261 (5th Cir. 1988), another case in which the prisoner alleges that he was kidnaped by U.S. agents, whereas the U.S. Government maintains that its agents did not participate in the alleged kidnaping, other than as observers.

My colleague Professor Theodor Meron called my attention to §3202(d) of the Maritime Drug Law Enforcement Prosecution Improvements Act of 1986, 100 Stat. 3207–96, 46 U.S.C. app. §1903(d), which reads:

A claim of failure to comply with international law in the enforcement of this Act may be invoked solely by a foreign state, and a failure to comply with international law shall not

tory does show, however, that Congress has thought a good deal about the problem (including six separate legislative enactments or amendments of section 481(c)), and that it has had and continues to have its reservations about roving law enforcement efforts of U.S. agents, on both constitutional and international law grounds. If the constitutional standard is shocking the conscience of the nation, the history of the Mansfield Amendment supports, at a minimum, a reconsideration of the *Ker* case. Even if *Ker v. Illinois* was correct when it was decided,¹⁸⁹ and even if a century later it cannot be firmly established that all foreign kidnaping is a violation of international law, U.S. courts should not disregard clear violation of a U.S. statute intended to reflect contemporary American values.

B. *Law in the Executive Branch*

That United States law enforcement officers do roam around the world (particularly the Third World) making or assisting in arrests and other forms of seizure going beyond intelligence gathering is apparent. The lawfulness of such activity has recently aroused considerable controversy in Washington. Much of the controversy remains behind closed doors, or available only through incomplete accounts in the press. If the present state of the debate, so far as it is known, is not fully reassuring, it is nevertheless comforting that the concerns raised throughout this article are of some concern to the U.S. Government as well.

1. *The Carter administration's view.* In the last year of the Carter administration, Attorney General Civiletti asked his Assistant Attorney General, Office of Legal Counsel, for a formal opinion on a proposal of the FBI "that might entail entry of American agents into a foreign country and forcible apprehension of a fugitive currently residing there."¹⁹⁰ The question assumed that the foreign country would file a "pro forma" protest, the inference apparently being that deep down, the country in question was just as happy to have the United States do its dirty work of law enforcement. The Assistant Attorney General, however, pointed out that since the foreign state would not be likely to attest that the protest was merely pro forma, "there is little to be

divest a court of jurisdiction or otherwise constitute a defense to any proceeding under this Act.

By its terms this Act applies only to interdiction at sea, and I am not aware of any similar legislation applicable to interrogations, arrests, or abductions from foreign soil. Congressional efforts to restrict the discretion of federal courts on determination of their own jurisdiction are, of course, generally disfavored, and one would hope that this provision does not become a precedent, particularly without specification of the international law in question. At any rate, if the argument made throughout this article were accepted, a person abducted from a foreign country for prosecution in the United States could assert a defense based on violation of the U.S. Constitution and laws, with the argument based on violation of international law having only a supporting role.

¹⁸⁹ See section III(A) *supra*.

¹⁹⁰ 4B Op. Off. Legal Counsel 543 (1980). The opinion is signed by John H. Harmon, Assistant Attorney General.

gained" by characterizing the nonconsent as pro forma, at least before a court.¹⁹¹

In sum [the Office of Legal Counsel wrote] we are of the opinion that in the absence of an international law violation, a federal district court will not ordinarily divest itself of jurisdiction in a criminal case where the defendant's presence has been secured by forcible abduction from the territorial limits of a foreign asylum state.¹⁹² Nor should it do so where there is an international law violation. However, since you [i.e., the Attorney General] have advised us that you expect a pro forma diplomatic protest by the asylum state and that the fugitive's prosecution will proceed in the Southern District of New York [i.e., within the circuit that decided *Toscanino*, *Lujan* and *Lira*¹⁹³], it is necessary to examine the international law implications of this operation more closely.¹⁹⁴

The examination, which extends over 14 printed pages, concludes that the operation would violate international law—not an extradition treaty or international human rights (i.e., not the second and third elements of the argument raised above), but "general international law principles," in that it would involve an "impermissible invasion of the territorial integrity of another state."¹⁹⁵ The analysis continues in terms of the basic authorization for the FBI "to detect and prosecute crimes against the United States."¹⁹⁶ The statute has no geographic limitation, but conventional statutory construction provides that where a statute imposes a duty, it authorizes by implication all "reasonable and necessary means to effectuate such duty."

Given the target's fugitive status and the inadequacy of extradition,¹⁹⁷ it can be forcefully argued that this operation is necessary if the FBI is to carry out its law enforcement mission under §533 [the authorizing statute]. However, the *reasonableness* of the operation is questionable if it violates international law or United States law. . . . Judges in abduction cases have expressed concern that such extraordinary apprehensions denigrate the rule of law in the name of upholding it. We think that concern, when coupled with a U.S. or international law violation, may well lead courts to conclude that the activity lies beyond the jurisdiction of the FBI.¹⁹⁸

¹⁹¹ *Id.* at 549.

¹⁹² As the opinion explains elsewhere, "asylum state" is used simply as the state where the fugitive resides, without any implication that that state has formally granted asylum or treated the fugitive as a refugee.

¹⁹³ See section III(C) *supra*.

¹⁹⁴ 4B Op. Off. Legal Counsel at 547.

¹⁹⁵ *Id.* at 549. The opinion discusses the question whether the operation would violate Article 2(4) of the United Nations Charter, but concludes that even if so, the Charter is not a self-executing treaty and thus the violation would not affect the criminal jurisdiction of American courts. *Id.* at 548-49.

¹⁹⁶ 28 U.S.C. §533 (1982).

¹⁹⁷ The opinion states in a footnote at this point: "We are assuming that it can be established that extradition is an inadequate means of apprehension in this case. We emphasize here the importance of an ability to make such a showing." 4B Op. Off. Legal Counsel at 552 n.26.

¹⁹⁸ *Id.* at 552. Note that this analysis is the obverse of the analysis of jurisdiction to prescribe and to enforce made in §§402, 403, and 431 of the RESTATEMENT, *supra* note 14. The *Restatement* maintains that though one of the formal bases of jurisdiction is present, if the exercise of

The opinion concluded that "asylum state consent appears pivotal to the success of the operation, both as a matter of litigation and public perception." Moreover, "in the current international climate [presumably a reference to the presence of the American hostages in Iran], this country can ill afford an operation that would permit others to argue that the United States does not respect international law. We advise that you not authorize the operation without the asylum state's tacit consent."¹⁹⁹

What if the state concerned gives its consent, tacitly or expressly?

If an apprehension is to be made, we recommend that it be made in the same manner as any professional arrest: with expedition, minimum restraint, and with full sensitivity to the fugitive's physical needs and constitutional rights. We would recommend that the fugitive be informed of his rights and the presence of outstanding warrants immediately upon his apprehension in the asylum state and again immediately within the territorial confines of the United States. Even if the fugitive waives his rights, we recommend that there be no attempt at interrogation until the fugitive is within the territorial limits of the United States.²⁰⁰

And finally:

As far as the participation of asylum state nationals is concerned, we make the following observations: Insofar as foreign nationals are acting at the behest or direction of this government, they will be regarded as American agents by the courts. If they take action outside the ambit of that agency relationship, *e.g.*, resort to torture, this government may successfully maintain that it was not a party to that action [citing *Lira*]. But this does not militate in favor of using asylum nationals. . . . Only if foreign nationals, without U.S. direction or compensation, deposited the fugitive on American soil would the legal problems in this memorandum be obviated by their presence.²⁰¹

So much for the Carter administration, or at least for the opinion-writing division of the U.S. Department of Justice.

Apparently, the opinion was requested in connection with a proposal to seize Robert Vesco, the fugitive financier then residing in the Bahamas, and evidently the advice was followed, at least in that case.

2. *The Reagan and Bush administrations.* Clearly, the Reagan administration did not agree with the advice quoted. Particularly in the last few years, as we saw, both the "war on drugs" and the "war on terrorism" seemed increasingly frustrating, and self-help was more and more frequently resorted to, even as Congress kept widening the scope of offenses deemed to

jurisdiction in the particular circumstance is unreasonable, it violates international law. The Office of Legal Counsel here maintains that if an exercise of enforcement jurisdiction violates international law, it is unreasonable and therefore unauthorized under a general U.S. statute. Compare also RESTATEMENT §115 and comment *a* thereto, §403 comment *g* and Reporters' Note 2.

¹⁹⁹ 4B Op. Off. Legal Counsel at 556.

²⁰⁰ *Id.* at 556-57.

²⁰¹ *Id.* at 557.

fall within the jurisdiction of the United States.²⁰² President Reagan is reported to have signed a classified intelligence directive or "finding" in January 1986 authorizing the CIA to identify terrorists who had committed crimes against Americans abroad and to help bring them to the United States for trial;²⁰³ and evidently the initiatives against terrorists and against drug traffickers tended to overlap, with no clear distinction (and perhaps no great interest) in the governing authorizations. As we saw, in the *Yunis* case, a warrant to arrest was obtained; in *Verdugo* and *Matta*, warrants seem not to have been obtained, and as in many of the earlier cases, the distinctions between collaboration among local and American police forces, and one police force acting as agents of the other, were hazy. No formal revision of the 1980 Justice Department opinion is known until the first summer of the administration of President Bush.

On June 21, 1989, the Office of Legal Counsel of the Justice Department formally (but confidentially) took back the 1980 opinion, and issued a new opinion coming to a different conclusion. The opinion was not released to the public, but news of it got out in October, producing headlines such as "FBI GETS OK FOR OVERSEAS ARRESTS . . . COULD APPLY TO EFFORTS TO BRING PANAMA'S NORIEGA TO TRIAL";²⁰⁴ "U.S. CITES RIGHT TO SEIZE FUGITIVES ABROAD";²⁰⁵ and "FBI TOLD IT CAN SEIZE FUGITIVES ABROAD, CRITIC SAYS JUSTICE OPINION MAKES U.S. AN INTERNATIONAL RUFFIAN."²⁰⁶ Both President Bush and Secretary of State Baker were caught by surprise by the news, and Mr. Baker later called the new Justice Department ruling "a very narrow legal opinion based on consideration only of domestic United States law."²⁰⁷ The White House issued a statement later on the day the report appeared, stating:

An interagency process exists to insure that the President takes into account the full range of foreign policy and international law considerations as well as domestic law enforcement issues raised by any specific case. There will be no arrests abroad that have not been considered through the interagency process.²⁰⁸

²⁰² See my earlier article, *supra* note 1, esp. at 884-92. The point is made in the U.S. DEP'T OF JUSTICE MANUAL §9-12.136 (Supp. 1989-2).

²⁰³ See *Taking on Terrorists*, U.S. NEWS & WORLD REP., Sept. 12, 1988, at 27; Wall St. J., Feb. 20, 1987, at 1, col. 6. The *Wall Street Journal* article, quoting unnamed "administration law enforcement and intelligence officials," reports that the "snatch, grab and deliver" operations were to be supervised by Colonel Oliver North and CIA Director William Casey; William Webster, then the director of the FBI and a former federal judge, is reported to have had serious misgivings, on the ground that it probably violated international law and would not succeed.

²⁰⁴ L.A. Times, Oct. 13, 1989, at 1A, col. 5.

²⁰⁵ N.Y. Times, Oct. 14, 1989, at 6, cols. 4-6.

²⁰⁶ Wash. Post, Oct. 14, 1989, at A15, cols. 1-3. The opinion was entitled "Authority of the FBI to Override Customary or Other International Law in the Course of Extraterritorial Law Enforcement Activities." The critic mentioned in the *Post's* headline was Congressman Edwards of California. "If we do it," he was quoted in the *Post* as saying, "that means Moscow could authorize the KGB to arrest somebody in our country." *Id.*

²⁰⁷ N.Y. Times, note 205 *supra*, at A6, col. 4.

²⁰⁸ *Id.* Iran, which perceived the news as directed against it, responded by adopting a law authorizing Iranian officials to arrest Americans anywhere and put them on trial. Wash. Post, Nov. 2, 1989, at A51, cols. 1-2.

None of these statements reassured Congress, particularly when a strict order of nondisclosure was imposed with respect to the Justice Department's opinion.²⁰⁹ The Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee promptly called a hearing on the subject, at which the author of the Justice Department's opinion and the State Department's Legal Adviser (as well as a ranking official of the FBI) testified. Some brief excerpts of their statements may serve to round out this summary of the executive branch's approach to extraterritorial law enforcement as of year-end 1989.²¹⁰

Having taken pains to assure the committee that the Department of Justice had not changed its policy, but on the other hand that extraterritorial enforcement of United States laws "is of growing importance to our ability to protect vital national interests," Assistant Attorney General William P. Barr undertook to explain why the 1980 opinion was flawed. First, the 1980 opinion had expressed the view that the United States, as a sovereign, has no authority under its own laws to conduct law enforcement in another country without that country's consent. The Carter administration's memorandum had assumed that the legal authority of the United States is necessarily limited by the sovereignty of other nations, citing the *Schooner Exchange* case.²¹¹

We do not agree with this proposition [Mr. Barr testified], and believe that the 1980 Opinion's reliance on *The Schooner Exchange* . . . was misplaced. Under our constitutional system, the executive and legislative branches, acting within the scope of their respective authority, may take or direct actions which depart from customary international law. At least as respects our domestic law, such actions constitute "controlling executive or legislative act[s]" that supplant legal norms otherwise furnished by customary international law.²¹²

²⁰⁹ Not only would the head of the Office of Legal Counsel not release the opinion (which was not classified) to the present writer, though he was very courteous in returning my telephone call, but the Department refused a formal request for the text of the opinion from Representative Don Edwards, Chairman of the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee, in advance of a hearing on the opinion. Exchange of Letters Edwards to Att'y Gen. Thornburgh, Nov. 2, 1989; Asst. Att'y Gen. Crawford to Edwards, Nov. 8, 1989.

²¹⁰ As these lines are written, the report of the hearing has not yet been published. The excerpts are taken from the witnesses' prepared texts. An account of the hearing appears in the Wash. Post, Nov. 9, 1989, at A72, cols. 1-6.

²¹¹ *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812).

²¹² Barr, *The Legality as a Matter of Domestic Law of Extraterritorial Law Enforcement Activities that Depart from International Law* 4-5 (statement before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary, Nov. 8, 1989) [hereafter House Hearing].

The reference in quotation marks is to the familiar case of *The Paquete Habana*, 175 U.S. 677, 700 (1900). The full paragraph from which the quotation is taken reads:

International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.

The Assistant Attorney General did not consider the issue from the point of view of the person being arrested, or from the point of view of the constitutional restraints (if any) applicable to such arrests or kidnapping. He treated the issue solely as one concerning the restraints on executive action imposed by customary international law, and concluded that "because the President has recognized authority to override customary international law, restrictions imposed by [that] law should not be read into [the FBI's] general enabling statutes in a manner that precludes the exercise of [the President's core executive law enforcement power]." ²¹³

Having rested his argument almost entirely on the President's authority to override customary international law (though citing no specific grant for that authority ²¹⁴), the representative of the Justice Department remembered that he had another audience:

[I]n light of the serious international consequences that could follow from deploying the FBI to conduct an extraterritorial apprehension in contravention of customary international law, I can assure you that the Administration would take such action only in the most compelling circumstances ²¹⁵

The Legal Adviser of the State Department—a former federal judge and before that a law professor—took a quite different approach. *First*:

While Congress and the President have the power to depart from international law, the courts have in effect insisted that they do so unambiguously and deliberately. This doctrine reflects how our nation's respect for international law is built into our domestic legal system, and a high value accorded that law in theory and practice. ²¹⁶

²¹³ Barr, *supra* note 212, at 8. In support of this view, the statement cites *Garcia-Mir v. Meese*, 788 F.2d 1446 (11th Cir.), *cert. denied*, 479 U.S. 889 (1986). In that case, the district court found that the indefinite detention of certain undocumented aliens who had come to the United States from Cuba on the Mariel boat lift was arbitrary and in violation of international law, but that the Attorney General's decision to detain them was nevertheless binding on the courts, and the court of appeals affirmed.

For Professor Henkin's criticism of this decision, concluding that "neither precedent nor plausible argument" supports the holding that the President can disregard international law in service of domestic needs, see Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny*, 100 HARV. L. REV. 853, 883-85 (1987).

For a range of views on the subject of the binding nature of customary law, none agreeing with Assistant Attorney General Barr's approach, see *Agora: May the President Violate Customary International Law?*, 80 AJIL 913 (1986); and its continuation, 81 AJIL 371 (1987).

²¹⁴ See Henkin, note 213 *supra*, at 884, pointing out that whatever power the President has to derogate from international law may be exercised only when he is acting within his constitutional powers.

²¹⁵ Barr, *supra* note 212, at 13. In another opinion prepared before the House hearing but not disclosed until December 16, 1989, Mr. Barr advised that U.S. military forces have the legal authority to conduct law enforcement operations outside the United States, including pursuing and apprehending international terrorists and drug traffickers. Wash. Post, Dec. 16, 1989, at A1, col. 5; L.A. Times, Dec. 17, 1989, at A1, col. 5.

²¹⁶ Sofaer, *The International Law and Foreign Policy Implications of Nonconsensual Extraterritorial Law Enforcement Activities* 5 (statement before House Hearing, *supra* note 212, Nov. 8, 1989).

Second:

"Territorial integrity" is a cornerstone of international law
Forcible abductions from a foreign State clearly violate this principle.²¹⁷

But, *third:*

The adverse effects of the principle of territorial integrity on law enforcement are . . . mitigated by the willingness of States to consent to foreign law enforcement action on their territory. No particular formality or publicity is required for such consent to be legally effective. Even tacit consent is sufficient if given by appropriate officials. For political reasons a State may decide to deny after the fact that it had consented to an operation. . . . In still other cases, a foreign State may cooperate by quietly placing an individual wanted by the United States on board a plane or vessel over which the United States has jurisdiction.²¹⁸

Finally, if all else fails:

[T]he principle of territorial integrity is not entitled to absolute deference in international law. Every State retains the right of self-defense

. . . . [W]e must not permit the law to be manipulated to render the free world ineffective in dealing with those who have no regard for law.²¹⁹

It might be thought that this argument is limited to extreme forms of terrorism: the Legal Adviser does, for instance, cite the Israeli rescue mission in Entebbe, Uganda, in July 1976. But his statement clearly extends beyond terrorism, and reaches a startling conclusion:

We are reaching the point . . . at which the activities and threats of some drug traffickers may be so serious and damaging as to give rise to the right to resort to self-defense. The evidence of imminent harm from traffickers' threats would have to be strong to sustain a self-defense argument. . . . But where a criminal organization grows to a point where it can and does perpetrate violent attacks against the United States, it can become a proper object of measures in self-defense.²²⁰

Like his colleagues from the Justice Department, the State Department's chief lawyer wanted to make clear that he was not advocating general use of the authority he defended: U.S. agents might be endangered by a mission to arrest a suspect abroad, both physically and in the sense that they might be arrested and punished; other undercover operations ("assets" in the language of the intelligence community) might be disclosed; the United States could face challenges to its actions in foreign courts or international tribunals; and "[a]n unconsented, extraterritorial arrest would inevitably have an adverse impact on our bilateral relations with the country in which we act.

²¹⁷ *Id.* at 6.

²¹⁸ *Id.* at 9.

²¹⁹ *Id.* at 9, 11.

²²⁰ *Id.* at 12.

Less obviously, such arrests could also greatly reduce law enforcement cooperation with that or other countries."²²¹

* * * *

The reader who has followed the discussion this far needs no additional comment from the present writer on the conflicting views expressed in Congress and by two administrations less than a decade apart—though, to put it charitably, reliance by the Legal Adviser on the right of self-defense in the context of seizing a Matta-Ballesteros or a Verdugo-Urquidez is to take the expression "war on drugs" rather more literally than it was intended.²²² There is certainly some truth in the repeated refrain that states sometimes pretend to be angry, when in truth they are glad Uncle Sam removed some gangster or terrorist. The reverse is also true: consent to a "joint operation" may be obtained at police level, but the political branches may take a quite different view when they find out about the operation. Sometimes it is hard for an outside observer to tell which of the two descriptions fits. For instance, in *Verdugo*, the Government of Mexico lodged a formal protest with the U.S. State Department in June 1988, asserting that "the Mexican government cannot recognize as valid a judicial practice that disregards the procedures established by the extradition treaty currently in force between Mexico and the United States."²²³ The State Department responded: "The U.S. request for the surrender of Mr. Verdugo was made in good faith to the Mexican authorities and the U.S. government reasonably believed that the action taken by the Mexican officers in response to that request reflected a law enforcement decision of the appropriate Mexican authorities."²²⁴ Whatever the true facts in *Verdugo*, or in any of the cases here discussed or others like them, none of the possible variations supplies a basis for a principle of international law, or for a principle of constitutional law, safeguarding the rights both of sovereign states and of persons accused of crime. That is what due process of law is for, both in the American constitutional and in the international law sense, and what seems to be lacking in all of these episodes.

²²¹ *Id.* at 15.

²²² This is not the place to engage in an elaborate discussion of the law of self-defense. Since Mr. Sofaer cites Article 51 of the UN Charter, however, it seems not unfair to point out that while the Charter speaks of the *inherent* right of self-defense, i.e., a right that is preserved, rather than conferred on member states by the Charter, the drafters were conscious of the misuse of the doctrine of self-defense by Germany and Japan at the start of World War II, and specified that the right existed *if an armed attack occurs* against a member state, and *until* the Security Council has taken the measures necessary to maintain international peace and security. There is no suggestion in any of the background of Article 51 or the massive writing on that article that it can be used to justify law enforcement directed against individual suspects located in another state.

²²³ L.A. Times, June 22, 1988, §2, at 3, col. 1. Compare the account taken from the court papers, pp. 448–49 *supra*.

²²⁴ L.A. Times, *supra* note 223. The district judge, sitting in a trial involving Verdugo other than the one discussed in section I(C) of this article (but arising from the same arrest), declined to dismiss the indictment.

V. SOME CONCLUSIONS

(1) The issues of jurisdiction to prescribe (discussed in the prior article), of constitutional restraints over U.S. law enforcement officers acting abroad, and of government-directed abduction from foreign states are all related. As jurisdiction is believed to expand, so does the drive to exercise it, often without the care that is observed in domestic law enforcement. Senator Specter's statement that an arrest in Lebanon is "really no different than principles of making an arrest when I was district attorney in Philadelphia"²²⁵ is just wrong, under U.S. statutory law, under the U.S. Constitution, and under international law.

(2) The emphasis in both U.S. courts and in the administrations' various statements on the lack of protest by foreign states when suspects are abducted from their territory is disquieting. For one thing, the states that do not protest tend to be, if not client states, at any rate states that have various reasons not to make formal protests. For another, even when silence can be fairly interpreted as consent—which, as we have seen, is often hard to tell—such consent cannot extend to violation of the rights of the accused.²²⁶

(3) A large number of cases have turned on the assertion by the U.S. Government as prosecutor that the really brutal acts were committed (if at all) by the foreign state—whether by the government itself or by some unauthorized police or militia—but not by officers of the DEA or FBI. These assertions may be true in a given case or in most cases; nevertheless, it is the United States which usually initiates and bears the expenses of the operation, and which prosecutes the accused. One wonders whether the effort to distinguish among relations of principal and agent, of partnership, of actor and observer, or of seller and buyer really contributes to an understanding of the process. If, as I have argued, agents of the United States Government in line of duty are at all times subject to the constraints of the United States Constitution, the collaborations disclosed in many of these cases are not reassuring. Moreover, local law enforcement officers may well be tempted to act beyond the constraints of their own laws and constitutions, since in the typical case the prisoner never comes before a court or higher administrative body in the state where he is arrested.

(4) I believe that all abduction organized by governments shocks the conscience, not only because kidnaping is a crime everywhere, but because there is a strong probability that the very safeguards and profes-

²²⁵ *Senate Terrorism Hearing*, note 19 *supra*, at 41. I should repeat that Mr. Sofaer took issue with that statement, *id.* at 63, and again at 80.

²²⁶ Compare Mann, note 143 *supra*, at 409:

It is submitted that if the State does or says nothing, the illegality remains. It is impossible to infer consent from silence or inactivity. Even if the State declares that it does not require the return of the abducted person, it is at least arguable that it waives the remedy rather than the wrong.

Dr. Mann goes on to suggest, in discussing the *Lujan* case, note 130 *supra*, that the state trying the abducted person—i.e., the United States—should bear the burden of proving that the state from which the prisoner was abducted has given its consent.



sionalism that distinguish civilized police action from vigilantism—warrants upon probable cause, prompt arraignment before a judicial officer, fair interrogation—will be unavailable.

(5) Two precedents loom large for the present discussion. *Reid v. Covert*, I would urge, should be reaffirmed, and all doubt removed that its teaching applies to all exercise of jurisdiction on behalf of the United States, regardless of the nationality or domicile of the person affected. *Kerr v. Illinois* I would urge should be reconsidered in light of contempo-

to explore here the *Noriega* case or the invasion of Panama as a whole, which obviously have ramifications reaching well beyond the focus of this article.

It does appear, however, that confidence in the *bene detentus* principle played a role in the U.S. Government's thinking about the Panama operation. It would be ironic, indeed, if Manuel Noriega were the one to launch a successful challenge to the *Ker-Frisbie* doctrine; it would be equally ironic—unfortunate is a better word—if U.S. courts were to reaffirm the doctrine in response to a challenge brought by the ex-dictator. One can only hope at this writing that the contentions here raised—the application of constitutional restraints wherever the United States Government acts and the rejection of kidnaping whether or not accompanied by torture—will be addressed in calmer settings.

I had always thought that the various “wars” our Presidents have proclaimed—the war on hunger, the war on poverty, the war on crime, the war on drugs, the war on terrorism—were metaphors invented by persons who had never experienced real war. The invasion of Panama makes one conscious of the power, as well as the fragility, of such metaphors. I believe it is important—and in no sense a sign of softness or tolerance in respect of drugs—to understand that the “war on drugs” is a metaphor. Real war permits—sometimes requires—relaxation of restraints on governmental action;²²⁸ law enforcement—investigation, arrest, trial, sentence, punishment—is law, not war, and therefore a reflection of our values—our peacetime abiding values.

2. (March 1990) On February 28, 1990, the Supreme Court decided the *Verdugo-Urquidez* case.²²⁹ I regret to report that the position that had commanded a majority in the court of appeals, consistent, generally, with the position advanced in section II of this article, received only two votes, those of Justice Brennan, who wrote a strong dissent, and Justice Marshall, who agreed with Justice Brennan but did not write. Justice Blackmun was not prepared to accept the proposition that the Fourth Amendment governs every action by American officials abroad that can be characterized as a search or seizure, since some of those actions do not purport to be exercises of *sovereign* authority over the foreign nationals with whom they come in contact. But he agreed with Justice Brennan, that “when a foreign national is held accountable for purported violations of United States criminal laws, he has effectively been treated as one of ‘the governed’ and therefore is entitled to Fourth Amendment protections.”²³⁰ Justice Stevens, concurring in the judgment, expressed the view that “the search conducted by the United States agents with the approval and cooperation of the Mexican authorities

²²⁸ Compare, e.g., *Korematsu v. United States*, 323 U.S. 214 (1944), sustaining massive internment of Japanese-Americans, which would certainly not be tolerated today; with *United States v. Caltex, Inc.*, 344 U.S. 149 (1952), denying compensation to owners of oil installations destroyed by the U.S. military to prevent them from falling into enemy hands, which might still pass muster.

²²⁹ 110 S.Ct. 1056 (1990).

²³⁰ *Id.* at 1078 (Blackmun, J., dissenting).

was not 'unreasonable' as that term is used in the first clause of the [Fourth] Amendment."²³¹ I had hoped that if the Supreme Court were determined to reverse the court of appeals' decision in *Verdugo*, it would take that approach, which is not (at least not necessarily) inconsistent with the position taken in this article.²³²

The five-member majority of the Court, however, in an opinion by Chief Justice Rehnquist, accepted hook, line, and sinker the argument made in the dissenting opinion of Judge Wallace in the court of appeals, as well as in the brief of the Solicitor General.²³³ "People" in the Fourth Amendment is different from "person" as used in the Fifth Amendment and other provisions of the Constitution. "While this textual exegesis is by no means conclusive," the Chief Justice wrote, "it suggests that 'the people' protected by the Fourth Amendment . . . refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community."²³⁴ Justice Rehnquist went on to assert that what we know of the history of the drafting of the Fourth Amendment "also suggests" that its purpose was to restrict searches and seizures that might be conducted by the United States in domestic matters.²³⁵ With all respect, I find no basis for these conclusions in the historical record,²³⁶ and no basis in language or in logic. None of the sources cited by Justice Rehnquist—Charles Warren,²³⁷ *The Federalist Papers*,²³⁸ or the statement of James Madison in introducing the Bill of Rights in Congress²³⁹—support the Chief Justice's conclusion.²⁴⁰ It is of course true, as the Chief Justice wrote, that there is no indication that the Fourth Amendment was understood by contemporaries of the Framers to apply to activities of the United States directed against aliens in foreign territory or in international waters.²⁴¹ It is also true that the Framers and their contemporaries did not consider wiretaps, computer break-ins, or techniques designed to thwart aircraft hijackings, let alone the kinds of activities discussed throughout this

²³¹ *Id.* at 1068. Justice Stevens also wrote that the warrant clause of the amendment has no application to searches of noncitizens' homes in foreign jurisdictions because American magistrates have no power to authorize such searches. For discussion of that point, see text at note 67 *supra*.

²³² See text at notes 70–73 *supra*.

²³³ See text at note 42 *supra*.

²³⁴ 110 S.Ct. at 1061.

²³⁵ *Id.*

²³⁶ See notes 41, 43 *supra*.

²³⁷ C. WARREN, *THE MAKING OF THE CONSTITUTION* 508–09 (1928).

²³⁸ *THE FEDERALIST* NO. 84, at 518 (Hamilton) (C. Rossiter ed. 1961).

²³⁹ 1 *ANNALS OF CONG.* 437 (J. Gales ed. 1834). For a citation to the debate as a whole, see note 43 *supra*.

²⁴⁰ Justice Kennedy, though he joined in the Chief Justice's opinion, wrote separately as well, and disagreed with all of the argument based on the text or drafting history of the Fourth Amendment. "The force of the Constitution," he wrote, quoting Story's *Commentaries on the Constitution*, "is not confined because it was brought into being by certain persons who gave their immediate assent to its terms." 110 S.Ct. at 1067. Justice Kennedy agreed with the Chief Justice, however, "that we must interpret constitutional protections in light of the undoubted power of the United States to take actions to assert its legitimate power and authority abroad." *Id.*

²⁴¹ *Id.* at 1061.

article. One cannot escape the conclusion that the real concern of the Court emerges in the last paragraph of the majority opinion, which seems to lump together massive troop movements, as in Panama, and individual operations, such as those to which this article is addressed:

For better or for worse, we live in a world of nation-states in which our Government must be able to "functio[n] effectively in the company of sovereign nations."²⁴² Some who violate our laws may live outside our borders under a regime quite different from that which obtains in this country. Situations threatening to important American interests may arise half-way around the globe, situations which in the view of the political branches of our Government require an American response with armed force. If there are to be restrictions on searches and seizures which occur incident to such American action, they must be imposed by the political branches through diplomatic understanding, treaty, or legislation.²⁴³

I can only hope that another court, in another case, draws strength from the dissents in this one, as has occurred so often in the constitutional history of the United States.

I hope further that even if the struggle over the reach of the Fourth Amendment is lost for a time, the main focus of this article, concerning state-sponsored kidnaping, is not cast aside. At a technical level, the objection to kidnaping rests as much on the Fifth as on the Fourth Amendment, and the Fifth Amendment has not, it seems, been disconnected from U.S. official conduct abroad.²⁴⁴ One can understand that a search of a suspect's home in a border area in collaboration with local police does not shock the conscience of the United States, even when it does not warm the heart; kidnaping, I submit, is far graver than search—even unauthorized search—for contraband or business records. I would hope that kidnaping by authority of the United States of America does shock the conscience of the nation. I would hope further that the distinctions between kidnaping with or without torture are understood to be unconvincing, in fact and law; and that the United States would look at the uneven practice of other states not as a justification for indecent action, but as a challenge to develop—by example and by treaty—a rule worthy to be called international law.

²⁴² Quoting *Pérez v. Brownell*, 356 U.S. 44, 57 (1958).

²⁴³ 110 S.Ct. at 1066.

²⁴⁴ The majority opinion in *Verdugo* expressly distinguished the scope of the two amendments; Chief Justice Rehnquist wrote, "we think it significant to note that it [the Fourth Amendment] operates in a different manner than the Fifth Amendment, which is not at issue in this case." *Id.* at 1060.

AGORA: U.S. FORCES IN PANAMA: DEFENDERS, AGGRESSORS OR HUMAN RIGHTS ACTIVISTS?

THE VALIDITY OF UNITED STATES INTERVENTION IN PANAMA UNDER INTERNATIONAL LAW

Only a few hours after ordering the U.S. military forces to Panama on December 20, 1989, President Bush explained that General Manuel Noriega had declared "a state of war with the United States and publicly threatened the lives of Americans in Panama."¹ This, he said, had been followed by the murder of an unarmed American serviceman by Noriega's forces and beatings and harassment of others. He added that, as General Noriega's "reckless threats and attacks upon Americans in Panama" had created an "imminent danger to the 35,000 American citizens in Panama," he as President was obligated "to safeguard the lives of American citizens."

Subsequently, on January 3, 1990, when Noriega had turned himself in to U.S. military authorities in Panama and was en route to Homestead Air Force Base in Florida, President Bush declared that he had accomplished all four objectives for which he had ordered U.S. troops to Panama. These were: "To safeguard the lives of American citizens, to help restore democracy, to protect the integrity of the Panama Canal Treaties, and to bring General Manuel Noriega to justice."² He considered the return of Noriega to mark "a significant milestone in 'Operation Just Cause,'" and said that the United States had "used its resources in a manner consistent with political, diplomatic and moral principles." The failure to include "legal" among the other principles mentioned by President Bush may have been inadvertent. Earlier, Secretary of State James A. Baker III had justified the U.S. intervention by invoking Article 51 of the United Nations Charter and Article 21 of the Charter of the Organization of American States (OAS), which entitle the United States to act in self-defense, and thus "to take measures

¹ Statement by the President (Dec. 20, 1989) (Office of the Press Secretary, the White House).

I concur with Professor Farer's analysis, *Panama: Beyond the Charter Paradigm*, *infra* p. 503. Hence, my comments are directed solely at Professor D'Amato, *The Invasion of Panama Was a Lawful Response to Tyranny*, *infra* p. 516. The refutation in this article of the justification for intervention advanced by the President and his advisers does not, as Professor D'Amato points out, mean that there may not exist other bases on which intervention could theoretically be justified; but I am aware of no others, and it seems logical to assume that if the President and his advisers were, they would have stated them. While a nation is not required to state valid justifications for its actions, principles of good faith would seem to preclude it from purposely misstating international law. The conclusions of this article are therefore twofold: the United States has misstated international law in attempting to justify its invasion; and since there are no other apparent principles under which one could justify the U.S. intervention, the U.S. action was illegal under international law.

² Statement by the President (Jan. 3, 1990) (Office of the Press Secretary, the White House).

necessary to defend [its] military personnel, . . . nationals, and . . . installations."³

The inquiry into the validity of U.S. actions under international law must begin by identifying the relevant international law norms. The starting point is Article 2(4) of the UN Charter, which embodies the authoritative community proscription against "the threat or use of force against the territorial integrity or political independence of any state or in any other manner inconsistent with the Purposes of the United Nations."

Equally pertinent is Article 18 of the OAS Charter,⁴ which prohibits the use of force in language even more categorical than that of the UN Charter. It unequivocally rejects a state's claim of right to use force in another state's territory, or to "intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State." This prohibition covers not only the use of armed force, but also "any other form of interference or attempted threat against the personality of the State or against its political, economic, and cultural elements." It is noteworthy that in 1970 the UN General Assembly recognized the principle of nonintervention in the Declaration on Principles of International Law concerning Friendly Relations among States.⁵

As to the pertinent principles of customary international law on the subject, the International Court of Justice has recognized nonintervention as an operative principle, founded on the respect for sovereignty and political integrity,⁶ and has recently reiterated its rejection of intervention on the grounds of law and policy.⁷ The following analysis addresses the inquiry: do the stated purposes of the Panama intervention fall within any of the exceptions under Article 51 of the UN Charter,⁸ Article 21 of the OAS Charter,⁹

³ See *Excerpts from Statement by Baker on U.S. Policy*, N.Y. Times, Dec. 21, 1989, at A9, col. 5 [hereinafter Baker Statement].

⁴ Article 18 reads:

No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic, and cultural elements.

OAS CHARTER, Apr. 30, 1948, 2 UST 2394, TIAS No. 2361, 119 UNTS 3. See also Art. 20 (on the inviolability of the territory of a state, which "may not be the object, even temporarily, of military occupation" or any other use of force).

⁵ Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations, GA Res. 2625 (XXV) (Oct. 24, 1970).

⁶ Corfu Channel case (UK v. Alb.), 1949 ICJ REP. 4, 34 (Judgment of Apr. 9).

⁷ Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Merits, 1986 ICJ REP. 14, paras. 205, 258, 263 (Judgment of June 27).

⁸ Article 51 states: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security."

⁹ Article 21 of the OAS Charter provides: "The American States bind themselves in their international relations not to have recourse to the use of force, except in the case of self-defense in accordance with existing treaties or in fulfillment thereof."

or principles of customary international law prescribing the prohibition on the use of force?

SAFEGUARDING THE LIVES OF AMERICAN CITIZENS

The doctrinal debate on the validity of "humanitarian intervention" continues.¹⁰ In light of the normative ambiguities inherent in the concept and the very strong differing positions taken by authorities on questions of law and policy, prospects for an early consensus on the definition and scope of the doctrine, or on the applicable criteria to prevent its abuse, are slim. This much is, however, certain: that even those who advocate the validity and viability of this concept can justify only a limited and temporary unilateral intervention, only as a last resort, and only when it meets the twin criteria of necessity and proportionality in the use of force as required under customary international law. Additionally, such unilateral action is ultimately subject to community review. Thus, notwithstanding the lack of agreement on the proper interpretation of Article 51 of the UN Charter, while rescue operations of one's nationals might be considered permissible, the U.S. invasion of Panama does not satisfy the minimum required standards.

Clearly, tensions between Panama and the United States had been steadily rising even prior to Noriega's annulment of the May 1989 elections, and in the week preceding the armed invasion, the escalation of tensions between the two states was especially dramatic.¹¹ On December 15, the Panamanian legislative body adopted a resolution formally declaring the country to be in a state of war with the United States. Simultaneously, Noriega was named "Maximum Leader" and given sweeping new powers. According to the resolution, the move was prompted by U.S. "aggression" and the economic sanctions in effect against Panama since 1988.¹² However, the Bush administration did not seem to take these measures seriously, describing the Assembly's action as "another hollow step in an attempt to force [Noriega's] rule on the Panamanian people."¹³ Deputy Secretary of State Eagleburger called it "a charade and nonsense."¹⁴ In another public statement, a White House spokesman announced that U.S. troops had not changed their alert status because of the declaration.¹⁵ Yet tension continued to build in the country as confrontations between Panamanians and Americans increased.

¹⁰ See, e.g., F. TESÓN, *HUMANITARIAN INTERVENTION* (1988); *HUMANITARIAN INTERVENTION AND THE UNITED NATIONS* (R. Lillich ed. 1973).

¹¹ See, e.g., Ropp, *Military Retrenchment and Decay in Panama*, *CURRENT HIST.*, January 1990, at 17; Gordon, *U.S. Increases Panama Forces, Hinting Action*, *N.Y. Times*, Dec. 20, 1989, at A1, col. 2.

¹² See Branigin, *Noriega Appointed 'Maximum Leader'; Panama Says State of War Exists with U.S.*, *Wash. Post*, Dec. 16, 1989, at A21.

¹³ See *Opposition Leader in Panama Rejects a Peace Offer from Noriega*, *N.Y. Times*, Dec. 17, 1989, at A5, col. 1 [hereinafter *Peace Offer*].

¹⁴ See *Noriega gets new powers, title in Panama*, *Chicago Trib.*, Dec. 16, 1989, at 8C.

¹⁵ See *Peace Offer*, *supra* note 13. Assuming the United States was planning its invasion during the weekend of this announcement, the Government would not have wanted to disclose its plans.

Granted, Noriega's "declaration of war" against his powerful neighbor to the north was a clear provocation. Secretary Baker's rhetorical statement following the invasion summarizes the administration's public stance on the issue. After citing an unverified "intelligence report that General Noriega was considering mounting an urban commando attack on American citizens in a residential neighborhood," Secretary Baker stated:

I cannot prove to you that this report was absolutely reliable, but I do know that if the President had failed to act as he did and Noriega's Dignity Battalions had killed or terrorized a dozen American families in Panama, you would be asking us today why didn't you act to prevent this kind of violence against our citizens?¹⁶

The tense situation, however, fails to qualify as a legal justification for the invasion under the test of "necessity." Nor can a full-scale invasion be considered a proportional response. The state of tension existing in Panama did not present an imminent danger to U.S. citizens. The most serious and repeatedly cited incident supposedly precipitating the invasion was a single occurrence on December 15 in which one U.S. Marine officer was killed by members of the Panamanian Defense Force, another was wounded, and a third was beaten and his wife threatened at a roadblock. And while there was no assurance that something similar would not happen again, the most serious incident after this one, and before the invasion, occurred when an American officer shot and wounded a Panamanian police officer, who, the American claimed, appeared to be reaching for a gun.¹⁷

The incidents are serious, but the question is whether they warranted the launching of "Operation Just Cause"—a full-scale invasion, of a size not seen since the Vietnam War, and eventually consisting of 12,000 American invaders (added to the approximately 12,000 U.S. military personnel already stationed in Panama), helicopter gunships, artillery and other heavy firepower.¹⁸ The military attack resulted in the death of 26 Americans and over 700 Panamanians, mostly civilians, in addition to severe and widespread physical devastation, property damage and dislocation.¹⁹

The conclusion is inescapable that the United States has failed to provide sufficient evidence to prove that the necessity prerequisite was met. But assuming that some level of intervention to protect U.S. nationals was justified, the scale of the operation and the prolonged period of intervention, coupled with the other objectives cited for the invasion, cast serious doubt on its having been a legitimate case of humanitarian intervention.²⁰

¹⁶ Baker Statement, *supra* note 3, col. 5.

¹⁷ See, e.g., Church, *Showing Muscle*, TIME, Jan. 1, 1990, at 23.

¹⁸ See Rosenthal, *U.S. Forces Gain Wide Control in Panama*, N.Y. Times, Dec. 21, 1989, at A1, col. 1.

¹⁹ See Army says "disciplined fire" cut Panama's civilian toll, Denver Post, Jan. 21, 1990, at 13A, col. 3; Panama may get \$1 billion in aid, Denver Post, Jan. 25, 1990, at 2A, col. 4.

²⁰ I am in agreement with Professor D'Amato's position that human rights spring from the people and not from governing elites (p. 522 *infra*); human rights cannot be left to the whim of governing elites, including those of the United States. The content of human rights guarantees must be universal, and must not depend upon the views of leaders who decide to project power (U.S., Soviet, Chinese, etc.) to enforce their own interpretations of human rights.

RESTORATION OF DEMOCRACY

A second ground given for the United States intervention in Panama was the restoration of democracy. This argument is based upon the well-documented fact that General Noriega had climbed to power by the use of strong-arm tactics and remained in power against the clear expression of the will of the Panamanian people. In May 1989, he nullified the election of the U.S.-supported opposition candidate as Panama's next President.

While no one could deny the ongoing excesses under Noriega's autocratic rule,²¹ there is no legal basis for replacing that rule with democracy. No international legal instrument permits intervention to maintain or impose a democratic form of government in another state.²² Nor does state practice support an expansive interpretation of Article 2(4), which was advocated in the UN Security Council by then U.S. Ambassador Jeane Kirkpatrick, following the U.S. invasion of Grenada in 1983.²³ She argued that the language used in Article 2(4), "or in any other manner inconsistent with the purposes of the United Nations," provides "ample justification" for the use of force "in pursuit of the other values also inscribed in the Charter—freedom, democracy, peace."²⁴

Perhaps the U.S. claims find resonance in Professor Michael Reisman's suggestion that a contextual interpretation of Article 2(4) be undertaken in light of the failings of the collective security system envisaged under the UN Charter. Thus, he would legitimize the use of force to "enhance opportuni-

²¹ I agree with Professor D'Amato's point that tyrannies are illegitimate, given the modern evolution of human rights law. Where our two views differ is in the consequence of that illegitimacy. Only in the most extreme cases, such as Cambodia and Uganda, can military intervention be justified. Even then, the intervention must be narrowly tailored to be of as short a duration as possible.

²² Professor D'Amato chides Professor Farer and me for using "loaded words" such as "government," "legitimate," etc. (p. 517 *infra*), in analyzing the situation in Panama only a few lines before he refers to Noriega and "his co-thugs." In the analysis presented here, it is thoroughly evident that Noriega's tactics deprived his regime of a certain legitimacy. The issue, however, is not whether Noriega was a tyrant, but whether his actions could have served as a justification for the U.S. military intervention. It is clear that, shorn of loaded rhetoric and viewed in comparative perspective, the Noriega regime was not a significantly worse violator of human rights than many other existing (and some U.S.-supported) regimes. Therefore, justifying the Panama invasion on such a ground seems likely to open the door to U.S. intervention or intervention by another powerful state in many other cases.

²³ See DEP'T ST. BULL., No. 2081, December 1983, at 74.

²⁴ *Id.*

Professor D'Amato compares Panama's preinvasion circumstances to a domestic struggle in which the state is called upon to apply the rule of law objectively and prevent further violence. Of course, this analogy misses its intended point entirely. Unlike spouses who, as citizens of a state, receive benefits from, submit to and are expected to abide by universally agreed-to principles of law and morality derived through a democratically elected legislative process and enforced by an objective justice system and police force, nations such as Panama and the United States (and the USSR and Afghanistan) coexist within an international framework in which legal and moral principles are agreed to on the basis of mutual respect. Disagreements are resolved through dialogue, negotiations and the application, across time, of consensual customary norms and principles. In situations where no consensus obtains, these *equal* participants are under constraints to comply with principles of international law such as nonintervention.

ties for ongoing self-determination."²⁵ Applying Reisman's standards, the United States intervention might be considered permissible since it removed Noriega's deprivation of the Panamanian people's right to political independence.²⁶

On the other hand, Professor Oscar Schachter has persuasively argued that the principle of self-determination, while an important principle of international law, does not *a priori* deserve priority over other well-established and important international legal principles, such as noninterference in internal affairs.²⁷ He also strenuously objects to the utilization of an expansive interpretation of Article 2(4) to "topple a repressive regime"²⁸ on the ground that it is a clear violation of the plain language of the Charter. In his words, "The idea that wars waged in a good cause such as democracy and human rights would not involve a violation of territorial integrity or political independence demands an Orwellian construction of those terms."²⁹

Such an expansive reading of Article 2(4) should also be rejected on the ground that even if the promotion of a democratic form of government were recognized as an overriding value of the international system, military intervention is unlikely to be an effective means of promoting democratic values. Foreign intervention prevents the genuine development of democracy;³⁰ if democratic forces are well developed in the target state, they will likely prevail without foreign assistance; if they are underdeveloped or nonexistent, a period of foreign-dominated "tutelage" is likely to follow, which is contrary to the concept of self-determination.

Finally, such a construction is not useful in determining legality or illegality at the time of the intervention. It is unclear whether it is the consequences

²⁵ See Reisman, *Coercion and Self-Determination: Construing Charter Article 2(4)*, 78 AJIL 642, 643 (1984).

²⁶ *Id.*

²⁷ See Schachter, *The Legality of Pro-Democratic Invasion*, 78 AJIL 645 (1984). See also Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620 (1984).

²⁸ Schachter, *The Legality of Pro-Democratic Invasion*, *supra* note 27, at 649.

²⁹ *Id.*

Professor D'Amato's contention that the United States violated neither the territorial integrity nor the political independence of Panama is weak. It turns on the fact that Panama has not been made a *de jure* colony of the United States. Under such an analysis, the Soviet invasions of Hungary, Czechoslovakia and Afghanistan, or for that matter the Nazi invasions of several European nations, did not take away their political independence or territorial integrity. Such a proposition must be rejected.

Even accepting, *arguendo*, that colonization of a territory is the only way to destroy territorial integrity, political independence must be a distinct concept or else the phrasing of Article 2(4) is unnecessarily repetitious. Political independence must refer to the freedom of a state to make choices. While the political choices Panamanians could make under Noriega were constrained, they remain so after the invasion owing to Panama's increased dependence on the United States.

Professor D'Amato says that "[b]efore and after the intervention, Panama was and remains an independent nation" (p. 520 *infra*). This avoids the issue: we are concerned with the precedent this invasion sets as a violation of both conventional and customary international law.

³⁰ See Berry, *The Conflict Between United States Intervention and Promoting Democracy in the Third World*, 60 TEMPLE L.Q. 1015 (1987).

of the intervention that are determinative of legality,³¹ or whether the intervener's intention is determinative,³² or both. In any case, if consequences are to be determinative, they cannot be judged until long after the fact. And whose standards are to be used to make that judgment? If intentions are to be considered, how are they to be discerned? What of the problem of multiple objectives and changing intentions? These problems make the Reisman criteria difficult to apply uniformly and create the danger of permitting justification of intervention in almost any case.

Appropriately, the justification of invasion for the sake of the institution of democracy has simply never been accepted.³³ The majority of states does not view the right of self-determination to mean that there is a right of democratic representation or that the government must reflect the will of the majority of the people. The United States stands alone in making such a claim, and the community response at the United Nations and the OAS³⁴ has appropriately been to reject the claim.³⁵

INTEGRITY OF THE PANAMA CANAL TREATIES

The U.S. claim finds no support in either of the two treaties in question—the Canal Treaty or the Neutrality Treaty, both signed on September 7,

³¹ See Reisman, *Criteria for the Lawful Use of Force in International Law*, 10 YALE J. INT'L L. 279, 284 (1985): "The critical question is . . . whether [force] has been applied in ways whose net consequences increased congruence with community goals and minimum order."

³² *Id.*: "whether it has been applied in support of or against community order and basic policies."

³³ See note 28 *supra*.

In agreement with Professor Reisman, Professor D'Amato argues that "human rights law demands intervention against tyranny" because it is "morally required" (p. 519 *infra*). Unfortunately, when all the explanations are given, the reader is still without a reasonable (and just) basis for deciding who the interveners should be. By permitting "any nation with the will and the resources" (*id.*), international relations are reduced to a situation in which the strong dictates to the weak what the standards for intervening will be. Of course, this permits the self-designated judges to decide when they will intervene, i.e., when it is most convenient. Thus, Panama is invaded but China is not. For a telling critique of this "incidents"-based justification, see Bowett, *International Incidents: New Genre or New Delusion?*, 12 YALE J. INT'L L. 386 (1987).

³⁴ On Dec. 29, 1989, the UN General Assembly criticized the U.S. intervention by an overwhelming majority and in strong terms as "a flagrant violation of international law and of the independence, sovereignty and territorial integrity of States." See GA Res. 44/240 (Dec. 29, 1989). See also Doswald-Beck, *The Legal Validity of Military Intervention by Invitation of the Government*, 56 BRIT. Y.B. INT'L L. 189, 207 (1985).

As for the OAS, see, e.g., *Criticism of U.S. Action Is Supported in 20-1 Vote*, N.Y. Times, Dec. 23, 1989, at A9, col. 5 (reporting vote of the OAS).

³⁵ Professor D'Amato seeks to equate the invasion in Panama with the indigenous democratic movements in Eastern Europe (p. 524 *infra*). The distinction is significant; for democracy to be lasting, it must be expressive of the hopes and ambitions of the population and not merely the interests of a powerful neighbor.

The "lesson" that the United States has taught to tyrannical rulers through the example of Panama is not so much about democracy and human rights, as about the importance of currying the favor of the United States. Unfortunately, U.S. practice in the rest of the world indicates that this favor is indeed for sale to tyrants.

1977.³⁶ The Canal Treaty expressly provides that Panama, "as territorial sovereign," grants to the United States for the duration of the Treaty (which is until the year 2000) "the rights necessary to . . . protect and defend the Canal."³⁷ The Treaty describes those rights in detail and establishes a "Combined Board," composed of an equal number of senior military representatives of Panama and the United States.³⁸ Full administration of the canal is to pass to Panama on December 31, 1999. The Neutrality Treaty declares that the canal "shall be permanently neutral."³⁹

In giving its advice and consent to the ratification of the Neutrality Treaty on March 16, 1978, the U.S. Senate added an amendment to the effect that the "correct interpretation" of the joint U.S.-Panama responsibility to assure the regime of neutrality in the canal after 1999 was

that each of the two countries shall, in accordance with their respective constitutional processes, defend the Canal against any threat to the regime of neutrality, and consequently shall have the right to act against any aggression or threat directed against the Canal or against the peaceful transit of vessels through the Canal.⁴⁰

To clarify, however, that the right to defend the canal does not extend to a right to intervene in Panama, the Senate added:

This does not mean, nor shall it be interpreted as, a right of intervention of the United States in the internal affairs of Panama. Any United States action will be directed at insuring that the Canal will remain open, secure, and accessible, and it shall never be directed against the territorial integrity or political independence of Panama.⁴¹

The language was taken from an earlier joint communiqué issued by President Carter and General Omar Torrijos, President of Panama.⁴²

No reasonable construction of these provisions can sustain the U.S. claim, especially since there was no evidence that the canal or its operation faced any threat from Noriega's forces requiring action to protect or defend it.

APPREHENDING NORIEGA

Noriega's indictment by United States grand juries in Miami⁴³ and Tampa,⁴⁴ Florida, reflects the longstanding U.S. practice of asserting extra-territorial legislative jurisdiction under the "effects" doctrine, or arguably

³⁶ Panama Canal Treaty and Treaty concerning the Permanent Neutrality and Operation of the Panama Canal, Sept. 7, 1977, Panama-United States, TIAS Nos. 10,030 and 10,029, respectively [hereinafter Canal Treaty and Neutrality Treaty].

³⁷ Canal Treaty, *supra* note 36, Art. I(2).

³⁸ *Id.*, Art. IV(3).

³⁹ Neutrality Treaty, *supra* note 36, Art. I.

⁴⁰ *Id.*, TIAS No. 10,029 at 3 (part of President Carter's proclamation).

⁴¹ *Id.* at 4.

⁴² 13 WEEKLY COMP. PRES. DOC. 1547 (Oct. 14, 1977).

⁴³ United States v. Noriega, No. 88-0079 CR (S.D. Fla. filed Feb. 4, 1988).

⁴⁴ United States v. Noriega, No. 88-28 CR-T (M.D. Fla. filed Feb. 4, 1988).

under the "protective" principle. Accordingly, the U.S. courts are likely to exercise personal jurisdiction over Noriega, based upon his presence, notwithstanding criticism of this reach of U.S. legislative and judicial jurisdiction. This, however, does not justify invading Panama to bring Noriega before the courts. For not all means are permitted to accomplish even a lawful goal.

In light of the constraints on unilateral use of force, with only limited, specific exceptions considered permissible, it is unclear which international law principle the United States was invoking in its attempt to justify its action. Perhaps the United States has confused the domestic legality of bringing Noriega before a U.S. court and the international legality of such an act. When Noriega is brought before a U.S. court, he will most likely be unable to raise the issue of the illegality of the U.S. intervention as a personal defense. U.S. courts generally do not inquire into the means by which a defendant is brought to the court, unless there is evidence of outrageous conduct, such as torture or other extreme abuse of individual human rights by the U.S. authorities in apprehending the individual abroad.⁴⁵ The legal harm done by the U.S. intervention is to the state of Panama, and only it can assert that claim against the United States, not General Noriega. That General Noriega cannot raise such a claim in a U.S. court, however, does not change the illegal nature of the invasion under international law.

The fact that Noriega is charged with drug trafficking, an international crime, does not mitigate the illegality of the invasion. As the Government of Mexico said in response to the U.S. invasion, "the conduct of international crimes cannot be a motive for intervening in a sovereign nation."⁴⁶ Since a state has no authority to violate the territorial integrity of another state in order to apprehend an alleged criminal, the U.S. claim cannot be sustained.

CONCLUSION

The conclusion is disconcerting to an international lawyer—that the U.S. action was in disregard of the pertinent norms and principles of international law on the use of force. The intervention was evidently dictated by political considerations, in disregard of faithful adherence to the existing norms on the use of force. The international community's condemnation of the invasion at the United Nations and the OAS appropriately reflects this concern.⁴⁷

⁴⁵ See *United States v. Toscanino*, 500 F.2d 267 (2d Cir.), *reh'g denied*, 504 F.2d 1380 (2d Cir. 1974), *on remand*, 398 F.Supp. 916 (E.D.N.Y. 1975); *United States ex rel. Lujan v. Gengler*, 510 F.2d 62, 65 (2d Cir.), *cert. denied*, 421 U.S. 1001 (1975); see also Lowenfeld, *U.S. Law Enforcement Abroad: The Constitution and International Law, Continued*, *supra* p. 444 (dealing with this question and the cases).

⁴⁶ See N.Y. Times, Dec. 21, 1989, at A14, col. 1.

⁴⁷ Professor D'Amato concedes the desirability of multilateral rather than unilateral intervention, but ignores both its rationale and the actual circumstances surrounding the intervention in Panama. The preference for multilateral intervention stems from several factors. One is that multilateral efforts may provide a check on intervention by a single state to pursue its own ends (political, military, economic, etc.), rather than merely correcting the international out-

It is imperative that state practice⁴⁸ reinforce these norms by consistent strict compliance with them. The need is to strengthen the community expectations that interstate relations will reflect the continuing vitality of principled constraints on the use of force. Whatever political objectives President Bush might have achieved by this intervention, he certainly failed to appreciate that compliance with restraints on the use of force serves the long-term interests of the United States,⁴⁹ and the world community as well.

VED P. NANDA*

PANAMA: BEYOND THE CHARTER PARADIGM

I.

In the fall of 1867, a powerful British expeditionary force, dispatched from India under the command of Field-Marshal Lord Napier and conveyed by over 250 ships, began deploying on the Red Sea coast of Africa. Its mission: rescue two British emissaries and their several assistants who, together with a brace of other Europeans, had been imprisoned by the volatile Ethiopian Emperor Theodore.

After constructing a port, 20 miles of rail lines and a virtual city in the midst of a torrid wasteland, Napier's army, complete with 44 elephants for hauling the heavy guns, found its way through, up and around the daunting gorges of the Ethiopian highlands. Finally reaching the main base of the emperor after extraordinary exertions, it engaged and decimated his forces, destroyed his citadel, auctioned off the contents of his Treasury to generate bonuses for the troops, released the prisoners, marched 400 miles back to the coast pillaging as it went, dismantled the railroad and piers, and returned to India.

Alan Morehead, the Australian writer on whose account I have relied,¹ though opining that the British should have remained long enough to estab-

rage that may have justified the intervention. A second rationale is to assure that the incident that justifies the intervention is indeed viewed by the international community as of sufficient magnitude to warrant intervention. The failure of other nations to participate in the intervention, cited by Professor D'Amato (p. 520 *infra*), may therefore indicate that the community thought intervention illegitimate. However, factually, I am unaware that the United States offered such an opportunity to the Latin American states.

⁴⁸ Professor D'Amato's interpretation of state practice is curious. He contends that state practice after 1968 has changed the meaning of Article 18 of the OAS Charter. The only support he cites is the U.S. intervention in Grenada (p. 523 *infra*), which was actually condemned by most of the international community. The logic of D'Amato's argument would allow George Bush in 1992 to contend that burglarizing Democratic National Headquarters has become acceptable practice since Richard Nixon authorized such action in 1972.

⁴⁹ I wholeheartedly concur with Richard Falk on this subject. See Falk, *The Decline of Normative Restraint in International Relations*, 10 YALE J. INT'L L. 263 (1985).

* Thompson G. Marsh Professor of Law; Director, International Legal Studies Program, University of Denver College of Law.

¹ A. MOREHEAD, *THE BLUE NILE* 205-74 (1962).

lish order in the empire, offers no final balance of the human and material costs paid by the British and Ethiopian peoples to support this vindication of Britain's honor, its interests ("pour encourager les autres") and, of course, its rights. By rights I refer to the *claims* of those who governed the great imperial states of Europe and their North American progeny and to the *pronouncements* of the international legal scholars who gave a rational order and legitimacy aura to those claims.

When I heard President George Bush's justification for the invasion of Panama,² this obscure historical episode burst from the vault of memory. And with it came the thought that Bush had managed at one and the same time to celebrate the end of one era and to illuminate the normative landscape of the next. In the light he has cast, it looks suspiciously like the landscape of the past, specifically of the Victorian imperial past.

But then the second thoughts marched in. The first of them paraded under the interrogative banner (supported by no less than three noncoms): "Can't we squeeze this case into the Charter paradigm?"³ The President, after all, implicitly invoked it—albeit in lay language—when he inveighed against Panamanian threats to the virtue of American matrons domiciled in Panama. The physical harassment of U.S. nationals had apparently grown in both gravity and frequency during the year preceding the invasion. Some incidents were attributable to officials. Others had a more uncertain provenance. In neither case did the Noriega Government exhibit concern for the victims or interest in punishing those responsible. On the contrary, it contributed to an environment in which Panamanians could regard attacks on U.S. citizens as a blow for Panamanian dignity welcomed by the Government at its highest levels of responsibility.

Nothing in the United Nations Charter—the seminal textual source of the postwar paradigm of international order⁴—or in any interpretative declara-

² Statement by the President (Dec. 20, 1989) (Office of the Press Secretary, the White House).

³ I frankly cannot tell from Professor D'Amato's feverish comment whether he believes (1) that there is no widely accepted paradigm with respect to the legitimate use of force, or (2) that there is a paradigm but I have misdescribed it, or (3) that there is a paradigm but it is odious and in a sufficiently advanced state of decrepitude that any scholar truly concerned about human beings should feel free to hasten its demise by writing as if it were already embalmed. See *The Invasion of Panama Was a Lawful Response to Tyranny*, *infra* p. 516.

⁴ One difficulty I encountered in following the unraveling thread of Professor D'Amato's argument is the ambiguity of his position with respect to the interpretation of texts in general and of the Charter in particular. When discussing Professor Schachter's work, D'Amato dons his deconstructionist's hat and emphasizes the "necessarily subjective" character of interpretation (p. 521 *infra*) (as a character in David Lodge's novel *Small World* puts it, every decoding is a new encoding). Having said that, however, Professor D'Amato seems to concede the capacity of texts to produce an intersubjective consensus: "We are better off with rules of international law that at least point us to important factual and contextual considerations . . ." (*id.*). Presumably we are better off only if those "rules" (i.e., those bits of text) can contribute to that degree of coordinated action and response that makes society possible. In short, the content of the text does matter.

More telling evidence of Professor D'Amato's irresolution about the uses and abuses of interpretation is his splenetic response to my, I thought hackneyed, observation that "the

tion of the General Assembly, or in any widely ratified international agreement recognizes defense of nationals as a justification for armed intervention. And on at least one occasion an intervention justified in part on this ground was condemned by the great majority of states. But since in the case of the U.S. invasion of Grenada, the factual predicate for the claim was conspicuously thin, the international response cannot fairly be interpreted as an indictment of the exculpatory theory as distinguished from its particular application.

The United States has consistently construed the Charter to allow rescue expeditions. France, Belgium and Israel are among the other countries that have effectively claimed a right to rescue. Within the international community of states, the expectation that governments enjoying the necessary means will continue to assert such a right is, I think, high. On those occasions when the member states of the United Nations have glossed the text of the Charter, as in the Declaration on Friendly Relations and the Definition of Aggression, they have not repudiated the claim. People being a necessary condition for the existence of a state, the protection of nationals can be assimilated without great strain to the right of self-defense explicitly conceded in the text of the Charter.

Taking these several factors into account, rescue missions cannot be persuasively indicted as violations of international law, as long as they comply

central Charter value [is] national autonomy." "Who proclaimed this to be the central value of the UN Charter?" D'Amato thunders. "Whatever happened to human rights? A glance at the Preamble . . . reveals its affirmation of 'faith in fundamental human rights . . .'; there is no mention of national autonomy" (p. 518 *infra*).

Particularly for a self-proclaimed contextualist ("all interpretation varies with context," p. 521 *infra*), this is a remarkably literal approach to interpretation. And I fear that, as literal approaches so often do, it leads Professor D'Amato astray. For the most casual study of the preparatory work and of state behavior in the immediate aftermath of the Charter demonstrates as conclusively as anything of this nature can be demonstrated that the defense of human rights was very much a subordinate concern of the initial UN membership. Surely Professor D'Amato is aware, for instance, that the founding members rejected a proposal sponsored by Chile and Panama to include a bill of rights in the Charter, that a majority led by the United Kingdom blocked inclusion of any reference in the Universal Declaration to a right of individual petition, that at its first session the Human Rights Commission decided that it had no authority to take any action with respect to individual petitions, and so on. Reading the reference to human rights in the context of the Charter itself, which gives the Security Council the authority to use or authorize members to use force against other members *only* to maintain or restore peace, also is suggestive.

A scholar who emphasizes the inconclusiveness of verbal formulas and the corresponding need to understand rules as doing nothing more than pointing us "to important factual and contextual considerations" (*id.*) has a particular obligation to see the larger context of events and to get his/her facts right. Perhaps because he is driven by the sort of unzipped feelings one often encounters in those who view the agonies of the Third World from a book-lined study in the First, Professor D'Amato does not always satisfy this obligation. For instance, in celebrating the invasion of Grenada, he refers to "the kind of tyranny that was about to gain a foothold [there] in 1983 (when a group of thugs machine-gunned their way into power, murdering the existing democratic rulers)" (pp. 519-20 *infra*). Professor D'Amato is presumably unaware that the existing ruler, namely Maurice Bishop, had himself seized power through a putsch and that what in fact occurred was a falling-out between two factions of a Marxist-Leninist party.

with the principles of proportionality and necessity and are not tainted by ulterior motives. The normative problem with Bush's Panamanian end game is precisely his difficulty in demonstrating compliance with the limiting conditions for lawful rescue.

II.

The growing insecurity of U.S. nationals stemmed directly from U.S. efforts to effect the removal of Manuel Noriega as commander of Panama's armed forces and de facto head of state. It therefore seems likely that the United States could have ended the campaign of harassment by agreeing to end its campaign against Noriega. That alternative means being available for protecting the security of U.S. nationals, how could the Bush administration plead necessity? Only by demonstrating that the alternative would require the surrender of another legal right the United States was entitled to maintain.

The point becomes clearer by analogy to a hypothetical municipal law case. Imagine a certain tough and affluent gentleman by the name of Crossdouble, habituated to short cuts in all the realms of life, who chooses to reach his office each day by strolling across a business associate's garden and pushing through a topiary hedge. Despite the wear and tear on his topiary, for many years Crossdouble's associate, a Mr. Beagan, tolerates this eccentricity as one of the costs of doing business. But the time comes when, finding that on balance their dealings are no longer profitable, Beagan withdraws from the association. Crossdouble, indifferent to this change in circumstance, continues his diurnal stroll.

Aggrieved by the ragged state of his topiary and no longer inhibited by avarice, Beagan posts "No Trespassing" signs which deter his former associate not in the least. Neither personal appeals nor appeals addressed through mutual acquaintances alter Crossdouble's habit. Finally, convinced that the man is intractable, Beagan files a complaint with the city attorney, who then has Crossdouble arrested and charged with malicious trespass.

After posting bail, the now-enraged stroller, accompanied by two husky employees, proceeds at dusk to his antagonist's home, kicks in the front door, batters the complainant, sexually threatens his wife, warns of more serious measures unless the complaint is withdrawn forthwith, kicks out the back door, strolls across the garden, and pushes his way with more than usual force through the topiary.

Beagan takes two aspirin, ices down his jaw, and then journeys again to the police station. The officer he consults, though sympathetic, advises him to consider dropping the charges. "We can't guard your house night and day. And who knows what this guy might do: kidnap your children; rape your wife; drain your pool. Be practical: either pay him to walk around rather than through your place or simply ignore the creep. After all, aside from a few bruised bushes and the bruises to your ego from having to put up with the guy, he's not really doing much damage."

Unpersuaded, the man goes home, loads the high-caliber weapon he purchased years before to shoot elephant in Africa, and waits patiently until

Crossdouble again arrives and kicks the door open. Whereupon the latter is retired by a bullet that passes through him and, regrettably, two neighbors sitting at home across the street watching television.

The White House presumably sees Panama as an *a fortiori* case because it occurs within a political system lacking police and courts. In their absence, self-help must be deemed a normal means for vindicating rights. To maintain his plea of necessity, then, President Bush must demonstrate that the United States had a right to force Noriega's expulsion from Panama.

Article 18 of the Charter of the Organization of American States (OAS), to which the United States is a party, provides:

No State . . . has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic, and cultural elements.⁵

Taken literally, this language would outlaw diplomacy. Beneath the froth of its hyperbole, however, it expresses the central structural principle of the postwar international legal system—equal sovereignty for all nation-states. If sovereignty means anything,⁶ it means that one state cannot compromise another state's territorial integrity or dictate the character or the occupants of its governing institutions. If the law allows any exception to this constraint

⁵ I have had some difficulty decoding Professor D'Amato's objection to my invocation and construction of Article 18. That subsequent practice glosses a text is a truism. Nor is it anomalous to claim that a rule embodied in those texts we call "international agreements" has been superseded by subsequent state practice. Professor D'Amato is certain that the governing elites who drafted and approved the Charter intended to preclude an invasion designed to promote human rights. Could he possibly be arguing that subsequent practice demonstrates the onset of tolerance among member states of the OAS for such invasions?

He cites only two precedents—Grenada and Panama. And for some reason or other he fails to note that immediately after the Panama invasion, the Permanent Council of the OAS approved a resolution "deploring" it (*Boletín de Noticias*, Dec. 22, 1989). My own exchanges with Latin diplomatic personnel at the OAS, particularly the ambassadors from several of the most influential South American democracies, confirmed my sense that the resolution, rather than being perfunctory, expressed in mild form a widespread sense of outrage among democratic elites. Perhaps they are influenced in part by an awareness of historical context to which Professor D'Amato is insensitive. I refer to the fact that the number of instances in which the United States has intervened to restore democracy is offset in some not trivial measure by cases where intervention, albeit by more covert means, has functioned to subvert democratically elected governments.

⁶ Why, Professor D'Amato asks, should sovereignty, assuming it means anything at all, interfere with efforts to eliminate tyrants? The issue of whether moral values are better served by prohibiting or authorizing intervention on behalf of insurgents battling in the name of democracy to unseat authoritarian regimes has been elegantly joined by Michael Walzer (*JUST AND UNJUST WARS*, esp. at 87–108 (1977)) and Stanley Hoffmann (*DUTIES BEYOND BORDERS* (1981)). In taking a negative position, Walzer sees a need to demarcate and protect space where a people with a sense of common identity can work out their own destiny. Neither he nor Hoffmann (who arrives finally at a more qualified, nuanced negative that arguably implies a slim affirmative penumbra) would apparently authorize direct intervention, i.e., invasion and occupation, except in cases of massive human rights violations such as those that marked the rule of Idi Amin in Uganda and the Khmer Rouge in Cambodia. Professor D'Amato does not suggest that the Noriega regime had yet reached that level of delinquency.

on state behavior, surely it is only where the exception is required to preserve the rule. In other words, consistent with the structural principle, one state may manipulate the politics of another only where the latter's behavior or internal condition leaves the former with no alternative means for defending its own political independence and territorial integrity. Thus, the trail of the claim of necessity for the invasion leads back to a claim of necessity for efforts to dictate who would govern Panama.

III.

The history of the present era begins with the effective assertion of such a claim by the victorious Allies at the close of World War II, who set about transforming the German and Japanese political orders. Since then its occasional, sometimes implicit, assertion has produced a body of precedent providing very doubtful support for the claim other than in its original context: the aftermath of an all-out war of self-defense.

From the outset of the Cold War, the United States acted as if the emergence anywhere in the hemisphere of a government it deemed Marxist so threatened the sovereignty of this nation or its allies as to justify measures to abort or overthrow the offending regime. A 1954 resolution of the OAS Foreign Ministers, adopted at the instance of the United States, declaring in effect that the appearance of a Marxist regime in the Western Hemisphere would constitute a threat to its peace and security, seemed to endorse this view, an impression reinforced by the Organization's supine response to the CIA-orchestrated overthrow of Guatemala's duly elected government later that year. Nevertheless, the clandestine character of the U.S. role evinced skepticism even in Washington about the legal basis for intervention. Washington's skepticism was underlined in 1961 when President John F. Kennedy was unwilling to authorize an open U.S. commitment to the Bay of Pigs assault on Fidel Castro's Government.

The Soviet Union's undisguised enforcement of a comparable national security claim in Eastern Europe—Hungary (1956) and Czechoslovakia (1968)—evoked large hostile majorities in the United Nations. And the more recent invasion of Afghanistan—resting, if anywhere, on this type of claim—elicited almost universal condemnation. Even when linked plausibly to the alleviation of gross violations of human rights—Tanzania and Uganda; India and East Pakistan; Vietnam and Cambodia—the claim has encountered widespread hostility. Vietnam had a particularly strong case: it intervened to replace an unassuageable, ideologically demented government perpetrating a holocaust against the Khmer majority, brutalizing its Vietnamese minority, and periodically violating Vietnam's territorial integrity through violent incursions. And yet Hanoi has confronted unrelenting antagonism from every regional and ideological voting bloc in the United Nations other than the Soviet Union and its closest allies. The failure of Vietnam to win recognition for the political changes it wrought is probably attributable, however, to its refusal to allow an expression of popular will in the wake of its occupation. Had fair elections been held, I suspect that the

resulting government would have been seated at the United Nations (as was the Government of Bangladesh following India's intervention).

If these precedents are not an insuperable, they are at least a formidable, barrier to justifying a campaign for Noriega's ouster, a barrier that Bush himself has not really attempted to scale. Were he inclined to make the attempt, he would have to show three things. First, that shipping narcotics across a frontier is as much a violation of territorial integrity as shipping troops and therefore triggers a right of self-defense; second, that Noriega played a significant, continuing role in facilitating violation; and third, that Noriega was unwilling to end collusion in the narcotics trade even when threatened with a campaign for his ouster (the threat being a less serious affront to domestic jurisdiction than the actual ouster).

The third element in the Bush administration's case for a right to force Noriega's expulsion from Panamanian political life, a more-or-less pure question of fact, poses the fewest difficulties for the administration. True, in his negotiations with Washington, Noriega's overriding concern seemed to be safety from prosecution, not continuance of his illegal enterprise. Would Noriega have rejected an offer to overlook past transgressions on condition that he withdraw from the drug trade, an offer backed by the threat of removing or terminating him should he prove intransigent? The administration has not so alleged. But it might reasonably claim that Noriega's malodorous history offered ample grounds for assuming the worthlessness of any pledge he might make.

The first element, a question of international community policy that has not yet been openly addressed, poses greater difficulties. An affirmative answer will substantially broaden the legitimate occasions for the use of force: Noriega's is neither the first nor likely to be the last government to become involved in the narcotics trade; pollutants including toxic wastes are other deeply injurious substances that can be pushed across frontiers. The precedent is not easily contained.

The second element is partially a question of fact, partially one of assessment. Accepting as true all the allegations made to date about Noriega's role in the drug trade leads one, I fear ineluctably, to the conclusion that the Panamanian was no more than a small cog, a convenience. Even the White House has not claimed that Noriega's capture will conspicuously affect the quantity of narcotics reaching this country. It appears, moreover, that Noriega was not directly involved in either production or delivery: neither he personally nor persons reporting to him actually launched or guided the narcotics on their trajectory into the United States. The less important and the more indirect his role, the weaker the argument for treating his actions as the equivalent of an ongoing armed attack on United States territory.

Thus, as part of the effort to squeeze its Panama expedition into the Charter paradigm of legality, the Bush administration must defend the proposition that under the Charter, one state can compel a change of government in another for reasons other than defense of its own political independence or territorial integrity. The Brezhnev Doctrine's applications and the U.S. invasion first of Grenada and now of Panama have implicitly tested the

proposition's acceptability. One could of course try explaining away the international community's adverse response, expressed through a multitude of unilateral declarations and votes in the political organs of the United Nations and the Organization of American States, by emphasizing the special circumstances of each case. But that ploy is not very effective in an instance like this where one faces a heavy presumption of incompatibility between the proposed doctrine and Charter norms. After all, if most states and scholars find any violent after-the-fact punishment of an armed attack (i.e., a reprisal) to be forbidden by the Charter, a fortiori they will find a breach of Charter norms where a regime guilty of some lesser delinquency is punished by death.

IV.

To this point, I have proceeded on the basis of four assumptions adopted for purposes of sharpening the focus on certain of the legal issues raised by the invasion. Those assumptions are: first, that Noriega and his associates were, for purposes of international law, the "legitimate" Government of Panama; second, that President Bush could have ended the harassment of U.S. nationals by ending efforts to overthrow Noriega; third, that no means for protecting U.S. nationals in Panama other than the invasion or negotiation of a *modus vivendi* with Noriega were available; and fourth, that the only relevant norms for measuring the propriety of United States conduct are those that stem from the Charter.

The first assumption is simply the application to the case of Panama of the virtually uniform practice in international relations of treating any group of nationals in effective control of their state as constituting its legitimate government. One occasionally conceded exception to that practice is where local elements, having ridden to power on the back of an invader (Afghanistan, Cambodia), rely for survival on the invader's continuing occupation of their country.

In the case of Panama, the Permanent Council of the OAS initially refused to accept the credentials of the ambassador dispatched by Guillermo Endara to represent Panama. The Noriega regime's ambassador continued to participate and joined in the vote deploring the invasion. Only after the U.S. occupation was secure and Endara had begun to function as head of local administration did the Council relent. What Endara still had not achieved by the end of January 1990, despite the total rout of Noriega and his supporters, was general recognition, by the Latin governments acting individually, as the legitimate head of state.

For tactical or ideological reasons, many governments have refused to tender formal recognition to well-established regimes. The United States waited more than two decades before recognizing the Communist regime in Beijing as the Government of China. But even Washington did not claim during the preceding two decades that it was thereby free under the Charter to assist the Nationalist remnant on Taiwan in reconquering the mainland. It was, in short, universally conceded that by virtue of having won the civil war,

the Communist leaders in Beijing formed the Government of China and therefore enjoyed the protection from foreign intervention afforded to all states by the United Nations Charter. If control were not generally regarded as insulating those exercising it from armed intervention, the United States would presumably have withdrawn recognition from the Sandinista regime so as to facilitate aid to the contras.

The continued felt utility of treating effective control as a sufficient condition of *de facto* legitimacy can sometimes seem repulsive from a moral perspective. But by allowing legitimacy to turn on a single fact that is relatively easy to verify, the practice serves the important policy of inhibiting intervention. Thus, it protects the central Charter value of national autonomy.⁷

The second assumption is a question of fact. Nothing thus far said by the Bush administration or revealed by any other source provides reason to doubt its correspondence to reality.

The third assumption, conversely, is almost certainly false. An intimidating display—for example, positioning carrier groups off both Panamanian coasts and tripling the assault forces marshaled on our Panamanian bases—coupled with an unambiguous statement of intention to seize Noriega and to dissolve the Panamanian Defense Forces (PDF) if Noriega were not gone by a specified date, would probably have sufficed to induce either Noriega's resignation or his removal by fellow officers. In the unlikely event he had responded by marshaling loyalists and seizing large numbers of American hostages, setting explosive charges around key mechanical components of the canal, and/or preparing to block the canal by sinking ships at key points, U.S. forces could have been withdrawn, the status quo ante restored, and plans then put in place for the surprise attack we subsequently launched. Noriega's voluntary departure, no doubt to a country where he would enjoy immunity from extradition, would have frustrated the aspiration to convict him in an American court. Departure compelled by fellow officers would have left Panama in their parasitic grip.

The dual objectives of removing Noriega and ending harassment of U.S. nationals might also have been achieved if the principal Latin American governments could have been induced to apply more intense political pressure on Noriega and his colleagues. At no time did the Latin heads of state call unequivocally for Noriega's departure. At no time were they prepared to call his continuance in office a threat to the peace and security of the hemisphere. At no time were they willing to declare that, as a consequence of his theft of the last presidential election, sovereignty had passed to the people themselves or to their evident choice in the 1988 presidential election, Guillermo Endara.

Fear of providing a legal justification for U.S. intervention no doubt lay at the heart of their reluctance. Supplementing it was a perception of Washington's implication in the chain of circumstances that had left Panamanians without the capacity to remove the incubus of Noriega and his colleagues. The United States had fostered the expansion and professional training of

⁷ See note 4 *supra*.

the PDF. Noriega, if not other officers, had been on Washington's payroll. The United States had winked at previous electoral charades, including the presidential election of 1984.

Another factor behind Latin reluctance to follow the OAS precedent in the Somoza case and declare Noriega's Government illegitimate was the absence of massive violations of the right to life and personal security. Whatever Noriega might have been willing to do had circumstances required it, his actual delinquencies were modest compared, for example, to those of the Salvadoran and Guatemalan armed forces who have enjoyed Washington's patronage.

Nevertheless, if Washington had informed the Latin governments of its determination to act unilaterally as a last resort but declared its preference for a Latin-led process and its willingness to exercise patience if the Latin governments would commit themselves to Noriega's removal by one means or another, they might have overcome their reluctance in order to abort yet another unilateral intervention. Latin America lost an opportunity to initiate an authentically multilateral operation from which the United States could not easily have withdrawn. The United States lost an opportunity to escape from the traditional, sterile confrontation between claims of absolute nonintervention on one side and an imperious unilateralism on the other. The result is a cloudy prospect for closer collaboration in dealing with transnational issues of ever-growing importance both to Latin America and to the United States.

Withdrawal of U.S. nationals from Panama was, of course, another way of protecting them without recourse to measures—invasion and destruction of the *de facto* Government—peculiarly hard to reconcile with the Charter paradigm. Was the United States entitled to ignore this alternative on the grounds that (1) it amounted to the surrender of legal rights, and (2) their surrender is not required by the principle that means short of force be exhausted before recourse to violence?

The right of aliens to travel or reside in a country rests exclusively on international agreement. (One might, however, argue that the total exclusion of aliens violates the human rights of nationals by drastically inhibiting their access to information and ideas and hence their exercise of freedom of thought, belief and opinion.)

United States nationals in Panama fall into two categories: those required for the operation and defense of the canal; the rest. Let us assume for the sake of argument that existing treaties between the United States and Panama created rights of travel and residence for some or all members of the latter group. Whether those rights should be deemed subject to suspension on national security grounds in the context of U.S. efforts to overthrow the country's *de facto* Government is at least an open question. But even if we were to conclude that the position of private persons should not be affected by intergovernmental relations, a conclusion few governments would accept since control of ingress is a core element of sovereignty, it is doubtful that an international tribunal, were it to find a treaty breach, would prescribe the remedy of specific performance. But if the United States did not have a right

to specific performance, then ordering or encouraging the departure of persons unassociated with the operation and defense of the canal would seemingly not constitute the surrender of a right. Washington would have remained free to seek compensation from Panama.

The issue posed by the treaty-based presence of troops and civilian experts required to run the canal is rather more difficult. The claim that by agreeing to the perpetual maintenance of foreign troops on its soil, one government can bind its successors in perpetuity is a claim that cannot be squared either with the idea of state sovereignty or with the right of peoples to self-determination and self-government. On the other hand, to hold such agreements void or voidable at the will of the host state would be to deny the international community a potentially important means for resolving seemingly intractable intra- and interstate conflicts. Felicitous mediation between the interests and values at stake can best be achieved by a general understanding that (1) an agreement to license the presence of foreign troops becomes voidable when the conditions from which the agreement stemmed have significantly altered, and (2) departure of the troops would not threaten gravely the peace and security of any adhering state or third-party beneficiary or the human rights of any group. If the concerned parties are unable to reach agreement, they should be obligated by the norm of peaceful settlement to submit their conflicting views to third-party review.

In the case of Panama, the Canal Treaties, themselves of recent origin, provide a not-distant date certain for the termination of U.S. rights. Under the circumstances, I believe that the United States is entitled to maintain in Panama the forces required for the defense of the canal and that it was not obligated by the principle of necessity to yield that right in order to avoid threats to the security of its forces and their dependents.

V.

This is not the occasion to examine all of the possible discrepancies between the U.S. occupation of Panama and the Charter paradigm. Much could be said, for instance, about the issue of proportionality. While the harassment of U.S. nationals was increasing, the few cases of serious injury or death seem to have occurred from inadvertent encounters with low-level operatives. If the available evidence indicated no more than an intention on the part of the Noriega Government to continue harassment at about the same intensity and the least destructive way of preventing continuation was an invasion calculated to cause death or serious injury to several thousand Panamanians and the destruction of the homes and businesses of many thousands more, can the criterion of proportionality be satisfied? Or is proportionality nothing more than a requirement that the damage imposed not be in excess of that required to attain a lawful objective? Does actual or anticipated resistance progressively expand the quantity of force that may be imposed, so that even if the original objective would not justify the infliction of extensive injuries to persons and property, the permissible degree of damage expands with the resistance, each act of resistance constituting an additional violation of the attacking state's rights?

I happily leave these questions to others, in part because, like the issues I have addressed, they belong more to the kinder and gentler world of legal scholarship than to the austere realm of politics. No fair-minded person can examine the words of the President, his colleagues, and the numerous media mavens who have celebrated this splendid little war without concluding that if they rest their case on any normative paradigm, it surely is not one derivable primarily from the Charter. Their views, identical in substance to those propounded with less polish and pretension in one's neighborhood bar, were nicely summarized by that *ne plus ultra* of conventional thought, the *Washington Post* columnist David Broder.

The Panama invasion, he has written, satisfied the six criteria for committing American forces laid down by the former Secretary of Defense, Caspar Weinberger, and, Broder insists, subsequently endorsed in their essence by the foreign policy spokesperson for the last Democratic presidential candidate. The engagement must be " 'vital to our national interest' "; we must commit our troops " 'wholeheartedly and with the clear intention of winning' "; we must have " 'clearly defined political and military objectives' "; and know " 'precisely how our forces can accomplish those objectives' "; " 'the objectives and forces must be consonant in style,' " that is, we must not get " 'halfway involved' "; there must be " 'reasonable assurance we will have the support of the American people and their elected representatives in Congress' "; and " 'the commitment of U.S. forces to combat should be a last resort.' " ⁸ "The Panama invasion," Broder concludes, "met all of those tests."

Broder's piece nicely illustrates the difficulty of getting frail human intellects to apply any test consistently. To declare Noriega's overthrow a vital national interest is to give new and less meaning to the word "vital." Here in action is the Humpty-Dumpty school of linguistic usage. As for force being the last resort, it can always be made that by the sequential failure to exercise other options. But whatever else one may think of the formula or its application to this case, it clearly has nothing to do with conventional legal norms. Nor does it rest on any evident moral ones other than a kind of crude national utilitarianism. Unlike the powerful Acquinian Just War paradigm, it requires no *just cause* for the use of force.

VI.

The apparent absence of an appealing paradigm in the minds of the officials who launched the war and the pundits who leaped to its defense does not preclude the possibility that one might be found elsewhere. Noriega and his colleagues were ugly parasites who had attached themselves firmly to the body of the Panamanian people. Unlike his predecessor, Omar Torrijos, Noriega was not successful in employing populist themes to build a substantial base in the civilian population; the last election revealed a huge hostile majority. In a moral sense, he was not the country's legitimate ruler.

⁸ Wash. Post, Jan. 14, 1990, at B7.

Unlike many other thugs who currently reign over people imprisoned in their own countries, he employed the power of the state to advance a criminal conspiracy to violate the laws of another country. In short, the United States did have a just cause for caging the tyrant; indeed, it had two: he had violated the rights of this country; he had violated the rights of the Panamanian people. And by its earlier actions—strengthening the PDF, ignoring its delinquencies, and corrupting the man who became its commander—the United States was substantially responsible for his grip on Panama.

The United States is now able during this period of political and economic reconstruction in Panama to demonstrate compliance with certain other necessary conditions of a just war. Let us suppose that the President and the Congress extend aid generously, particularly to those civilians directly injured by the invasion. Let us further suppose that the administration resists the temptation to reassemble the PDF with its conventional Latin American officer corps—self-governing and-perpetuating—for service as a U.S. surrogate maintaining order in the country. And finally let us suppose that the United States takes other steps to give Panamanians a fair chance for the first time in their national history to achieve real democracy and autonomy. In that event, those who for understandable reasons have judged us harshly may look back on the invasion and say that although we acted outside the old law and proposed no new one, at least we intended to do good and were not clearly imprudent in calculating that more good than evil would result from our acts.

Whether George Bush ever attempted such a calculation is, as they say, “a nice question.” Even those inclined to give Presidents the benefit of the doubt may wonder whether Alan Morehead’s final explanation of the British descent on Ethiopia is not, after all, a fit epitaph for Bush in Panama:

[T]he British sought no gain of any kind, and they had no quarrel with the Ethiopian people. . . . [T]he whole vast expensive operation was nothing more nor less than a matter of racial pride; Theodore had affronted a great power and now he was to be punished.⁹

TOM J. FARER*

⁹ See A. MOREHEAD, *supra* note 1, at 258.

My principal and modest purpose in writing this little piece was to work out for myself whether one could make the invasion fit the Charter paradigm. (The extant utility of that paradigm for the promotion of international security, human rights or any other end is an issue I cannot intelligently address within the brief compass of an *Agora*.) While trying to imagine the various arguments the Bush administration could mobilize in support of the invasion’s alleged consistency with widely prevailing notions about the legitimate use of force, I did for a moment consider the claim that any state may invade any other state in order to remove a government that appears not to enjoy substantial popular support and is therefore forced to maintain itself in substantial degree through intimidation of the majority. After reviewing the admittedly traditional sorts of evidence one might offer on behalf of such a claim, I came to suspect that even the most ardent advocate could not manage a persuasive legal argument and therefore that making the attempt, even in the role of devil’s advocate, might make one appear just a little bit silly. I fear that Professor D’Amato has confirmed my suspicion.

* Of the Board of Editors.

THE INVASION OF PANAMA WAS A LAWFUL RESPONSE TO TYRANNY

I.

What Professors Tom Farer and Ved Nanda do not seem to understand is the positive implication for the development of human rights resulting from the United States intervention in Panama.¹ Their views are so conditioned by a statist conception of international law that they seem unable to see through the abstraction that we call the "state"² to the reality of human beings struggling to achieve basic freedoms. I am not talking about the human rights of American "matrons domiciled in Panama," as Professor Farer puts it, who were "rescued" in 19th-century expeditionary-force style.³ Rather, I am talking about the human rights of Panamanian citizens to be free from oppression by a gang of ruling thugs. My focus is on the basic civil liberties and fundamental freedoms of the people of Panama themselves.

Although I am confident that Professors Farer and Nanda are personally committed to the cause of human rights, it seems that when they put on their formalistic hats and talk about international law, they revert to the Oppenheimian notion that international law is all about states and not at all about people.

For example, Professor Farer says that "[i]f sovereignty means anything, it means that one state cannot compromise another state's territorial integrity or dictate the character or the occupants of its governing institutions."⁴ But why should "sovereignty" mean anything? Who assigns it its meaning? Why should its meaning have legal consequences? How is even its Farerian meaning compatible with the enforcement against states of the evolving rules of international law? Professor Farer—according to his own "Humpty-Dumpty school of linguistic usage"⁵—may proclaim that his words mean only what he wants them to mean, but is he entitled to exercise definitional sovereignty over others?

Professor Nanda joins Professor Farer in relying upon Article 18 of the OAS Charter to say that international law denies to any state the right to intervene directly or indirectly in the internal or external affairs of any other state. I do not doubt that the representatives of states at the OAS in 1948 wanted such a principle—they adopted it without much debate. But I will

¹ See Farer, *Panama: Beyond the Charter Paradigm*, *supra* p. 503; Nanda, *The Validity of United States Intervention in Panama under International Law*, *supra* p. 494.

² For an important discussion of the concept of "state" from the viewpoint of transboundary intervention, see F. TESÓN, *HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY* (1987). I do not subscribe entirely to Professor Tesón's views about Hegel; I think that the "state" is more than the sum of the individuals living in it at any given time, and hence is properly accorded some degree of autonomous consideration. See D'Amato, *The Relation of the Individual to the State in the Era of Human Rights*, 24 *TEX. INT'L L.J.* 1, 7-11 (1989).

³ P. 504 *supra*.

⁴ P. 507 *supra*.

⁵ P. 514 *supra*.

argue that the wishes of those representatives and their academic apologists are far less important to international law than the actual customary-law-generating behavior of states. The U.S. interventions in Panama and, previously, in Grenada are milestones along the path to a new nonstatist conception of international law that changes previous nonintervention formulas such as Article 18.

Like Professor Farer, I want to illustrate my argument by an analogy. In the 19th century, United States courts refused to intervene when wives applied for judicial help against beatings inflicted by their husbands. Some judges repeated the saying, "A man's home is his castle." Most judges observed that the wife has an adequate remedy if her husband hits her—she can sue for a divorce. And nearly all judges opined that intrusion by the "heavy hand of the state" would provide a cure that was worse than the disease. Simple prudence, according to the judges, required a judicial policy of abstention from domestic problems. And what was considered prudent rapidly became transformed into a "neutral principle"—that the law will not intervene in the home on behalf of either spouse.

Courts now recognize that battered wives need and deserve judicial protection. Historians look back at the 19th century and speculate about how much brutality, how much horror, women had to endure at the hands of physically stronger spouses who treated them like chattel. Law students recognize that 19th-century judicial abstention from battery in the home was not the "neutral principle" it was advertised to be; rather, its apparent evenhandedness served to insulate the physically stronger marriage partner against any external compensatory force that could be provided by the police. And legal philosophers now realize that words found so abundantly in the old opinions such as "home" and "domestic" and "marriage" do not stake out lines of jurisdiction but, rather, beg the question of where and for what purposes there ought to be jurisdiction.

The citizens of Panama were as powerless against Noriega and his henchmen as the 19th-century American wives were against physically stronger husbands. In describing Noriega's rule, we should discard loaded words like "government," "legitimate," "authority," "army," "police," and so forth. These words only serve to dull our senses against the reality of power by begging the very question that is the subject of the present debate—whether Panama's borders should be treated as an exclusive reservation of "domestic jurisdiction" to Noriega or whether those borders should be permeable for some purposes.

Noriega ruled Panama because he and his co-thugs controlled the guns, rockets, mortar, truncheons and tear gas. Any citizen who defied Noriega by rational argument risked being answered by bullets. Jails were used to hold political prisoners—citizens who disagreed too loudly with Noriega. Somehow, miraculously, there was an election in May 1989, and Noriega's candidate was defeated. No matter; Noriega had the power. The opposition candidates appealed to reason, to fairness, to the will of the people; Noriega invoked the logic of brute force, of steel, of gunpowder, of the infliction of imprisonment and disappearance. The electoral victors were crushed.

Did Noriega have any "right" to rape Panama for his own ends, to exult in unrestrained power, to ignore or trample on the rights and needs of the people who were his "subjects"? If he had any "right" under Panamanian law, it was because he made that law. (The 19th-century husband also "made the rules" of the household and was himself "above the law"—if his wife did not like it, he could "make her like it" by the application of force.) What about a "right" under international law? Professors Farer and Nanda wish to interpret international law in such a way that it hands Noriega such a right on a silver platter.

Professor Farer makes his argument with commendable half-heartedness. He puts quotation marks around the word "legitimate" when he says that "Noriega and his associates were, for purposes of international law, the 'legitimate' Government of Panama."⁶ But it is a crabbed 19th-century interpretation of international law that Professor Farer here invokes, and he signals his reluctance to invoke it by the quotation marks. He concedes that his legitimacy argument "can sometimes seem repulsive from a moral perspective."⁷ We may well wonder why so sensitive an observer of international relations as Professor Farer⁸ feels compelled to brush morality aside. He writes:

But by allowing legitimacy to turn on a single fact that is relatively easy to verify, the practice serves the important policy of inhibiting intervention. Thus, it protects the central Charter value of national autonomy.⁹

In other words, Professor Farer has been carried away by the rhetoric of statism. He urges us to treat states tenderly even at the morally repulsive cost of refusing to help the citizenry get out from under tyrannical rule. According to Farer, because we can easily tell that Noriega was in charge of Panama (just look at his guns, his brutality, the fact that he ran local television), this easy identification "serves the important policy of inhibiting intervention." But what connection is there between readily identifying the head of state and inhibiting intervention? Would Professor Farer accept intervention in a country where the people govern themselves through town meetings, because in such a country the fact of who's in charge is not easy to verify? Since when, and by whom, was ease of identification elevated to one of the most important values in the international system? And does not his entire argument of ease of identification presuppose the question whether intervention *should* be inhibited? What about his last sentence—"the central Charter value of national autonomy"? Who proclaimed this to be the central value of the UN Charter? Whatever happened to human rights? A glance at the Preamble to the UN Charter reveals its affirmation of "faith in fundamental human rights," "social progress," and "economic and social advancement of all peoples"; there is no mention of national autonomy.

⁶ P. 510 *supra*.

⁷ P. 511 *supra*.

⁸ See his excellent study, T. FARER, *THE GRAND STRATEGY OF THE UNITED STATES IN LATIN AMERICA* 69-78 (1988) (dealing with the Inter-American Commission on Human Rights).

⁹ P. 511 *supra*.

Professor Nanda refers more directly than does Professor Farer to the problem of Noriega's "autocratic rule," "strong-arm tactics," and nullification of the election of May 1989.¹⁰ Nevertheless, Professor Nanda can find "no legal basis for replacing that rule with democracy."¹¹ Here, at least, I agree with the rhetoric of Professor Nanda's statement: surely there is no Wilsonian principle of international law that permits intervention to impose a democratic form of government in another state, any more than there is a Brezhnev Doctrine in international law that permits intervention to impose or restore a socialist or Communist form of government. But concepts such as "democracy" and "socialism" are profoundly beside the point. Again, consider the 19th-century battered wife. She was not appealing to the courts to impose a particular form of government in her household; rather, she sought protection from brutality and enslavement. Analogously, at the governmental level, the question we should ask is not what intervention is *for* but what it is *against*. I argue that human rights law demands intervention against tyranny.¹² I do not argue that intervention is justified to establish democracy, aristocracy, socialism, communism or any other form of government. But if any of these forms of government become in the Aristotelian sense corrupted,¹³ resulting in tyranny against their populations—and I regard "tyranny" as occurring when those who have monopolistic control of the weapons and instruments of suppression in a country turn those weapons and instruments against their own people¹⁴—I believe that intervention from outside is not only legally justified but morally required.

II.

There are several interim questions that can be raised about the argument I have sketched so far. Among the more conspicuous are the following.

1. *What country may intervene?* My preference would clearly be in favor of multilateral intervention, such as that of France, Great Britain, and Russia in the Greco-Turkish conflict of 1827, one of the earliest cases of humanitarian intervention.¹⁵ Today, the best "intervener" would be the United Nations. But the Security Council's armed forces have never been called into being, and the General Assembly has mounted only defensive peacekeeping forces—and then only on rare occasions. Regional arrangements would be preferable to unilateral action. But my bottom line is that I maintain that *any* nation with the will and the resources may intervene to protect the population of another nation against the kind of tyranny that was about to gain a foothold in Grenada in 1983 (when a group of thugs machine-gunned their way into

¹⁰ P. 498 *supra*.

¹¹ *Id.*

¹² See Reisman, *Coercion and Self-Determination: Construing Charter Article 2(4)*, 78 AJIL 642 (1984).

¹³ ARISTOTLE, *POLITICA*, bk. III, chs. 6–13.

¹⁴ A good elaboration of this definition is found in J. S. FISHKIN, *TYRANNY AND LEGITIMACY: A CRITIQUE OF POLITICAL THEORIES* 12–25 (1979).

¹⁵ The intervention, claimed to be under the auspices of the Treaty of Locarno, was aimed at protecting Christians who were being persecuted by Turkey. See 1 L. OPPENHEIM, *INTERNATIONAL LAW* 312–13 (H. Lauterpacht 8th ed. 1955).

power, murdering the existing democratic rulers), and against the kind of tyranny exhibited by Noriega in Panama. Although I would have preferred other Latin American nations to have joined in the intervention in both these cases, since they chose not to do so, it was left to the United States to safeguard unilaterally the fundamental freedoms of the people of Grenada and of Panama.

2. *Did the United States have a right to invade Panama to arrest Noriega because he was under indictment in Florida for dealing in drugs?* Professors Farer and Nanda have rehearsed the reasons given by President Bush for the Panamanian action, but they do not necessarily constitute justification under international law. The only reason he gave that even comes close to the justificatory reason I have suggested in this paper is "to help restore democracy." No matter; a state is not required under international law to cite valid international law reasons for its actions.¹⁶ International lawyers may appropriately evaluate the actions states undertake on the basis of customary international law irrespective of verbal rationales proffered by the states themselves.¹⁷

3. *Did the United States violate Article 2(4) of the Charter?* There is no doubt that under our present understanding of international law the use of military force for the purpose of territorial aggrandizement or colonialism violates customary international law. Nor is there any doubt that such use of force would not count as humanitarian intervention even if appropriately disguised at the time—rather, it would be regarded as pure aggression. I submit that the core intent of Article 2(4) was to secure these understandings.¹⁸ Accordingly, the U.S. forcible intervention in Panama did not violate Article 2(4) because the United States did not act against the "territorial integrity" of Panama: there was never an intent to annex part or all of Panamanian territory, and hence the intervention left the territorial integrity of Panama intact. Nor was the use of force directed against the "political independence" of Panama: the United States did not intend to, and has not, colonialized, annexed or incorporated Panama. Before and after the intervention, Panama was and remains an independent nation.

4. *Who determines whether a target nation is under tyrannical rule?* This question is a variant on the formalist objection to any transboundary use of force: the asserted relativity of justification. Scholars such as Professor Oscar Schachter prefer "neutral" rules that totally outlaw transboundary force,

¹⁶ Nor is there any requirement that the intervention be actuated by a legally proper motive. In the case of governments, it is impossible to tell what motivated the action, and if the government explains its motivation, it is still impossible to tell whether the explanation is accurate. I have attempted to spell this out more fully in A. D'AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* 34-39 (1971).

¹⁷ *Pace* the curious argument of Michael Akehurst that what states *say* is more important than what they *do*. Akehurst, *Custom as a Source of International Law*, 47 *BRIT. Y.B. INT'L L.* 1 (1974-75). He seems to have forgotten that what Professor Henry Higgins observed of the French in *My Fair Lady* was meant to be ironic: "The French don't actually care what you *do*, as long as you *pronounce* it properly!"

¹⁸ I have attempted to state this position in some historical and legal detail in A. D'AMATO, *INTERNATIONAL LAW: PROCESS AND PROSPECT* 57-73 (1987).

despairing of the imagined subjectivity that would be involved in any attempt to determine whether a given use of force was justified.¹⁹ Such a position seems good in theory, but inevitably deconstructs itself. For example, Professor Schachter must admit a loophole for the use of force in self-defense,²⁰ but it is a loophole that gets wider the more one looks at it. Any state can claim that it has acted in self-defense, and in many cases the mere claim will seem credible. If in some cases it appears strained, the aggressor can cover by using the phrase "anticipatory self-defense." The fact is that we cannot delineate "self-defense" in advance to cover future contingencies of often-increasing complexity. Generally speaking, neutral-sounding formulas are not and cannot be self-interpreting; rather, in any case of real-world aggression, there will be disputes as to the meaning and applicability of such formulas. The end result is that all the facts and circumstances surrounding the alleged aggression will have to be taken into account in assessing whether or not it was an illegal aggression. Hence, Professor Schachter's position does not and cannot do the job it sets out to do—to prevent subjective interpretation of rules of law—but, rather, will only serve to divert scholars from the real values at stake and instead lead them into academic, abstract and formalistic linguistic exercises.

Since the job of looking at the facts and circumstances has to be done by the international lawyer anyway, I claim that my position is certainly no more problematic than Professor Schachter's. I assert that we must inquire into the factual situation whether Noriega was a tyrannical ruler. The term "tyrannical" is almost as vague as the term "aggression,"²¹ but not quite—though people may differ on the range of behavior that constitutes tyranny, there is probably consensus both outside and inside Panama that Noriega fits the bill. Certainly neither Professor Farer nor Professor Nanda disputes Noriega's entitlement to the status of "tyrant."

Another way of stating my point is that there is no "objective" language in international law. All rules of law must be interpreted; all interpretation varies with context; all interpretation is necessarily subjective. We are better off with rules of international law that at least point us to important factual and contextual considerations than we are with rules that point us only to an endless series of subrules, explanatory rules and learned commentary regarding the interpretation of all of those rules—commentary that then itself must be interpreted. The important factual and contextual considerations in the present case, I submit, are whether the people of Panama were helpless under a tyrannical rule and deserved, in morality and in law, aid from an

¹⁹ See Schachter, *International Law in Theory and Practice*, 178 RECUEIL DES COURS 13, 58–60 ("The Quest for Objectivity"), 133–87 (use of force and exceptions) (1982 V).

²⁰ *Id.* at 150–66.

²¹ The term "aggression" is notoriously vague and ambiguous. Consider the dispute as to which side was the aggressor in the recent Iran-Iraq War or in the Vietnam War (North Vietnam or the United States?). Consider also the various types of aggression that have been seriously suggested in the United Nations such as cultural aggression and economic aggression. If nation A commits cultural aggression against nation B, may B counter militarily against A and call it self-defense?

outside power to remove the unlawful government that was brutalizing them. The factual situation of the people of Panama cannot be found by consulting textbooks on the legality and exceptions regarding the use of force in international relations.

5. *How can the death of over seven hundred innocent Panamanian citizens be justified?* I believe that the United States used *too few* troops (some 24,000) in the military attack on Panama, with the result that these troops overcompensated for their small numbers by the disproportionate use of force.²² If at least ten times that number had been deployed, such an overwhelming presence of military forces would have reduced their felt need for firing their weapons. Moreover, in the presence of such superior numbers, Noriega's defenders may have surrendered much sooner. It is extremely ironic that the *legal uneasiness* felt by the United States in undertaking the Panamanian operation—reflected in the kinds of arguments Professors Farer and Nanda have put forth, arguments that were surely repeated in top decisional circles—probably led to the deployment of as few troops as possible. There was undoubtedly a fear that a massive use of troops would appear somehow to be a greater violation of international law. If, instead, the position that I am urging had been the consensus position among American international lawyers and advisers to President Bush, more troops may well have been deployed with a consequent reduction in civilian casualties. Thus, the very fear that the Panamanian intervention was illegal became, in the event, ironically self-confirmatory with respect to the unfortunately high number of civilian casualties.

III.

No matter how I interpret Article 2(4) of the UN Charter, Professors Nanda and Farer would say that a different provision of a different multilateral treaty—Article 18 of the OAS Charter—shuts the door tightly against any form of transboundary military intervention. I will not undertake a textual analysis of Article 18, replete though it is with vast ambiguities (as Professor Farer concedes). Rather, let us assume that the text could be cited for the proposition that Professors Nanda and Farer want.

I could make, although at the present time it would be unpersuasive to make, the following argument.

Article 18 is the self-interested expression of ruling elites of Latin American countries establishing a nonintervention cartel so that they will each have free rein (reign) in their own nations. *Whenever* diplomats get together and sign a multilateral treaty, the easiest thing they can agree upon is noninterference in each other's internal affairs. If we want to take human rights seriously, we cannot give much weight to conspiracies among ruling elites that do not represent the views of their populations. If the international law of human rights springs from the people, and not the elites that run governments, then so much the worse for the nonintervention treaties invented by the latter for their own self-interest. They do not constitute real rules of

²² Additionally, as in the case of the military intervention in Grenada, U.S. troops apparently were ill-trained for "surgical" missions where many innocent civilians are present.

international law but, rather, are quasi-rules, invented by ruling elites to insulate their domestic control against external challenge.²³

The foregoing is, I repeat, an argument that is unpersuasive now, although someday in the future—if the human rights revolution in international law continues its present course—the same argument may seem intuitively obvious. At the present time, treaties generate rules of customary law, and one of the customary rules of treaty formation continues to be that the credentials of representatives of governments of the signatory states are taken at face value.

But if treaties generate customary rules when they come into force, treaties do not “freeze” such customary rules forever. Rather, new rules of custom may arise out of the practice of states, and these new rules of custom may alter the previous treaty-generated rules.²⁴ Although this argument is obvious, scholars are often misled by the unvarying *text* of treaties. The words of Article 18, although the OAS Charter was signed in 1948, still look the same in 1990. Professors Farer and Nanda cite those words as if they were timeless. But, in fact, customary practice since 1948 has superseded whatever legal impact those words had on international law in 1948.

A major customary law development since 1948 was the intervention by the United States in Grenada in 1983, and a second one is the Panamanian intervention of 1989. I argued at the time of the Grenada intervention that it was a lawful and temporary humanitarian intervention to free the people of Grenada from the tyranny of the thugs who had machine-gunned their way into power.²⁵ Fortunately for my argument, the U.S. military forces pulled out of Grenada soon after their mission was accomplished, and now the episode can safely be cited as an instance of limited humanitarian intervention on behalf of the citizens of Grenada. Assuming that the U.S. forces continue to pull out of Panama (as they are doing at this writing), the Panamanian intervention will be a reaffirming instance of this new customary rule that changes the previous rule flowing out of Article 18.²⁶

²³ For the argument that human rights law trumps even an explicit intergovernmental waiver of liability, see D'Amato & Engel, *State Responsibility for the Exportation of Nuclear Power Technology*, 74 VA. L. REV. 1011 (1988).

²⁴ See, with respect to Article 2(4) of the UN Charter, Franck, *Who Killed Article 2(4)?*, 64 AJIL 809 (1970); cf. Henkin, *The Reports of the Death of Article 2(4) Are Greatly Exaggerated*, 65 AJIL 544 (1971).

²⁵ D'Amato, *Intervention in Grenada: Right or Wrong?*, N.Y. Times, Oct. 30, 1983, at E18, col. 3.

²⁶ Assuming that Article 18 of the OAS Charter generated a customary rule of nonintervention when it came into force, and assuming that I have proven that subsequent customary law development has changed the rule into one of intervention to prevent tyranny, what about the *inter se* obligations of the parties to the OAS Charter? Those obligations, I suggest, could remain the same. It is possible to violate a treaty obligation even though the same action is now legal under customary law. But we would not say that such action is illegal under “international law”; rather, it is only “illegal,” if at all, under the particular treaty regime and only with respect to the particular sanctions, if any, provided by the treaty itself. To be sure, the parties to the treaty may wish to interpret the subsequent customary law development as constituting a “changed circumstance” so that their interpretation of the treaty is not at variance with the newly formed custom. For a discussion of the analogous case of Article 2(4) of the UN Charter, see D'Amato, *Trashing Customary International Law*, 81 AJIL 101 (1987).

IV.

The real world is changing faster than the paradigms of scholars. The Berlin Wall has crumbled with a suddenness that surprised everyone, but in fact it was merely a visual manifestation of the dynamic logic of popular sovereignty that is sweeping through Eastern Europe. Tyrannical leaders are being replaced in nation after nation by governing bodies that are more responsive to the citizenry.

Contributing to the momentum of popular sovereignty are the Grenada and Panama interventions. Not only did the United States remove tyrannical leaders from those two countries, but more importantly it set an example that has undoubtedly shaken other ruling elites that enjoy tyrannical control in their own countries. For even if some of those entrenched elites regard themselves as secure against popular uprising in their own countries (usually by the application of torture and brutality against political dissidents), they cannot now feel totally insulated against foreign humanitarian intervention. Thus, Grenada and Panama may very well act as catalysts in the current global revolution of popular sovereignty. In this respect, as well as on their own merits, the two interventions underscore the unraveling of statist conceptions of international law. The arguments of Professors Farer and Nanda, struggling to conform to the tautological jargon of statism, already seem anachronistic.

ANTHONY D'AMATO*

* Of the Board of Editors.

EDITORIAL COMMENT

STANDING TO CHALLENGE HUMAN ENDEAVORS THAT COULD CHANGE THE CLIMATE

International lawmaking is a time-consuming business when traditional methods are used. The process is worse than time-consuming when it is applied to technological change and its effect on the human environment. In that arena, it has been recognized for quite a while that traditional methods—treaty making and state practice leading to custom—are simply inadequate by themselves.¹

One technique for accelerating the adaptation of international law to developments in the environmental field is the use of "soft" law to promote the "progressive emergence of general environmental norms and principles."² Of course, one source of soft law is the well-placed United Nations General Assembly resolution.³ Procedural, as well as substantive, norms may be developed with the help of soft law.

In the fall of 1988, the Government of Malta proposed a General Assembly "Declaration proclaiming climate as part of the common heritage of mankind."⁴ During negotiations on Malta's proposal, "common heritage" became "common concern."⁵ Presumably, this change reflected a desire to avoid the politically charged debate over the full implications of "common heritage," engendered by its use in the deep seabed and outer space contexts. In any event, the General Assembly did adopt a resolution on the

¹ See, e.g., Gotlieb, *The Impact of Technology on the Development of Contemporary International Law*, 170 RECUEIL DES COURS 115, 139-41 (1981).

To take an important, recent example of treaty making, the Montreal Protocol [to the Vienna Convention on the Protection of the Ozone Layer] on Substances that Deplete the Ozone Layer, Sept. 16, 1987, 26 ILM 1550 (1987), had been overtaken by scientific discovery by the time it entered into force on January 1, 1989. It provides in Article 2(4) that industrialized countries are to reduce their annual consumption of chlorofluorocarbons (CFCs) by June 30, 1999, to 50% of their consumption in 1986. Under Article 5, developing countries have an extra 10 years to do so. Reacting to alarming scientific findings regarding the depletion of the ozone layer, 81 nations in May 1989 declared their intent to phase out completely the production and consumption of CFCs controlled by the Montreal Protocol not later than 2000. Helsinki Declaration on the Protection of the Ozone Layer, May 2, 1989, 19 ENVTL. POL'Y & L. 137 (1989). See also United Nations Environment Programme [UNEP] Governing Council Res. 15/36, para. 11(a), in Report of the Governing Council on the work of its fifteenth session, 44 UN GAOR Supp. (No. 25) at 164, 167, UN Doc. A/44/25 (1989).

² Governing Council of the UN Environment Programme, *Environmental Perspective to the Year 2000 and Beyond*, in UN Doc. UNEP/GC.14/26, Ann. II, at 34 (1987).

³ On the concept of "soft law," see especially Baxter, *International Law in "Her Infinite Variety"*, 29 INT'L & COMP. L.Q. 549 (1980).

⁴ UN Doc. A/43/241 (1988).

⁵ See Malta's draft and revised draft resolutions, UN Docs. A/C.2/43/L.17 and A/C.2/43/L.17/Rev.1 (1988).

"Protection of global climate for present and future generations of mankind," containing the "common concern" language.⁶

Specifically, the resolution "[r]ecognizes that climate change is a common concern of mankind, since climate is an essential condition which sustains life on earth."⁷ It goes on to recommend several measures designed to develop understanding of the causes and effects of climate change and to generate international measures for climate preservation. The subject is undeniably an important one. But is the resolution important to the development of international law on climate change? The answer appears to be that it is, in a limited sense.

Although the resolution was proposed as a "Declaration," the General Assembly did not adopt it with that pedigree. In UN practice, a declaration has a special status. Even though it is formally a resolution with no higher rank in the Charter than other resolutions, it is regarded as "a formal and solemn instrument suitable for those occasions when principles considered to be of special importance are being enunciated."⁸ An ordinary resolution is presumably less formal or less solemn, or both. Moreover, an ordinary resolution—like the one on climate change—normally uses language less legislative in form than a declaration would. It typically "calls upon," rather than "decides." It typically is expressly, as well as technically, recommendatory (using "should" rather than "shall").

This lack of special status, however, does not strip the resolution on climate change of all legal significance. Taken as a whole, it may be regarded as ultrasoft law, but it is somewhere beyond the starting point on the continuum from nonlaw to true law. It is the product of serious discussions that produced a consensus in the Second Committee.⁹ The General Assembly adopted it by consensus.¹⁰ More to the present point, the key paragraph,

⁶ GA Res. 43/53 (Dec. 6, 1988).

⁷ *Id.*, para. 1. The "common concern" language is repeated in GA Res. 44/207, Preamble (Dec. 22, 1989). The Noordwijk Declaration on Atmospheric Pollution and Climatic Change, Nov. 7, 1989, says in paragraph 7 that "Climate change is a common concern of mankind." Int'l Env't Rep., Current Rep. (BNA) 624 (Dec. 13, 1989). The Statement of the Meeting of Legal and Policy Experts, emanating from a meeting convened by the Government of Canada in February 1989, says in paragraph A.3 that the atmosphere "constitutes a common resource of vital interest to mankind." See UN Doc. A/C.2/44/2 (1989), and 19 ENVTL. POL'Y & L. 78, 79 (1989).

⁸ Cable from the UN Office of Legal Affairs (Nov. 16, 1981), 1981 UN JURID. Y.B. 149. The formulation is based on a Legal Memorandum of the Office of Legal Affairs, UN Doc. E/CN.4/L.610, quoted in part in 34 UN ESCOR Supp. (No. 8) at 15, UN Doc. E/3616/Rev.1 and E/CN.4/832/Rev.1 (1962).

⁹ See UN Doc. A/C.2/43/SR.44, at 8-9 (1988); UN Doc. A/43/905, at 5 (1988).

¹⁰ See UN Doc. A/43/PV.70, at 66 (1988). There are differing views about the significance of consensus in the adoption of General Assembly resolutions. Compare Jiménez de Aréchaga's discussion, in *CHANGE AND STABILITY IN INTERNATIONAL LAW-MAKING* 48-49 (A. Cassese & J. Weiler eds. 1988) [hereinafter *CHANGE AND STABILITY*], and Sloan, *General Assembly Resolutions Revisited (Forty Years After)*, 58 BRIT. Y.B. INT'L L. 39, 140 (1987) (stressing the significance of consensus), with Condorelli, *The Role of General Assembly Resolutions*, in *CHANGE AND STABILITY*, *supra*, at 37, 42-47, and Delupis, *The Legal Value of Recommendations of International Organizations*, in *INTERNATIONAL LAW AND THE INTERNATIONAL SYSTEM* 47, 54-55 (W. Butler ed. 1987) (noting that consensus texts tend to be watered down). Schwebel, *The Effect of Resolutions*

quoted above, does not purport to prescribe conduct. Instead, it serves a legitimizing function by recognizing climate change to be a common concern of mankind. Its legal significance does not depend on any quasi-legislative power of the General Assembly; rather, it depends on the strength of the shared governmental conviction it enunciates and on the inferences that may properly be drawn from it.

The paragraph is legitimizing in the sense that it recognizes a collective interest in climate change that presumably extends well beyond the interests acknowledged at the Stockholm Conference on the Environment in 1972. The Stockholm Action Plan implied something less than common concern by calling only for consultation with "other interested States" when activities posing a risk of appreciable effects on climate were being contemplated or implemented.¹¹ Even that limited assertion has influenced the development of international environmental law,¹² but the collective consciousness regarding interrelated climatic effects has been raised since 1972. It has found expression in the current resolution.¹³

Clearly, if climate change is a matter of "common concern," international regulation of it is legitimate.¹⁴ But that still is not saying much. It is not necessary to identify climate change as a "common concern of mankind" so as to legitimize, today, the international regulation of a phenomenon inherently capable of transcending national boundaries. We may then ask if the concept has some additional significance. It would seem that it does. It implies that—whatever states' obligations may be in the area of climate change—they run *erga omnes*.¹⁵ Consequently, any state should have standing to

of the U.N. General Assembly on Customary International Law, 73 ASIL PROC. 301, 302, 308–09 (1979), warns about false consensus, achieved despite significant reservations harbored by a minority of states. In such cases, adoption of the resolution is usually followed by statements expressing the reservations. Only two statements followed the adoption of GA Res. 43/53, one by the European Community and one by Malta. Both enthusiastically supported the resolution. UN Doc. A/43/PV.70, at 66–68 (1988).

¹¹ Stockholm Action Plan for the Human Environment, Recommendation 70, UN Doc. A/CONF.48/14 (1972), reprinted in 11 ILM 1421, 1449 (1972).

¹² See F. KIRGIS, PRIOR CONSULTATION IN INTERNATIONAL LAW 123–24 (1983).

¹³ The linkages between climate change and other environmental conditions, including the possibility that action to correct one environmental threat could have repercussions in other environmental areas, appear in the Report on the Villach Conference of the World Climate Impact Studies Programme (1985), summarized in UNEP, 1985 Annual Report of the Executive Director, UN Doc. UNEP/GC.14/2, at 70–71 (1986). A preambular paragraph of GA Res. 43/53 refers to the conclusions of the Villach Conference.

¹⁴ A second World Climate Conference will be convened in November 1990. A framework convention on climate change is being prepared, with the goal of completing it by the time of the 1992 UN Conference on Environment and Development. See UN Doc. UNEP/GC.14/26, at 51 (1987); Noordwijk Declaration, *supra* note 7, para. 29.

¹⁵ The International Court has recognized the principle of obligations *erga omnes* in the context of basic human rights, Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951 ICJ REP. 15, 23 (Advisory Opinion of May 28); and Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain) (Second Phase), 1970 ICJ REP. 3, 32 (Judgment of Feb. 5); and in the context of a unilateral undertaking addressed to the international community, Nuclear Tests (Austl. v. Fr.; NZ v. Fr.), 1974 ICJ REP. 253, 269 and 457, 474 (Judgments of Dec. 20).

make representations to any other concerning the latter's climate-affecting policies or activities, without having to allege that it is uniquely affected.¹⁶ Nor should standing be a problem when a state brings a proceeding in an international tribunal with jurisdiction to hear a challenge to climate-affecting conduct.¹⁷ Whether a state could take other unilateral action to vindicate the common concern, such as reprisals, would depend on whether it has fulfilled whatever procedural and substantive conditions apply to the chosen remedy.¹⁸

The law of standing in the context of climate change thus would complement the law of standing as it is increasingly recognized in relation to the marine environment beyond the limits of national jurisdiction. The current *Restatement of Foreign Relations Law* asserts:

Any significant pollution of the marine environment . . . is of concern to all states. Any state may complain to the offending state or to an appropriate international agency against violation of generally accepted

When the Court in *Barcelona Traction* said that "on the universal level, the instruments which embody human rights do not confer on States the capacity to protect the victims of infringements of such rights irrespective of their nationality" (1970 ICJ REP. at 47), it was not denying the relevance of the *erga omnes* principle to standing; it was simply observing that universal human rights instruments have not explicitly conferred standing upon all states parties to protect the rights of persons of any nationality. *But see* ILO Constitution, Oct. 9, 1946, Art. 26(1), 62 Stat. 3485, TIAS No. 1868, 15 UNTS 35 (any member state may file a complaint if it is not satisfied that any other member is securing effective observance of a labor convention that both have ratified, without having to show harm to itself or its nationals).

Application of the *erga omnes* principle to *locus standi* in the context of indiscriminate environmental harm was suggested (as an "apparently radical concept") in Brownlie, *A Survey of International Customary Rules of Environmental Protection*, 13 NAT. RESOURCES J. 179, 183 (1973). But see the more guarded conclusions on standing by way of an *actio popularis*, as that term is generally understood, in B. SMITH, *STATE RESPONSIBILITY AND THE MARINE ENVIRONMENT* 98 (1988).

¹⁶ Recognition that climate change is a common concern of mankind might be thought to imply standing not only for states, but for individuals as well. As in the case of human rights, it is individuals who will suffer the consequences if governments fail to meet their obligations. But the analogy to human rights does not take individuals very far down the road to standing. Individuals do not yet have international personality in the sense that states do. Foreign offices will require that complaints from non-nationals be presented by their own governments. There are currently no international tribunals or other international mechanisms designed to hear individuals' environmental complaints. Ordinary courts in domestic legal systems are not likely to treat a General Assembly resolution asserting a common concern as a sufficient basis, in itself, for an individual's standing to complain about threatened climate change if the complainant is no more vulnerable to the change than is the general population.

¹⁷ In other contexts, standing has been a problem in international tribunals. It was an insurmountable problem in *Barcelona Traction*, *supra* note 15. That case did not involve any question of standing to represent common interests. The ICJ's second opinion in the South West Africa Cases (Ethiopia & Liberia v. S. Afr.), 1966 ICJ REP. 6 (Judgment of July 18), rejected the standing of two former League of Nations members to assert violations of a League Mandate. It should not preclude standing in a "common concern" proceeding, even though the Court observed cryptically that a right of *actio popularis* "is not known to international law as it stands at present." 1966 ICJ REP. at 47. The Court was not dealing with a matter explicitly defined by the international community at that time as a matter of common concern.

¹⁸ For a full discussion, see Charney, *Third State Remedies in International Law*, 10 MICH. J. INT'L L. 57 (1989).

international rules and standards for the protection of the marine environment by another state or its nationals or ships.¹⁹

Moreover, in the context of standing, the "common heritage" concept applicable to the deep seabed is indistinguishable from "common concern." The International Law Commission has provisionally adopted a commentary to one of its articles on state responsibility asserting that the "common heritage" concept as applied to the deep seabed expresses a collective interest that may be vindicated by any party to the UN Convention on the Law of the Sea (once it enters into force).²⁰ Although this passage in the Commission's commentary and the Commission's corresponding draft article refer only to the standing of states parties to a multilateral convention, the commentary adds that this does not exclude the development of customary rules to the same effect.²¹

Efficiency is likely to be served by recognizing universal state standing in the context of climate change, so long as the world lacks a functioning international body with the legal capacity, standing and political will to protect shared interests in climate stability. Efficiency would be served because the cost to broadly inclusive interests will have escalated, perhaps incalculably, by the time any one or a few states could show unique, nonminimal harm to themselves. Standing to complain without a showing of unique harm would enable not only a single government, but also several like-minded governments acting together, to challenge the climate-affecting activity before the consequences get out of hand. Timely challenge could thus be made, with the cost of mounting the challenge spread among more than one complainant.²²

There is a risk for the unwary in all this. Those who have standing must be vigilant lest they lose their rights by inaction. If state A asserts, verbally or by conduct, a right to do something, it is an assertion against all that have a sufficient interest to complain legitimately. Thus, if "common concern"

¹⁹ 2 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, pt. VI, Introductory Note, at 101 (1987).

²⁰ Report of the International Law Commission on the Work of its thirty-seventh session, [1985] 2 Y.B. INT'L L. COMM'N, pt. 2 at 1, 27, UN Doc. A/CN.4/SER.A/1985/Add.1.

²¹ *Id.* Of course, standing in one context—the suspension of a multilateral treaty obligation in response to another party's material breach—would have to take account of Art. 60(2), Vienna Convention on the Law of Treaties, May 23, 1969, 1155 UNTS 331. If climate change is a common concern of mankind, a breach of an environmental convention that significantly affects climate might well be subject to the broad grant of standing in Article 60(2)(c).

²² This would not necessarily mean that states not subject to the norm complained of could join in the challenge. Thus, in the case of treaty norms that do not reflect custom, standing might be limited to states parties to the treaty plus any intended third-party beneficiaries. The mere recognition of "common concern" probably would not render all states third-party beneficiaries of all treaty norms dealing with climate. Of course, treaty norms may codify, crystallize or generate custom. Cf. *North Sea Continental Shelf* (FRG/Den.; FRG/Neth.), 1969 ICJ REP. 4 (Judgment of Feb. 20). The Vienna Convention for the Protection of the Ozone Layer, Mar. 22, 1985, Art. 2(2)(b), 26 ILM 1529 (1987), requiring appropriate measures to control activities under contracting parties' jurisdiction that are likely to have adverse effects from modification of the ozone layer, may well be in one of the custom-related categories.

gives all states standing to complain about prospective climate change anywhere in the world, no state may be heard to say that its failure to object has legal significance only at the point when special effects of the change on its own territory become apparent. Of course, some states with standing to object may do so as surrogates for the others. The point is that if no states object, or if only a few do so without representing the others, all others might discover that they have acquiesced in the climate-affecting conduct. That would bar their complaints against violation of any norm that falls short of *jus cogens*.

Realization that rights could be lost might cause governments to formulate challenges when the risk of climate change is insufficient to justify them.²³ That may simply be a cost of increased awareness. In any event, the harm from overzealous complaints legitimized by broadened notions of standing is likely to be less than the harm from activities that cannot effectively be challenged unless particularized effects on individual states are apparent.

Despite the hazards just mentioned, the recognition of climate change as a common concern of mankind is to be welcomed.²⁴ In the long term, the most efficient mechanism will be an international body functioning on premises maximally scientific and minimally political, with its own standing to protect climate stability. Malta's initiative contemplates that eventuality, but it has also given states a potentially useful instrument in the interim.

FREDERIC L. KIRGIS, JR.*

²³ For discussion of problems inherent in a broad concept of standing, see Charney, *supra* note 18, at 86–90.

²⁴ Cf. Schachter, *International Law in Theory and Practice*, 178 RECUEIL DES COURS 9, 199–201 (1982 V), concluding that there are distinct advantages in applying the concept of obligations *erga omnes* to a limited category of principles, including those prohibiting massive pollution of the atmosphere or the sea. Charney, *supra* note 18, at 95, concludes that third-state remedies may be desirable when no directly injured state would have traditional standing—as in the case of damage to common spaces outside the jurisdiction of any state.

* I am grateful to Michael R. Archie, of the Washington and Lee University School of Law, for his research help in the preparation of this Editorial Comment.

NOTES AND COMMENTS

HERBERT W. BRIGGS (1900–1990)

Herbert W. Briggs was one of the leading international lawyers of a century almost 90 years of which his life spanned. He was one of a diminishing group of American international lawyers (Quincy Wright was another) who held a Ph.D. from a faculty of arts and sciences rather than a law school degree. He seemed no less the lawyer for that. And he was very much the advocate and architect of a more effective international law.

Herbert Briggs was born in Wilmington, Delaware, in 1900. He received an A.B. from West Virginia University in 1921 and a Ph.D. from the Johns Hopkins University in 1925. After studies in Brussels and summers at the Hague Academy of International Law, service as a research associate at the Foreign Policy Association, and teaching at Johns Hopkins and Oberlin College, he joined the faculty of Cornell University in 1929. He taught international law, international organization and international politics at Cornell until his retirement in 1969 from the Department of Government and Faculty of Law as Goldwin Smith Professor of International Law Emeritus.

Briggs was perhaps best known for his casebook, *The Law of Nations: Cases, Documents and Notes*, first published in 1938. A work of exceptional pith and insight, it was one of the major teaching tools of international legal education in the United States for many years and a work that was highly regarded abroad. He was the author of *The Doctrine of Continuous Voyage* (1926), *The International Law Commission* (1965), two sets of lectures at the Hague Academy, and some 85 articles in legal and other journals, above all the *American Journal of International Law*. His writing reflected his personality: vigorous, open, acute, sometimes salty.

Professor Briggs was a member of the Board of Editors of the *Journal* from 1939 until his death. He served with distinction as Editor in Chief (1955–1962) and as President of the American Society of International Law (1959–1960). A major figure in the Society and on the *Journal* for more than 50 years, Briggs brought to these and other activities an intellectual and personal vivacity that won universal regard and affection. His appearance and aptitude were unchanged over the decades; his red face, white hair and blue eyes may be said to have been the only nationalistic characteristics he displayed.

Briggs ably served from 1962 to 1966 as a member of the UN International Law Commission, whose procedures and product he had been studying in depth at the time of his election. The codification of international law was a longstanding interest, to which he had contributed in the Harvard Research in International Law, the Harvard Draft Convention on International Responsibility of States for Injuries to Aliens, and the work of the Institut de Droit International. He served as counsel for Honduras, Spain and Libya in four cases before the International Court of Justice (and con-

tributed to the analysis of the Court's jurisdiction and jurisprudence in his writings). He also served as counsel to Chile and Canada in international arbitral proceedings. Briggs was a member of the United States delegation to the Vienna Conference on the Law of Treaties in 1968.

A mark of the professional esteem in which Briggs was held was his appointment in 1975 by the Governments of the United Kingdom and France as one of five members of a court of arbitration on the delimitation of a portion of the continental shelf in the English Channel.

Herbert Briggs was blessed with a long, healthy and productive life, a happy family, and an ebullience of intellect and character. He shared his blessings widely and he will be missed.

STEPHEN M. SCHWEBEL*

HERBERT BRIGGS: A MEMOIR

When an enormously vital human being dies, there is always a poignant sense of loss. It is a loss of our own hopes and dreams, to a great extent: one more strong and admirable individual is gone. This is true even if we knew the person only slightly. It is of course emphatic if we knew the person well.

When a conspicuously honest and straightforward person dies, there is always a sense of disappointment. No matter how long a life such a person led, or how much he or she may have achieved, there is always a twinge of recognition that in the end—no matter how upright and direct that person had been—those qualities were still no protection against our own humanity and the mortal fallibility we all share.

* * * * *

I first met Herbert Briggs 10 years ago, in the early phases of the *Tunisia / Libya Continental Shelf* case, in which we both served as counsel for Libya. I had of course heard of him, and read him, for some 20 years before that. This straightforward, gravel-voiced, strong old gentleman, with a surprising shock of white hair and the immaculate dark suit and white shirt—bearing his walking stick in one hand and a slender portfolio of papers in the other—made the same immediate and lasting impression on me that he did on so many others.

Most surprising about him was his unique combination of gruffness and gentleness, of Yankee or certainly old-fashioned American uprightness, or straightforwardness, and an almost mischievous wit. One seldom heard Herbert Briggs speak ill of another; what he did, by contrast, was to roast the opposition—to deal on the merits.

And he dealt simply. I have often considered, in the past number of years since I first knew him and became an unofficial pupil, how quintessentially simple his approach to legal and political problems was, and in consequence

* Judge of the International Court of Justice.

how *right* it was. This is not to say that he oversimplified, or even simplified, matters. What he did possess was the remarkable power to see clearly—a great difference from seeing simply. In those years I have found myself more than once asking myself, “How would my old friend Herbert view this?” or “How would Herbert have tackled this one?” This is, indeed, a posthumous compliment of a high order. But occasionally one does meet men and women whose approach possesses such singular quality that one tends to recall its basic attractiveness, its strongest element, when one is oneself in search of a solution to an impossible quandary.

I remember, on one of the many flights back and forth to The Hague on which I served as his happy traveling companion, having asked about the origin of his interest in international law. He answered as follows. When he was a boy of 12—the year being 1912—his mother came into a modest inheritance and, over the objections of Herbert’s father, a plain-living man of the cloth, determined that this inheritance would at least in part be spent on taking the Briggs family on a tour of Europe. And so they went.

This was eye-opening, one would think, for all the Briggses, but most of all for young Herbert, who remembered all his life the fine summer afternoon when he stood on the balcony of their hotel to watch the entire German army swing past in enormous squares of field gray, spiked helmets bristling, plumes tossing, horses prancing and swinging in the sunlight. The clash and thunder of the marching bands was something to be heard over the rhythmic crash of ten thousands of jackboots in the ceremonial goose step. Above all other memories, he recalled seeing, at the head of the massed army columns, the Kaiser himself in full uniform, followed by his six sons, in full uniform—all riding black horses.

It was at that time that Herbert Briggs determined that he would study international relations, and the laws of war, and would learn what made men make armies, and how to prevent war.

I also remember asking him once about his year at the Hague Academy. The Permanent Court was then only in its sixth year. He told me, proudly, and with a twinkle, that he had cut classes on several afternoons to hear *the oral arguments in the Lotus case*.

My travels with him over a period of 5 years were an unalloyed delight. Lunch time on an airplane crossing the Atlantic would inevitably bring out his recollection of Manley Hudson’s mixing martinis before lunch and announcing that they would “help you get over the hump of the day.” He seldom complained about age or infirmity. He carried a walking stick rather than a cane.

Proud to the end of having become a preeminent international lawyer without having a law degree, he was one of the best pleaders before the International Court. The judges liked to listen to him. He was direct, forceful, concise, and honest. His gravelly American voice rang out firmly, and the Court paid strict attention. We were all proud of him.

He was also one of the finest draftsmen I have ever known. His submissions had not one word too many; not two words where one would suffice; no ambiguities; spare and straightforward. One learned a lot by watching him

work. This was also the experience of those who worked with him on the *Journal* over the years.

* * * *

And so one of the great ones has gone from our field. I cannot help but remember the words of another great one—Richard Baxter—in his address at the ILA–American Society joint fall luncheon in 1976:

My own generation has not necessarily been models of scholarship. I am reminded of the two lines . . .

“Where’s Mortimer, where’s Mowbray?
Nay what is more and most of all,
where is Plantagenet?

“They are entombed, in the urns and
sepulchers of mortality.”

Not merely a great scholar and student of international law has gone. Also a dear friend, and mentor, to many of us who follow.

KEITH HIGGET*

CORRESPONDENCE

TO THE EDITOR IN CHIEF:

January 30, 1990

In the July 1989 issue of your distinguished *Journal* (at pp. 590–95), a summary of the arbitral award of September 29, 1988, concerning the boundary dispute between Egypt and Israel (usually referred to as the *Taba* case) was published. The authors, Haihua Ding and Eric S. Koenig, succeeded in giving a short outline of this very complex case and of the problems involved. On a few points, however, I wish to add some details, which may shed light on several specific matters.

On reading page 593, the impression may arise that the Tribunal decided in favor of the Parker pillar location for the disputed pillar No. 91. But, although the Tribunal certainly favored this location, it could not and did not decide on this spot since neither of the parties had claimed it. The Tribunal accepted the location advanced by Egypt for pillar 91, a place that is horizontally at a distance of 284 meters and vertically at 64 meters from the Parker location.

The southernmost pillar established by the Tribunal (pillar No. 91) is at a distance of 170 meters from the shore, and the Tribunal was not authorized to determine the course of the boundary from this pillar to the gulf. Thus, the award did not fully solve the boundary dispute. But after the award was rendered, the parties conducted negotiations on the continuation of the line, and on February 26, 1989, they reached an agreement (slightly supple-

* Of the Board of Editors.

mented on March 7, 1989) according to which the line ends on the shore at a place corresponding roughly to the location of the former Parker pillar. This location left to Israel about 250 meters of shoreline beyond Egypt's original claim, but the hotel and the shore facilities are on the Egyptian side (*see* 28 ILM 611 (1989)).

In the Ras el Naqb area (p. 594 of the summary), the close-to-a-straight-line criterion was adopted only for pillar 88. With regard to pillar Nos. 85, 86 and 87, the Tribunal decided in favor of the locations claimed by Egypt since pillars existed at those locations and they conformed to the boundary line drawn on various maps.

RUTH LAPIDOTH*

* Professor of International Law, The Hebrew University, Jerusalem.

CONTEMPORARY PRACTICE OF THE UNITED STATES RELATING TO INTERNATIONAL LAW

MARIAN NASH LEICH*

The material in this section is arranged according to the system employed in the annual *Digest of United States Practice in International Law*, published by the Department of State.

JUDICIAL ASSISTANCE

(U.S. *Digest*, Ch. 6, §6)

War Criminals

On October 19, 1989, Richard Thornburgh, Attorney General of the United States, and Alexander Sukharev, Procurator General of the Union of Soviet Socialist Republics, signed at Moscow a Memorandum of Understanding Between the Union of Soviet Socialist Republics Office of the Procurator General and the United States Department of Justice Concerning Cooperation in the Pursuit of Nazi War Criminals, reaffirming their existing cooperation by way of judicial assistance in war crimes cases.

The text of the Memorandum of Understanding follows:

The Union of Soviet Socialist Republics Office of the Procurator General and the United States Department of Justice, in the spirit of reciprocity, cooperation, and mutual interest in the pursuit, investigation and prosecution of individuals who are suspected of having committed Nazi war crimes or of having assisted in the commission of such crimes during the years of the Second World War, have agreed to the following:

1. The Union of Soviet Socialist Republics Office of the Procurator General and the United States Department of Justice agree to provide legal assistance on a reciprocal basis in the investigation of individuals who are suspected of having committed Nazi war crimes or of having assisted in the commission of such crimes.

2. The Union of Soviet Socialist Republics Office of the Procurator General and the United States Department of Justice shall furnish one another on a confidential basis, through diplomatic channels, names, other data and archival documents relating to the foregoing category of individuals.

3. Inasmuch as the procedures for the gathering of evidence followed by the Office of Special Investigations (OSI) of the United States Department of Justice, which have been worked out in the process of the evolving practice of cooperation by both sides, have been accepted by numerous courts and tribunals under appropriate laws, regulations,

* Office of the Legal Adviser, Department of State.

rules, and judicial precedents of the United States of America, and do not contradict Soviet legal norms, the Union of Soviet Socialist Republics Office of the Procurator General and the United States Department of Justice affirm their readiness to continue to provide mutual assistance in the gathering of appropriate evidence.

4. The Union of Soviet Socialist Republics Office of the Procurator General and the United States Department of Justice will facilitate the travel of specialists and experts to each other's countries for joint work on specific cases of this category. All expenses connected with such trips and with the examination of specific cases will be the responsibility of the requesting side.

5. The Union of Soviet Socialist Republics Office of the Procurator General and the United States Department of Justice, recognizing the legal and moral importance of the investigation of cases involving individuals who have committed Nazi crimes or assisted in them, hereby affirm their unfailing resolve and commitment to actively cooperate in the investigation of such cases.

6. The Union of Soviet Socialist Republics Office of the Procurator General and the United States Department of Justice agree to periodically hold meetings in Moscow and Washington for the purpose of continuing and expanding cooperation in this area.

7. This Memorandum of Understanding shall enter into force immediately upon signature. It may be amended upon written agreement of the parties with amendments to be recorded in supplementary protocols.¹

In an account of the work of the Office of Special Investigations, Criminal Division, Department of Justice, prepared by that Office for the Legal Adviser of the Department of State, under date of December 18, 1989, the Office of Special Investigations referred to an unreported decision of the United States Court of Appeals for the First Circuit in *United States v. Gudauskas* (No. 88-1849) and *United States v. Katin* (No. 88-1850), entered on February 7, 1989, which rejected an attempt by the United States District Court for the District of Massachusetts to alter existing procedures for obtaining testimony from the Soviet Union. In a per curiam decision, a three-judge panel of the First Circuit stated:

It would appear that the government may face a very real threat of irreparable harm. The government claims that the Soviet Union will not agree to the conditions the district court imposed—the disqualification of Soviet procurators from presiding at the depositions and the taking of the depositions before American consular agents—and hence the practical effect of the district court's order is to severely curtail the government's case. One witness has already died and the others are aged and in poor health. We do not know what type of medical care is available where the witnesses live or what life expectancies generally are there. Consequently, unless the witnesses' testimony is now preserved, it may be irretrievably lost.

¹ Dept. of State Files L/T.

Under these circumstances, we believe the new matter should be presented to and evaluated by the district court in the first instance. This is not ordinary litigation, but rather litigation brought by the sovereign implicating domestic and foreign policy concerns. Not all countries have as free ranging discovery as do we, and they may adhere to conventions (e.g., location of deposition and identity of presiding officer) which appear formalistic, but are part of their system. We would tend to think, however, that the fairness of the deposition procedure and the reliability of the witnesses' testimony should be assessed not now in advance based on predictions as to what might happen in the deposition procedure, but rather after the evidence has been gathered and if and when the government seeks to introduce it. At that time, with a more concrete record, defendants' rights can be appropriately safeguarded.

If the new showing the government makes should not convince the district court that the protective restrictions previously imposed—the taking of the depositions before an American consular agent and the disqualification of Soviet procurators from presiding at the depositions—should be lifted, the district court nevertheless should consider whether to modify its protective order to permit the taking of the depositions solely for purposes of preserving the evidence should the government not prevail at trial, appeal from a final judgment, and challenge the protective order on appeal.²

The Office of Special Investigations also reported that since 1979, "specific judicial assistance was requested and obtained from the Soviet Union in numerous denaturalization and deportation cases brought by the Office of Special Investigations . . . Both testimony of witnesses and documenting evidence has been obtained."³

² The full text of the per curiam opinion may be found, also, at Dept. of State File No. P90 0015-1204/1215.

³ Dept. of State File No. P90 0015-0895/0898.

The report then listed the cases in question:

Eight of these cases were denaturalization actions: *United States v. Kairys*, 600 F.Supp. 1254 (N.D. Ill. 1984), *aff'd*, 782 F.2d 1374 (7th Cir.), *cert. denied*, 476 U.S. 1153 (1986); *United States v. Kowalchuk*, 571 F.Supp. 72 (E.D. Pa. 1983), *aff'd en banc*, 773 F.2d 488 (3d Cir. 1985), *cert. denied*, 475 U.S. 1012 (1986); *United States v. Koziy*, 540 F.Supp. 25 (S.D. Fla. 1982), *aff'd*, 728 F.2d 1314 (11th Cir.), *cert. denied*, 469 U.S. 835 (1984); *United States v. Kungys*, 571 F.Supp. 1104 (D.N.J. 1983), *rev'd and remanded*, 793 F.2d 516 (3d Cir. 1986), *rev'd and remanded*, 485 U.S. 759, 108 S.Ct. 1537 (1988); *United States v. Linnas*, 527 F.Supp. 426 (E.D.N.Y. 1981), *aff'd*, 685 F.2d 427 (2d Cir.), *cert. denied*, 459 U.S. 883 (1982); *United States v. Osidach*, 513 F.Supp. 51 (E.D. Pa. 1981), *appeal dismissed on defendant's death*, No. 81-1956 (3d Cir. July 22, 1981); *United States v. Palciauskas*, 559 F.Supp. 1294 (M.D. Fla. 1983), *aff'd*, 734 F.2d 625 (11th Cir. 1984); *United States v. Sprogis*, No. CV-82-1804 (E.D.N.Y. May 18, 1984), *aff'd*, 763 F.2d 115 (2d Cir. 1985).

Three were deportation cases: *In the Matter of Laienieks*, A11 937 435 (Immigration Court, San Diego June 9, 1982), *rev'd*, 18 I&N Dec. 433 (BIA 1983), *rev'd*, 750 F.2d 1427 (9th Cir. 1985); *In the Matter of Maikovskis*, A8 194 566 (BIA 1981) (ordering depositions); *In the Matter of Maikovskis*, A8 194 566 (BIA, Aug. 14, 1984), *aff'd sub nom. Maikovskis v. INS*, 773 F.2d 435 (2d Cir. 1985), *cert. denied*, 476 U.S. 1182 (1986); *In the Matter of Kalejs*, A11 655 361 (Immigration Court, Chicago Nov. 1, 1988).

In the following 16 cases, Soviet depositions were ordered by the trial judge, but either they have not yet been taken; they have been taken and there has not been a trial; or the defendant has settled, left the United States, or has died: *United States v. Artishenko*, No. 82-3822 (D.N.J. filed Nov. 12, 1982) (defendant denaturalization pursuant to consent

FOREIGN ASSETS CONTROL

(U.S. Digest, Ch. 10, §5)

Proposed Vesting of Vietnamese Assets

At a hearing on H.R. 2166,¹ November 17, 1989, before the Subcommittees on Asian and Pacific Affairs and on International Economic Policy and Trade of the House Committee on Foreign Affairs, a major issue discussed was whether Vietnamese assets, which had been frozen (blocked) under regulations of the Secretary of the Treasury (the Office of Foreign Assets Control), effective April 30, 1975, should be vested by the U.S. Government to pay U.S. claimants. The proposed legislation would amend title VII of the International Claims Settlement Act of 1949, as amended (22 U.S.C. §1645 *et seq.*), to provide for the vesting of such assets and the payment therefrom of claims of United States nationals that the Foreign Claims Settlement Commission had adjudicated (and on which it had made awards) under Public Law No. 96-606 (the Vietnam Claims Program), approved December 28, 1980.²

Deputy Assistant Secretary of State David F. Lambertson explained the policy of the administration with regard to the Socialist Republic of Vietnam (SRV) and its opposition to the proposed legislation. Excerpts follow:

We fully understand and support the need to satisfy our nationals' claims against Vietnam. Nevertheless, we oppose H.R. 2166, which would vest Vietnamese assets blocked in this country in order to reimburse U.S. claimants. Our opposition to vesting is based upon: (1) the need for sustained SRV cooperation on bilateral humanitarian issues; (2) our policy and legal interests in resolving such claims by negotiation (in the context of normalization) rather than unilateral action; and (3)

agreement, Oct. 22, 1984); *In the Matter of Benkunshas*, A7 340 910 (Immigration Court, Chicago filed Mar. 25, 1984), *case dismissed on respondent's death*, Jan. 24, 1986; *In the Matter of Bernotas*, A7 255 565 (Immigration Court, Hartford filed July 8, 1983); *United States v. Dercacz*, 530 F.Supp. 1348 (E.D.N.Y. 1982); *United States v. Didrichsons*, No. C88-686C (W.D. Wash. filed May 27, 1988); *United States v. Gudauskas*, No. 84-0215-C (D. Mass. filed June 1, 1984); *United States v. Hrustitzky*, No. 83-579-ORL-CIV-11 (M.D. Fla. filed Aug. 9, 1983) (defendant renounced citizenship and departed from the United States, Sept. 10, 1984); *United States v. Juodis*, No. 81-1013-CIV-T-17 (M.D. Fla. filed Oct. 26, 1981), *case dismissed on defendant's death*, Nov. 10, 1986; *United States v. Karklins*, No. CIV-81-0460-LTL (C.D. Cal. filed Jan. 29, 1981), *case dismissed on defendant's death*, Apr. 6, 1983; *United States v. Katin*, No. 84-3601-C (D. Mass. filed Nov. 9, 1984); *United States v. Kirsteins*, No. 87-CV-964 (N.D.N.Y. filed July 15, 1987); *United States v. Klimavicius*, 117 F.R.D. 12 (D. Me. 1987) (defendant denaturalized pursuant to consent decree), *vacated and remanded*, 847 F.2d 28 (1st Cir. 1988) (default judgment); *In the Matter of Lehmann*, A11 218 851 (Immigration Court, Cleveland filed Nov. 23, 1981) (order of deportation entered pursuant to agreement Feb. 27, 1984); *United States v. Schuk*, 565 F.Supp. 613 (E.D. Pa. 1983) (defendant denaturalized pursuant to consent agreement, Oct. 31, 1985); *United States v. Trucis*, 89 F.R.D. 671 (E.D. Pa. 1981), *case dismissed on defendant's death*, Dec. 15, 1981; *United States v. Virkutis*, No. 83-C-1758 (N.D. Ill.) (defendant denaturalized pursuant to consent agreement entered Apr. 8, 1988).

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¹ 101st Cong., 1st Sess. (1989).

² 94 Stat. 3534 (22 U.S.C. §§1645-1645o (1982)).

the failure of the proposed vesting legislation to account for U.S. Government claims against Vietnam

Unilateral vesting is likely to have an adverse impact on the level of cooperation that Hanoi is currently providing on our humanitarian agenda as well as on future steps to resolve these questions. Foreign Minister [Nguyen Co] Thach sent a clear signal of the importance Hanoi gives to the vesting issue in a March 1988 communication to then-Secretary of State Shultz and General [John W.] Vessey [Jr., Special Presidential Emissary to Hanoi for POW/MIA Affairs]. He cautioned that passage of vesting legislation would impede efforts to resolve humanitarian issues of concern. He stated that the frozen assets question should be solved through negotiations at an appropriate time and said that Vietnam would not accept unilateral action by the U.S. on this issue. The most readily available avenue for Hanoi to respond if this legislation were to pass would be through our humanitarian agenda, e.g., by a slowdown on POW/MIA cooperation or in one or more of the other bilateral humanitarian programs now proceeding smoothly.

In view of Vietnam's lack of cooperation in efforts to achieve a settlement at the [1973] Paris Conference,³ we also believe that any bilateral approach to Vietnam to negotiate a claims settlement would be inappropriate at this time. We know that Vietnam's leaders are keenly aware of this issue. They have previously expressed interest in discussing claims settlement; we have declined to enter into such discussions since this is primarily a financial issue. Claims settlement in this context would be widely seen as a step toward "normalization."

We believe that an agreement at the present time to open bilateral negotiations with Hanoi on these claims would be perceived by the ASEAN countries and Vietnam as a sign of flagging U.S. resolve toward achieving a comprehensive settlement of the Cambodian conflict. We therefore believe that this issue should be addressed in the context of a negotiation relating to normalization—when circumstances permit such negotiations to begin. A political settlement in Cambodia must come first.⁴

Michael L. Young, Deputy Legal Adviser of the Department of State, addressed specific technical comments upon the proposed legislation, H.R. 2166, in a written statement provided to the subcommittees, that stated, in major part:

We have difficulty with the findings of this legislation insofar as they explicitly or implicitly regard the Socialist Republic of Vietnam as having an established right to these assets, now or at some future time. . . . This legislation explicitly provides that the Socialist Republic of Vietnam has a right to these assets in the future and implicitly recog-

³ The Act of the International Conference on Vietnam, Mar. 2, 1973, TIAS No. 7568, 24 UST 485, constituted the parties' acknowledgment, approval and support of the Agreement on Ending the War and Restoring Peace in Vietnam, Jan. 27, 1973, and of the four Protocols thereto, TIAS No. 7542, 24 UST 1; see also Joint Communiqué, June 13, 1973, issued by the parties to the January 1973 Agreement, TIAS No. 7674, 24 UST 1675.

⁴ Dept. of State File No. P90 0015-0852/0858.

nizes—through the provision for interest—that they have an ownership interest in these assets now.

The property in question was frozen “under regulations of the Secretary of the Treasury which became effective on April 30, 1975.” (Section 717(a)(1) of the International Claims Settlement Act of 1949, as amended by section 2 of proposed H.R. 2166.) This is property which formerly belonged to the Republic of Vietnam, or South Vietnam. The Republic of Vietnam has ceased to exist. The United States has not recognized the Socialist Republic of Vietnam.

Further, the legislation provides in section 3 that the Socialist Republic of Vietnam must be given “full credit” for the amount of the assets vested, plus interest from the date of vesting, in any future claims settlement negotiation. In our view, the United States is not compelled—as this full credit provision would have it—to recognize in advance a right of the Socialist Republic of Vietnam to these assets at some future time.

It is true that the normal rule, in the normal case of a simple change of government in a country, is that the new government succeeds to the rights and liabilities of the old. Vietnam is not, however, the normal case, and the normal rule does not automatically apply.

In the case of Vietnam there have been changes in the country as well as in the Government. Moreover, under the normal rule, the Socialist Republic of Vietnam must accept all of the liabilities of the Government of the Republic of Vietnam. Where this rule applies, the new government fully assumes the liabilities and responsibilities of the old government. In this case, therefore, the Socialist Republic of Vietnam’s claim to ownership is far from clear. We see this issue as one which will have to be determined by the parties in the course of normalization, and not as one where the answer is necessarily dictated by law.

In this context, it would seriously and needlessly prejudice our position in such talks to begin by admitting that we owe the Socialist Republic of Vietnam some \$240 million, as this legislation would provide. In this respect, the legislation would confer a significant benefit on the Socialist Republic of Vietnam, free of charge, at the expense of the U.S. Government.

Moreover, the fact that these assets do not now belong to the Socialist Republic of Vietnam is important, in our view, from the point of view of legal principle. . . . As a general principle, the United States does not support seizing another government’s assets as a self-help measure. There has been only one instance in which the United States has vested foreign government assets in peacetime to pay claims without the agreement of the government concerned. That one case—concerning Czechoslovakian steel mill equipment—involved two key exceptional factors. First, vesting occurred after prolonged unsuccessful claims settlement negotiations, stretching over some ten years. Moreover, liquidation was necessary in order to preserve the value of the deteriorating equipment, for which the United States might otherwise have been responsible. The Czechoslovakian Government was notified that its dilatory action precluded any other action under the circumstances and was afforded an opportunity to renew earnest negotiation efforts. This exceptional case is justified on the basis of the particular circumstances,

and does not support a general rule that foreign government property may be seized as a self-help remedy to pay claims.

It is true that the South Vietnamese assets are in a unique status. The foreign government which owned these assets has ceased to exist, and the United States does not recognize any government in its place. As noted above, the application of general rules of succession to ownership is questionable in this case. Any claim which the Socialist Republic of Vietnam may assert to these assets would be contingent upon our agreement that they are entitled to them.

Under these unique circumstances, we would not say that vesting the South Vietnamese assets is precluded by international law. The basis for this conclusion, however, lies in the particular circumstances and not in the permissibility of vesting as a general rule. Nonetheless, in view of the precedential and policy concerns raised by vesting, it is clearly preferable that the status of these assets and settlement of claims against Vietnam be resolved by negotiations, as they have been in the past even with governments, such as Iran, with whom the U.S. did not have diplomatic relations.

Another technical difficulty with the proposed legislation is that it does not exempt diplomatic and consular properties from vesting. Since there are also United States diplomatic and consular properties in Vietnam, eventual normalization arrangements would be complicated by our selling the properties here.

Finally, I would like to note two points which have financial implications for the United States. First, the bill provides for full payment to claimants of 100 percent of their adjudicated claims. This would probably result in a reduced recovery to the United States Government for official claims, since it is unlikely that the Socialist Republic of Vietnam would ultimately agree to settle the private claims for the full amount which we claim, and the difference would have to be offset by official claims. Moreover, the contemplated distribution of almost all of the frozen assets to private claimants would mean that the Socialist Republic of Vietnam would have to agree to provide new funds for any significant settlement of official claims.⁵

R. Richard Newcomb, Director, Office of Foreign Assets Control, Department of the Treasury, also testifying before the subcommittees, discussed the origin and ownership of the blocked Vietnamese assets, in part, as follows:

I. HISTORY OF THE VIETNAM BLOCKING

The FACR [Foreign Assets Control Regulations] were issued in December 1950 following the entry of the People's Republic of China ("China") into the Korean War. They imposed a complete embargo on trade or financial transactions of any kind involving China or North Korea, or nationals of those countries. The embargo had the effect of freezing all government and privately-owned Chinese and North Korean assets subject to the jurisdiction of the United States. North Viet-

⁵ *Id.*, No. P90 0015-0859/0865.

nam was added to the list of countries to which the FACR apply on May 5, 1964. Cambodia and South Vietnam were added to the list on April 17, 1975, and April 30, 1975, respectively, after the fall of Phnom Penh and Saigon to communist forces. Trade restrictions with China were lifted on June 10, 1971, and Chinese assets were unblocked on January 13, 1980.

In May 1975, a survey of blocked South Vietnamese accounts in excess of \$50,000 at major U.S. banks in the Federal Reserve Districts of New York, San Francisco, and Kansas City revealed approximately \$79 million in blocked South Vietnamese assets. A more detailed and comprehensive survey or census of all blocked assets in the United States was conducted by Treasury in 1983 through 1984, and the results were published in May 1985. The records from these two surveys, plus Treasury licensing and correspondence records since the 1975 blocking, are the primary sources of information currently available concerning the blocked assets.

II. VALUE AND COMPOSITION OF THE BLOCKED ASSETS

The blocked South Vietnamese assets as of early 1988 totaled over \$218 million, not including the value of the Vietnamese embassy building in Washington.⁶ This estimate is based on the total reported on the 1983-1984 census adjusted by updates received by Treasury in the spring of 1988 from the eight U.S. holders who reported holding the twelve largest deposits (over \$2 million each) in 1983. . . .

The "large accounts", which total \$205.6 million, represent about 94 percent of the total blocked South Vietnamese assets and are held by seven large U.S. commercial banks and the Federal Reserve Bank of New York. In April 1975, these accounts were held in the name of the National Bank of Vietnam (the "NBV"), also formerly known as the Banque Nationale du Vietnam, which was the central bank of the Republic of Vietnam. Eleven of these accounts have since had their names changed to the State Bank of Vietnam (or, in some cases, the State Bank of the Vietnam Southern Office) (the "SBVN") at the request of the State Bank of Vietnam, the central bank of the Socialist Republic of Vietnam. These name changes were permitted by Treasury with the concurrence of the State Department. The change in the names of the account parties and the limited administrative control retained by the account parties are without prejudice to the issue of whether the account parties are entitled to ownership of the account funds.

Consistent with blocking controls applied by the United States against other foreign countries, the FACR and related Treasury licensing policies grant U.S. holders of blocked deposits permission to act upon the directions of foreign account parties if the deposits remain blocked at domestic U.S. banks, the ultimate beneficial owners are not changed, and the assets are handled in a sound fiduciary manner. . . .

⁶ The projected value of these assets through the end of 1989 is over \$245 million. In addition, the South Vietnamese embassy is estimated to be worth approximately \$4 million. Only one account, involving approximately fifteen hundred dollars, was blocked prior to April 30, 1975. All the other assets were blocked on, or subsequent to, that date. [This footnote is part of Mr. Newcomb's testimony.]

Since 1975, the funds have been invested in time deposits of short maturities, Treasury bills, and renewable World Bank debt securities with two-year maturity dates. These accounts have thus earned interest at money market rates since the initial blocking. In 1979, the State Bank of Vietnam requested that the account of sixteen nationalized South Vietnamese commercial banks held at two U.S. banks be consolidated into two of its own accounts at those banks. These transfers were not permitted by Treasury.

.....

III. ORIGIN AND OWNERSHIP OF THE BLOCKED ASSETS

.....

To establish a precise link in accounting terms between the balances in these accounts and earlier assistance payments from U.S. Government agencies to South Vietnamese agencies other than the central bank would require access to records formerly maintained by the National Bank of Vietnam. . . .

The Treasury Department, however, believes that given the massive U.S. economic and military assistance programs negotiated with the Government of the Republic of Vietnam prior to its downfall, some contractual U.S. Government interest probably exists with respect to some portion of the funds located in the United States formerly owned by the Government of the Republic of Vietnam. This potentially includes any funds transferred into the United States by the National Bank of Vietnam prior to the blocking.

.....

The question of who actually owns the funds is really a question of state succession. The funds belonged to the former Government of the Republic of Vietnam. That government no longer exists. At the current time we do not recognize the Government of the Socialist Republic of Vietnam.

Treasury Concerns Regarding Vesting

. . . The passage of vesting legislation would represent the first time that the United States has vested assets in the absence of either a peace treaty permitting vesting or sustained efforts to negotiate a claims settlement agreement. Treasury has traditionally opposed, and continues to oppose, vesting legislation.

Vesting the assets of a foreign country without negotiations would have serious precedential implications, both with respect to non-Vietnamese foreign-owned assets in the United States and U.S.-owned assets in other countries, and could have damaging consequences affecting our claims position with respect to Vietnam. Unlike blocking assets which merely preserves the status quo, vesting assets is an irrevocable final action in which title to the property is seized. It involves an actual confiscation of property.

Vesting could run counter to the objective of facilitating eventual claims settlement. Unilateral vesting may prejudice the commencement of any settlement negotiations and could undermine our ability to negotiate successfully a resolution of the remaining U.S. Government claims if such negotiations were to take place.

Any proposal to seize blocked assets to fund awards against Vietnam must also take into consideration U.S. Government claims. If U.S. Government claims are placed in a subordinate position to that of private claimants, there must be compelling foreign or domestic policy reasons to justify such a subordination. In the case of Vietnam, U.S. Government claims would effectively be precluded from recovery from the blocked funds if private claims were satisfied in full. This would be particularly unfortunate in light of the heavy expenditure of U.S. taxpayer dollars to support the former Government of the Republic of Vietnam.

Another consideration involved in any use of blocked assets to fund awards is the fact that Treasury blocking controls, as they are applied to Vietnam, freeze assets in which there exists any interest of Vietnam or Vietnamese nationals, direct or indirect. . . . This means that some assets to which third parties may have a more direct claim to title than the current or former governments of Vietnam or their nationals could be included in the funds proposed to be vested and be lost to the third-party claimants, giving rise to possible U.S. Government liability to certain of these third parties (such as U.S. citizens born in Vietnam) for a Fifth Amendment "taking" of property.

A final concern . . . is that a unilateral vesting of blocked property could damage the reputation of the United States as a safe location for the investment of foreign capital, as many foreign investors would view the action as arbitrary, unjustified, and counter to standard international practice. In addition, a wholesale peacetime vesting of foreign property under these conditions by the United States would encourage or serve to legitimize similar treatment of U.S.-owned assets abroad.

The extent of this foreign investment by the U.S. puts us in an extremely vulnerable position abroad. The United States has staunchly maintained that foreign property—whether U.S. property abroad or foreign property in the U.S.—cannot be taken without prompt, adequate, and effective compensation. To unilaterally vest, or confiscate, these assets as currently proposed would set a damaging precedential example for countries less dedicated than the United States to the preservation of property rights.⁷

LORI Y. VASSAR

USE OF FORCE

(U.S. *Digest*, Ch. 14, §1)

Protection of Nationals—Deployment of U.S. Forces to Panama

On December 20, 1989, President George Bush announced to the nation that he had ordered U.S. military forces to Panama during the night.

The President stated that for nearly 2 years the United States and nations of Latin America and the Caribbean had worked together to resolve the

⁷ Dept. of State File No. P90 0015-0866/0880.

crisis in Panama. The goals of the United States had been to safeguard the lives of Americans, to defend democracy in Panama, to combat drug trafficking, and to protect the integrity of the Panama Canal Treaty. Many attempts had been made to resolve the crisis through diplomacy and negotiations, and all had been rejected by the dictator of Panama, General Manuel Noriega, an indicted drug trafficker. (Two United States grand juries in Florida had indicted Noriega on February 4, 1988, on charges of cocaine and marijuana trafficking.¹)

On December 15, the President said, Noriega had declared his military dictatorship to be in a state of war with the United States, and had publicly threatened the lives of Americans in Panama. (On that date, at Noriega's instigation, the illegitimate Panamanian National Assembly declared that the Republic of Panama was in a "state of war" with the United States, and in an inflammatory anti-American speech on national radio and television, Noriega stated that, "We, the Panamanians, will sit along the banks of the Canal to watch the dead bodies of our enemies pass by")

The "very next" day, President Bush continued, forces under Noriega's command (the Panama Defense Forces) shot and killed an unarmed American serviceman and wounded another, arrested and brutally beat a third American serviceman, and then "brutally" interrogated the serviceman's wife, threatening her with sexual abuse. That, the President said, was enough.

The President declared:

General Noriega's reckless threats and attacks upon Americans in Panama created an imminent danger to the 35,000 American citizens in Panama. As President, I have no higher obligation than to safeguard the lives of American citizens. And that is why I directed our Armed Forces to protect the lives of American citizens in Panama and to bring General Noriega to justice in the United States. I contacted the bipartisan leadership of Congress last night and informed them of this decision, and after taking this action, I also talked with leaders in Latin America, the Caribbean, and those of other U.S. allies.

At this moment, U.S. forces, including forces deployed from the United States last night, are engaged in action in Panama. The United States intends to withdraw the forces newly deployed to Panama as quickly as possible. . . .

The brave Panamanians elected by the people of Panama in the elections last May [May 7, 1989], President Guillermo Endara and Vice Presidents Calderon and Ford, have assumed the rightful leadership of their country. You remember those horrible pictures of newly elected Vice President Ford, covered head to toe with blood, beaten mercilessly by so-called "dignity battalions." Well, the United States today recognizes the democratically elected government of President Endara. I will send our Ambassador [Arthur H. Davis] back to Panama immediately.

¹ *United States v. Noriega*, No. 88-0079 CR (S.D. Fla. filed Feb. 4, 1988); *United States v. Noriega*, No. 88-28 CR-T (M.D. Fla. filed Feb. 4, 1988).

Key military objectives have been achieved. Most organized resistance has been eliminated. But the operation is not over yet. General Noriega is in hiding. And nevertheless, yesterday a dictator ruled Panama, and today constitutionally elected leaders govern.

I have today directed the Secretary of the Treasury and the Secretary of State to lift the economic sanctions with respect to the democratically elected government of Panama and, in cooperation with that government, to take steps to effect an orderly unblocking of Panamanian Government assets in the United States. I'm fully committed to implement the Panama Canal treaties and turn over the Canal to Panama in the year 2000. The actions we have taken and the cooperation of a new, democratic government in Panama will permit us to honor these commitments. As soon as the new government recommends a qualified candidate, Panamanian, to be Administrator of the Canal, as called for in the treaties, I will submit this nominee to the Senate for expedited consideration.

I am committed to strengthening our relationship with the democratic nations in this hemisphere. I will continue to seek solutions to the problems of this region through dialog and multilateral diplomacy. I took this action only after reaching the conclusion that every other avenue was closed and the lives of American citizens were in grave danger. I hope that the people of Panama will put this dark chapter of dictatorship behind them and move forward together as citizens of a democratic Panama with this government that they themselves have elected.

The United States is eager to work with the Panamanian people in partnership and friendship to rebuild their economy. The Panamanian people want democracy, peace, and the chance for a better life in dignity and freedom. The people of the United States seek only to support them in pursuit of these noble goals.²

The Department of State identified the legal principles involved in the U.S. military action in Panama in press guidance, from which excerpts follow:

The United States objectives were: (1) to protect American lives; (2) to assist the lawful and democratically elected government in Panama in fulfilling its international obligations; (3) to seize and arrest General Noriega, an indicted drug trafficker; and (4) to defend the integrity of United States rights under the Panama Canal treaties.

We determined that U.S. military action was necessary to protect and defend the Canal, to maintain the ability of the United States to execute its treaty rights and obligations and to protect the lives of American citizens.

We consulted with the duly elected Panamanian government [the government of President Guillermo Endara] which Noriega had illegally kept out of office, and they indicated that they welcomed our assistance.

² 25 WEEKLY COMP. PRES. DOC. 1974-75 (Dec. 25, 1989).

The United States has the inherent right of self-defense, as recognized in article 51 of the UN Charter and article 21 of the OAS Charter. This right of self-defense entitles the United States to take necessary measures to defend U.S. military personnel, U.S. nationals and U.S. installations. Further, the U.S. has both the right and the duty under Article IV of the Panama Canal Treaty to use its armed forces to protect and defend the Canal and its availability to all nations. In addition, the legitimate democratically elected government of Panama was consulted and welcomed our actions.

Military force has always been a last resort. We have consistently sought a peaceful resolution of the Panamanian situation. However, the recent declaration of war by the Noriega regime, coupled with brutal attacks on U.S. personnel, convinced us that action in self-defense was necessary now.

The United States has not acted to install any government. The Panamanians chose their government on May 7 [1989]. All credible international observers certified that President Endara was elected by an overwhelming majority. We recognize the democratically elected, legitimate government of Panama. We will assist that government in fulfilling its international obligations and in restoring peace, prosperity, and freedom to Panama.

The primary responsibility of the U.S. under the Canal Treaties is to protect and defend the Canal. We must carry out our treaty responsibilities. There are many U.S. citizens and interests in Panama. We also have the right and responsibility to take action to protect them when they are threatened.

We are restoring normal diplomatic and economic relations with Panama. We have recognized the government of Endara and we will lift all economic sanctions at the earliest possible time.

While the situation is highly unusual, the action we have taken is fully consistent with past U.S. policy and recognized principles of law with regard to the use of armed force.³

On December 20, 1989, President Bush directed the following memorandum to the Secretary of State and the Secretary of the Treasury:

The democratically elected government is now in place in Panama. With respect to that government, I hereby direct you to lift the economic sanctions imposed by Executive Order No. 12635. Therefore, payments from the United States and payments by U.S. persons in Panama to that government are not prohibited. You are directed to take steps to ensure that the prohibitions will not be applied to that government of Panama and in cooperation with that government to effect an orderly unblocking of Panamanian government assets in the United States.⁴

³ For the full text of the questions and answers on Panama, see Dept. of State File No. P90 0018-0477/0482.

⁴ 25 WEEKLY COMP. PRES. DOC., *supra* note 2, at 1977.

On January 2, 1990, the President announced the recess appointment of Ambassador Deane Roesch Hinton as Ambassador to the Republic of Panama, to succeed Ambassador Davis.

On December 20, 1989, President Bush also issued a memorandum for the Secretary of Defense, directing and authorizing the units and members of the United States Armed Forces to apprehend General Manuel Noriega and any other persons in Panama currently under indictment in the United States for drug-related offenses. The memorandum directed that any persons so apprehended were to be turned over to civil law enforcement officials of the United States as soon as practicable.⁵

Under date of December 21, 1989, the President, consistent with the War Powers Resolution, notified the Speaker of the House, Thomas S. Foley, and the President Pro Tempore of the Senate, Senator Robert C. Byrd, of the United States military action in Panama. The President's letter stated, further:

In the early morning of December 20, 1989, the democratically elected Panamanian leadership announced formation of a government, assumed power in a formal swearing-in ceremony, and welcomed the assistance of U.S. Armed Forces in removing the illegitimate Noriega regime.

The deployment of U.S. Forces is an exercise of the right of self-defense recognized in Article 51 of the United Nations Charter and was necessary to protect American lives in imminent danger and to fulfill our responsibilities under the Panama Canal Treaties. It was welcomed by the democratically elected government of Panama. The military operations were ordered pursuant to my constitutional authority with respect to the conduct of foreign relations and as Commander in Chief.

. . . [O]ur objectives are clear and largely have been accomplished. Our additional Forces will remain in Panama only so long as their presence is required.⁶

⁵ *Id.* at 1976.

Noriega took refuge on December 24, 1989, in the Papal Nunciature at Panama, where he remained until January 3, 1990. At that time, he turned himself in to U.S. authorities in Panama with the full knowledge of the Panamanian Government, and was escorted to a nearby U.S. military helicopter and flown to Howard Air Force Base in Panama, where U.S. Drug Enforcement Administration officials arrested him. Noriega was then transported to Homestead Air Force Base, Florida, and was arraigned on January 4, 1990, in the U.S. district court in Miami on charges stemming from his earlier indictment for drug trafficking.

⁶ *Id.* at 1984, 1985.

INTERNATIONAL DECISIONS

PETER D. TROOBOFF*

Act of state—jurisprudential basis of doctrine—inquiry into motivation for foreign official act

W. S. KIRKPATRICK & CO. v. ENVIRONMENTAL TECTONICS CORP., INTERNATIONAL. 110 S.Ct. 701, 29 ILM 182 (1990).

U.S. Supreme Court, January 17, 1990.

Plaintiff, Environmental Tectonics Corp., International, sought damages for losses incurred when its competitor, defendant W. S. Kirkpatrick & Co., International, secured a construction and equipment contract with the Nigerian Government by allegedly paying bribes to a number of Nigerian government officials. Defendants sought summary judgment on the ground that the act of state doctrine precluded inquiry into the motives of Nigerian officials in awarding the contract. Despite a letter from the Legal Adviser of the Department of State generally supporting continued adjudication of the claims, the district court granted defendant's motion. The court of appeals reversed and the Supreme Court affirmed unanimously (per Scalia, J.) and *held* that adjudication of the claims will not require the courts of the United States to pass upon the validity of any Nigerian official act and that, accordingly, the act of state doctrine has no applicability to this case.

In 1981 defendant arranged through a Nigerian citizen to bid on a contract for the construction and equipping of an aeromedical center at an air force base in Nigeria. The chief executive officer of defendant agreed to pay commissions equal to 20 percent of the contract price if the contract was awarded. It was alleged that defendant understood that these commissions were to be paid to a Nigerian agent and distributed in agreed amounts to certain officials of the Nigerian Government who would be instrumental in the contract award.

After defendant received the contract award, an investigation by the Federal Bureau of Investigation and the U.S. Department of Justice uncovered the bribery scheme. The defendant company and its CEO, also a defendant, were charged with, and pled guilty to, violations of the Foreign Corrupt Practices Act (15 U.S.C. §78dd-2), which proscribes payments to foreign government officials to obtain or retain business. The Offer of Proof by the United States Attorney in support of the guilty pleas provided considerable detail regarding the defendants' actions and undertakings to make such payments, which led to award of the Nigerian contract. Plaintiff immediately filed its action for damages based on the Racketeer Influenced and Corrupt Organizations Act (18 U.S.C. §§1961-1968 (1988)) (RICO), the Robinson Patman Act (15 U.S.C. §§13-13b, 21a (1988)) and the New Jersey Anti-Racketeering Act (N.J. Stat Ann. §2C:41-2 (1982)).

* Mark P. Kindall of the District of Columbia Bar assisted the Editor in the preparation of the summaries in this issue.

When the defendants moved to dismiss on the grounds of the act of state doctrine, the district court sought the views of the Department of State. In a letter to the district court, the Legal Adviser of the Department of State, following his position in prior cases,¹ informed the court that even if the adjudication of the suit "were to involve a judicial inquiry into the motivations of the Government of Nigeria's decision to award the contract, the Department does not believe the act of state doctrine should bar the Court from adjudicating this dispute." The Legal Adviser cautioned, however, that inquiries into the motive for foreign official acts and discovery against foreign government officials "may seriously affect United States foreign relations." For that reason, the Legal Adviser urged that the court "assure that no unnecessary inquiries are made, or allegations tested, during the course of discovery or trial."² Despite this communication from the Legal Adviser, the district court granted summary judgment for the defendant.

The U.S. Court of Appeals for the Third Circuit reversed on the ground that the district court had improperly speculated on the effect that the suit would have on United States relations with Nigeria.³ In an opinion by Judge Pollak, the Third Circuit concluded that the lower court had ignored the significance of the limited nature of the claim: Environmental Tectonics was seeking only to recover damages from the defendants; plaintiff did not seek to invalidate the defendants' contract or to receive damages from Nigeria or its officials. The court relied on the Legal Adviser's letter in holding that the plaintiff's claims posed no threat of "institutional conflict between the political and judicial branches that would justify invoking the doctrine." Noting that it was not bound by the State Department's legal conclusion regarding the applicability of the doctrine, the Third Circuit nonetheless accorded "substantial respect" to the Department's "factual assessment of whether fulfillment of its responsibilities will be prejudiced by the course of civil litigation."⁴

In the Supreme Court, the Solicitor General appeared as amicus and urged affirmance of the Third Circuit's ruling but on a narrow ground—namely, that the State Department's position in this case depended upon the circumstance that plaintiff's claims implicated only the allegedly corrupt personal motivations of Nigerian government officials and not the official purposes of the Nigerian Government in awarding the contract. The Solicitor General specifically urged the Court not to adopt a general rule for applying the act of state doctrine "that would attach dispositive significance to the fact that this suit involves only the 'motivation' for, rather than the 'validity' of, a foreign sovereign act."⁵ In the opinion of the Solicitor General, "some cases that concern only a foreign government's 'motivation'

¹ Brief for the United States as Amicus Curiae at 3, *Environmental Tectonics* (citing amicus briefs filed by the United States in *Mitsui & Co. v. Industrial Inv. Dev. Corp.*, cert. denied, 445 U.S. 903 (1980), and *Hunt v. Mobil Oil Corp.*, cert. denied, 434 U.S. 984 (1977)).

² Letter of the Legal Adviser to the United States District Court for the District of New Jersey, Appendix to the Petition for Certiorari, at A34-37.

³ *Environmental Tectonics v. W. S. Kirkpatrick & Co.*, 847 F.2d 1052 (3d Cir. 1988).

⁴ *Id.* at 1062.

⁵ Brief for the United States as Amicus Curiae at 37 [hereinafter U.S. Brief].

plainly *do* raise substantial act of state concerns" and should, therefore, not be heard by the United States courts.⁶

As an appendix to his amicus brief, the Solicitor General transmitted to the Court a letter from the Legal Adviser to the Solicitor General setting forth an additional and much broader ground for finding the act of state doctrine inapplicable in this case. Specifically, the Legal Adviser not only reaffirmed his prior submission to the district court but added that "in the absence of a representation to the contrary, the courts may properly assume that no unacceptable interference with U.S. foreign relations will occur on account of the adjudication of like cases."⁷ The Legal Adviser also confirmed that the court of appeals had correctly interpreted his cautionary note in the letter to the district court. In particular, he explained that "these observations were intended to remind the trial court to exercise 'appropriate supervision' over the trial process so as to 'limit damage to foreign sensibilities.'"⁸

In his opinion for the Court, Justice Scalia traced the evolution of the "jurisprudential foundation" of the act of state doctrine. He reviewed the reference to "international comity and expediency" in *Oetjen v. Central Leather Co.*⁹ and to separation of powers concerns in *Banco Nacional de Cuba v. Sabbatino*.¹⁰ Justice Scalia also noted the proposed exceptions to the doctrine for commercial transactions in *Alfred Dunhill of London, Inc. v. Republic of Cuba*¹¹ and for cases in which the executive branch has expressed no objection to the adjudication (as discussed but not adopted by a majority in *First National City Bank v. Banco Nacional de Cuba*).¹²

Returning to first principles, Justice Scalia emphasized that the act of state doctrine is a "rule of decision"¹³ whose precise scope and applicability can be readily discerned from the holdings of prior decisions: "In every case in which we have held the act of state doctrine applicable, the relief sought or the defense interposed would have required a court in the United States to declare invalid the official act of a foreign sovereign performed within its own territory."¹⁴ The doctrine has no applicability in the instant case, the Court held, because plaintiff's claim would require no such determination of validity regarding the defendant's contract with Nigeria.

The Court proceeded to address the Solicitor General's point that the policies underlying the act of state doctrine may require its application when an inquiry into the motives for actions taken by foreign governmental officials might embarrass a foreign sovereign or interfere with the conduct of United States foreign policy.¹⁵ Justice Scalia expressly declined to accept this

⁶ *Id.* (emphasis in original).

⁷ Letter from the Legal Adviser to the Solicitor General, July 25, 1989, U.S. Brief, *supra* note 5, Appendix at 2a.

⁸ *Id.* (citing the Third Circuit's opinion, 847 F.2d at 1062 n.11).

⁹ 246 U.S. 297 (1918).

¹⁰ 376 U.S. 398 (1964).

¹¹ 425 U.S. 682, 695 (1976) (opinion of White, J.).

¹² 406 U.S. 759, 760 (1972) (opinion of Rehnquist, J.).

¹³ 110 S.Ct. 701, 705 (citing *Ricaud v. American Metal Co.*, 246 U.S. 304 (1918)).

¹⁴ *Id.* at 704.

¹⁵ The Solicitor General did not support the position of the defendant that such embarrassment or interference would arise in this case.

element of the Solicitor General's position. Instead, the Court stated that the policies underlying the doctrine could only result in its narrowing, i.e., not invoking the doctrine even when under the "rule of decision approach" it would be "technical[ly]" applicable. As for broadening the doctrine "into new and uncharted fields," the Court refused to adopt this approach, explaining that

[c]ourts in the United States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them. The act of state doctrine does not establish an exception for cases and controversies that may embarrass foreign governments, but merely requires that, in the process of deciding, the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid.¹⁶

* * * *

In its most important decision concerning the act of state doctrine since *Sabbatino*, the Supreme Court has responded decisively to the longstanding controversy regarding the jurisprudential underpinnings of the doctrine. It is noteworthy that the Court had received a brief amicus curiae from the American Bar Association, which urged "[r]eturning the doctrine to its conflict of laws foundations" so as to produce "a more predictable and defensible rule."¹⁷

Students of the further evolution of the doctrine will be watching with interest to see in light of the *Environmental Tectonics* ruling what response the Solicitor General gives to the Court's invitation for the views of the United States in the pending request for certiorari in a recent Seventh Circuit act of state case, *F. & H. R. Farman-Farmanian Consulting Engineers Firm v. Harza Engineering Company*.¹⁸ In the meantime, it is interesting and worthwhile to consider how the United States courts would have resolved cases that were dismissed on act of state grounds if those courts had had this most recent Supreme Court ruling before them. It seems likely that in several of these proceedings the courts would have proceeded to perform what the Supreme Court correctly characterized as their obligation to adjudicate the cases and controversies presented to them. Alternatively, the courts would have been required to consider whether other bases such as *forum non conveniens*, foreign sovereign immunity or even the political question doctrine provided a sounder basis for refusing to hear the claims asserted.¹⁹

PETER D. TROOBOFF

¹⁶ 110 S.Ct. at 707.

¹⁷ Brief Amicus Curiae of the American Bar Association at 4.

¹⁸ 58 U.S.L.W. 3387 (U.S. Dec. 12, 1989) (No. 89-867), *requesting certiorari* in 882 F.2d 281 (7th Cir. 1989) and Order of Feb. 20, 1990, 58 U.S.L.W. 3526 (U.S. Feb. 20, 1990) (claim by former Iranian shareholders of an expropriated—without compensation—Iranian firm against U.S. engineering company for services rendered by the firm and collected by the U.S. company in the Iran-U.S. Claims Tribunal). (The author's firm is counsel for the petitioner in this case.)

¹⁹ *E.g.*, *International Ass'n of Machinists & Aerospace Workers v. Organization of Petroleum Exporting Countries*, 649 F.2d 1354 (9th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982) (act of state doctrine applied on basis of broad foreign policy concerns).

Iran-U.S. Claims Tribunal—deduction of percentage of award by U.S. Government—taking without just compensation—retroactive application and due process

UNITED STATES v. SPERRY CORP. 110 S.Ct. 387.

U.S. Supreme Court, November 28, 1989.

This case challenged the right of the United States to deduct 1.5 percent from an award of the Iran–United States Claims Tribunal. Appellees Sperry Corp. and Sperry World Trade, Inc. (Sperry), both U.S. corporations, received an award from the Tribunal in 1982. Section 502 of the Foreign Relations Authorization Act, Fiscal Years 1986 and 1987 (50 U.S.C. §1701 note (Supp. V 1987)), effective retroactively to June 7, 1982, authorized a deduction of 1.5 percent from the awards of successful claimants before the Tribunal, which included Sperry's award. Sperry filed suit in the United States Claims Court challenging the constitutionality of the newly enacted statute. The claims court dismissed the suit.¹ On appeal, the United States Court of Appeals for the Federal Circuit (per Meyer, J.) reversed and held that the deduction constituted a taking without compensation in violation of the Fifth Amendment to the United States Constitution.² On appeal to the Supreme Court, the Court (per White, J.) unanimously *held*: that section 502 violates neither the Just Compensation Clause nor the Due Process Clause of the Fifth Amendment.

In July 1980, Sperry had obtained from the U.S. District Court for the District of Columbia a prejudgment attachment against Iranian assets in the United States of approximately \$7 million, based on a suit against Iran and 15 of its instrumentalities alleging breach of contract, conversion of property and interference with business relations. On January 19, 1981, the United States and Iran entered into the Algiers Accords, which provided for the establishment of the Iran–United States Claims Tribunal in which U.S. nationals could bring claims against Iran.³ The Accords suspended all pending legal proceedings in the United States against Iran, nullified all attachments and judgments pursuant to them, and prohibited all further litigation in the U.S. courts of claims within the jurisdiction of the Tribunal. The United States further agreed to return all Iranian assets held in the United States. The Supreme Court upheld the Executive's actions in entering into the Algiers Accords in *Dames & Moore v. Regan*.⁴

In September 1982, the Tribunal awarded plaintiffs \$2.8 million. The United States deducted 2 percent from the Tribunal's award pursuant to a directive from the Department of the Treasury. Plaintiffs challenged the constitutionality of the directive before the U.S. Claims Court, which ruled that the directive was unlawful. In response, Congress enacted section 502 of the Foreign Relations Authorization Act in August of 1985. Section 502 requires the Federal Reserve Bank of New York to deduct for the United States 1.5 percent of the first \$5 million of any Tribunal award and 1 percent of any amount over \$5 million. The claims court subsequently dismissed

¹ 12 Cl. Ct. 736 (1987).

² 853 F.2d 904 (1988), *summarized in* 83 AJIL 86 (1989) (summarizing the appeals court's decision and disagreeing with its holding).

³ *See infra* p. 557 n.1.

⁴ 453 U.S. 654 (1981).

Sperry's action on the ground that the 1985 Act had mooted Sperry's case, and Sperry appealed. The Federal Circuit reversed and held section 502 unconstitutional, likening the 1.5 percent deduction to a permanent physical occupation by the Government of private property, which the Supreme Court had held in *Loretto v. Teleprompter Manhattan CATV Corp.*⁵ to be a *per se* taking, that is, without regard to the multiple factors typically considered in taking cases.

The Supreme Court reversed the appeals court's decision, holding that section 502 does not violate either the Just Compensation Clause or the Due Process Clause of the Fifth Amendment. With respect to Sperry's just compensation claims, the Supreme Court determined that no property was taken without just compensation, because Sperry's prejudgment attachment against Iran was nullified by the executive orders implementing the Accords, which orders were upheld in *Dames & Moore*. Second, the Court found that Sperry did not suffer the deprivation of its claim against Iran; on the contrary, Sperry settled the claim for a substantial sum and made no claim that the gross amount of the award was less than what would have been recovered in ordinary litigation. Third, the Court concluded that the deduction itself did not constitute a taking, because it was a "fair approximation of the cost of benefits supplied."⁶ Justice White explained: "We need not state what percentage of the award would be too great a take to qualify as a user fee, for we are convinced that on the facts of this case, 1½% does not qualify as a 'taking' by any standard of excessiveness."⁷ The Court disagreed with the contention that Sperry had not benefited in any way from the procedures established by the Accords. "Had the President not agreed to the establishment of the Tribunal and the Security Account, Sperry would have had no assurance that it could have pursued its action against Iran to judgment or that a judgment would have been readily collectible."⁸

Sperry claimed that section 502 violated the Due Process Clause because the deductions apply to awards made prior to the enactment of the statute. The Supreme Court found the retroactive application of the Act to be justified by a rational legislative purpose, that is, ensuring that all successful claimants before the Tribunal are treated alike. The Court further concluded that section 502 does not violate the Due Process Clause in assessing the user fee only against successful claimants, because the classification (1) neither burdens fundamental rights nor creates suspect classification, and (2) can be credibly justified by the arguments that only those who are successful realize a benefit from the Tribunal sufficient to justify assessment of a fee, and assessing a user fee against all claimants would "undesirably deter those whose claims were small or uncertain of success from presenting them to the Tribunal."⁹

Sperry also argued before the Court that section 502 was enacted in violation of the Origination Clause of Article I, section 7 of the Constitution,

⁵ 458 U.S. 419 (1982).

⁶ 110 S.Ct. 387, 394 (quoting *Massachusetts v. United States*, 435 U.S. 444, 463 n.19 (1978)).

⁷ *Id.* at 395.

⁸ *Id.* at 396-97.

⁹ *Id.*

which provides that "[a]ll Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills." Sperry's contention was based on the Senate's having added section 502 as an amendment to a bill that originated in the House and contained no revenue-raising provisions at that time. The Court declined to consider the merits of Sperry's contention, because the threshold question of the justiciability of claims based on the Origination Clause had yet to be decided in the case of *United States v. Munoz-Flores*.¹⁰

* * * *

The Supreme Court's holding is sensible and well reasoned. Unlike the court of appeals, the Supreme Court perceived the benefits offered Sperry by the Algiers Accords. As the Court pointed out, Sperry had no assurance that it could enforce its district court judgment against Iran without the benefit of the Accords. Moreover, Sperry had no district court judgment to enforce after the Supreme Court's decision in *Dames & Moore v. Regan*. Thus, the Court quickly recognized that the only taking that could have occurred was as a result of the 1.5 percent deduction. With respect to this issue, the Court's decision is unequivocal in concluding that (1) a reasonable user fee based on a rational classification, such as success in obtaining an award, does not constitute a taking under the Just Compensation Clause; and (2) such a fee may be imposed retroactively without violating the Due Process Clause if it is supported by a rational legislative purpose, such as a more equitable distribution of burdens among users. Finally, in concluding that the deduction did not cause a taking, the Court provided additional useful clarification of the Just Compensation Clause by dismissing as "artificial" the argument, accepted by the court of appeals, that the deduction was akin to a "permanent physical occupation" of Sperry's property pursuant to *Loretto*.

ROSE C. CHAN
Of the California Bar

Jurisdiction—1958 New York Convention—enforcement of award by Iran-U.S. Claims Tribunal in United States courts

MINISTRY OF DEFENSE OF THE ISLAMIC REPUBLIC OF IRAN v. GOULD INC.
887 F.2d 1357; *certiorari denied*, 110 S.Ct. 1319.
U.S. Court of Appeals, 9th Cir., October 23, 1989; U.S. Supreme Court,
March 5, 1990.

The Islamic Republic of Iran's Ministry of Defense (Ministry) sought to enforce an award of the Iran-United States Claims Tribunal against Gould Inc. and its subsidiaries (Gould). In a motion to dismiss on the ground that the district court lacked subject matter jurisdiction, Gould contended that (1) the Iranian Government was not recognized by the United States and was thus barred from access to the federal courts; (2) the Tribunal's constituent

¹⁰ 110 S.Ct. 48 (1989) (order granting certiorari).

instrument, the 1981 Algiers Accords,¹ was not self-executing and hence did not provide a source of federal question jurisdiction; and (3) the Tribunal's awards were unenforceable under the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.² The district court found that it had jurisdiction under the Federal Arbitration Act (9 U.S.C. §§201-208), which implements the 1958 Convention in the United States. On interlocutory cross-appeals, the Court of Appeals for the Ninth Circuit affirmed and *held* (per O'Scannlain, J.) that the district court has subject matter jurisdiction to enforce an award of the Tribunal against an American corporation under the Federal Arbitration Act.

In the early 1970s, Hoffmann Electric Corp., later merged with Gould, concluded two contracts with the Ministry to supply specified radio equipment. During the Iranian Revolution, performance of the contracts was interrupted. Gould sued in the United States for breach of contract. The action was dismissed without prejudice when President Reagan, pursuant to the Algiers Accords, ordered that claims by Americans against Iran pending before U.S. courts be suspended and referred to the Claims Tribunal in The Hague.³ Gould filed two claims before the Tribunal; the Ministry counterclaimed for amounts owing for breach of contract and sought the return of certain Iranian equipment held by Gould.⁴ The Tribunal set off the amounts due and awarded \$3.6 million to the Ministry, and also ordered return of the equipment. Because the Algiers Accords do not provide for the payment of awards to Iranian counterclaimants from the Security Account, the Ministry was obliged to seek enforcement of its judgment in the United States.⁵

The Ninth Circuit first determined that the basic requisites for jurisdiction under the Federal Arbitration Act had been satisfied in this case. The court held that the award arose "out of a legal relationship . . . which is

¹ The Algiers Accords include the (1) Declaration of the Government of the Democratic and Popular Republic of Algeria (Jan. 19, 1981) (the General Declaration), and (2) Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran (Jan. 19, 1981) (the Claims Settlement Declaration), both reprinted in DEP'T ST. BULL., No. 2047, February 1981, at 1, and 1 IRAN-U.S. CLAIMS TRIBUNAL REPORTS [hereinafter IRAN-U.S. C.T.R.] 3 (1983).

² Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 UST 2517, TIAS No. 6997, 330 UNTS 38 [hereinafter New York Convention or Convention].

³ Exec. Order No. 12,294, 3 C.F.R. 139 (1981). See also *Dames & Moore v. Regan*, 453 U.S. 654 (1981) (upholding the President's authority to issue that order).

⁴ The Tribunal had earlier decided that a counterclaim for an amount in excess of that sought by the claimant was within its jurisdiction. *Gould Marketing, Inc. and Ministry of National Defense*, ITL 24-49-2 (July 27, 1983), reprinted in 3 IRAN-U.S. C.T.R. 147, 151-52 (1983 II), summarized in 77 AJIL 893 (1983).

⁵ See *Islamic Republic of Iran and United States* (Case A21), Dec. 62-A/21-FT (May 4, 1987), reprinted in 14 IRAN-U.S. C.T.R. 324, 330-31 (1987 I) (confirming that automatic payment from the Security Account, created by the Algiers Accords, was unavailable to Iran, but that the United States had an obligation "to provide some procedure or mechanism whereby enforcement may be obtained within its national jurisdiction, and to ensure that the successful Party has access thereto").

commercial in nature and . . . which is not entirely domestic in scope."⁶ Additionally, the award, having been made in the Netherlands, satisfied the requirement that it be made in the territory of another state party to the Convention.⁷

The Ninth Circuit then considered Gould's two objections to the enforceability of the Tribunal's award under the New York Convention.⁸ First, Gould contended that because it did not voluntarily submit in writing to arbitration by the Tribunal, the Convention was inapplicable. The court of appeals agreed that the New York Convention indeed requires an agreement in writing so as to obtain the recognition and, later, the enforcement of an award.⁹ The panel held, however, that the Algiers Accords themselves constituted such an agreement. The court relied on the President's power to conclude international claims settlements and thus act on behalf of Gould and other U.S. citizens in entering into such agreements. While this presidential power is not plenary, it does extend to obliging American claimants either to seek redress before the Tribunal or to drop their claims. The Ninth Circuit also noted that, in filing and arbitrating its claim before the Tribunal, Gould had ratified the actions of the United States in signing the Accords.

Next, Gould suggested that it was an implicit requirement of the Convention that arbitral awards be made in accordance with the national law of a state party. Since the Tribunal's award in favor of Iran was "a creature of international law, and not national law," Gould argued, it could not be enforced under the Convention.¹⁰ Gould relied on the provision in the Convention allowing refusal to enforce when an "award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the laws of which, that award was made."¹¹ Gould argued that this defense would be unavailable against Tribunal awards because they are not made under a national law; thus, the Convention could not apply to such awards since it would be contrary to the intent of its drafters to deprive parties of this defense.

The Ninth Circuit agreed that the award of an "a-national" arbitration could not be challenged on all the grounds available to attack an award

⁶ 887 F.2d 1357, 1362.

⁷ This condition was attached by the United States as a reservation to its accession to the Convention, *supra* note 2. See 21 UST at 2566, reprinted in notes following 9 U.S.C.A. §201.

⁸ The question of Iran's access to the courts of the United States was not certified on appeal. 887 F.2d at 1361 n.7. The issue of federal question jurisdiction based on the self-executing nature of the Algiers Accords, raised in the Ministry's cross-appeal, was not reached because of the holding of jurisdiction based on the Federal Arbitration Act. 887 F.2d at 1366. *But see* Islamic Republic of Iran v. Boeing Co., 771 F.2d 1279, 1283-84 (9th Cir. 1985) (which held that the Accords are not self-executing).

⁹ See Convention, *supra* note 2, Art. 2, para. 1 ("Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences . . . between them in respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration"); and *id.*, Art. 5, para. 1(a).

¹⁰ 887 F.2d at 1364.

¹¹ Convention, *supra* note 2, Art. 5, para. 1(e).

under a national law. This result, however, was entirely consistent with the purposes of the Convention, which allows parties to "untether" themselves from a particular national law.¹² The other defenses contained in the Convention, including those requiring procedural fairness, would still be available. The court of appeals thus held that even though the Tribunal's awards are not made under a national law, they are nonetheless enforceable under the New York Convention.

* * * *

This decision seems correct on all counts. The court of appeals properly emphasized that Gould had voluntarily brought proceedings before the Tribunal pursuant to the Algiers Accords. While Gould did not expect that the Iranian Ministry would win an award on its counterclaims, that was precisely the risk that Gould assumed when filing its claim. This voluntary conduct distinguishes this case from those instances where a party is coerced into arbitration, a concern raised by the United States when negotiating the Convention and later by some writers.¹³ Other cases may arise where a party's voluntary submission to arbitration is not so manifest,¹⁴ but this was hardly problematic in *Gould*.

The Ninth Circuit also contributed to promoting international arbitration generally by rejecting Gould's strained interpretation of Article V of the New York Convention. Gould's position would have demanded that, to be enforceable, every arbitration be made under a national law. Although this contention is not frivolous,¹⁵ it ignores the wording of the Convention itself.¹⁶ As Judge O'Scannlain's opinion notes, substantial procedural safe-

¹² See 887 F.2d at 1365. The panel also cited a decision of the Hoge Raad (Supreme Court) of the Netherlands, which held that review of an award under national law is necessary only when one of the grounds for setting it aside has been shown and reference to national law is required to evaluate that ground. The Hoge Raad thus confirmed that national awards are enforceable, but could be challenged on the remaining grounds specified in Article V. See *Société européenne d'entreprises v. Socialist Fed. Republic of Yugoslavia*, 1974 *Nederlandse Jurisprudentie* [N.J.], No. 361 (H.R. 1973), summarized in 5 *NETH. Y.B. INT'L L.* 290, 295 (1974), modified on other grounds, 1976 *N.J.*, No. 274 (H.R. 1975), summarized in 7 *NETH. Y.B. INT'L L.* 349 (1976).

¹³ See, e.g., Lewis, *What Goes Around Comes Around: Can Iran Enforce Awards of the Iran-U.S. Claims Tribunal in the United States?*, 26 *COLUM. J. TRANSNAT'L L.* 515, 545-46 (1988); and sources cited in *Gould*, 887 F.2d at 1363 n.9.

This point was made in *Dallal v. Bank Mellat*, a 1985 British High Court decision that the Ninth Circuit took pains to explain, and that had held that Tribunal decisions operated as *res judicata*. 1986 *Q.B.* 441, 460-61, [1986] 1 *All E.R.* 239, 254 (Hobhouse, J.) ("[A] person can make . . . a tribunal competent by voluntarily resorting to it *Dallal* chose to resort to the Hague tribunal, and thereby submitted to its jurisdiction; it is not now open to him to say that it was incompetent").

¹⁴ See A. J. VAN DEN BERG, *THE NEW YORK ARBITRATION CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION* 170-232 (1981).

¹⁵ See, e.g., *id.* at 28-43.

¹⁶ See Lewis, *supra* note 13, at 548-51; Lake & Dana, *Judicial Review of Awards of the Iran-United States Claims Tribunal: Are the Tribunal's Awards Dutch?*, 16 *LAW & POL'Y INT'L BUS.* 755, 792-805 (1984) (identifying commentators who support the court's conclusion and citing municipal decisions to that effect).

guards are available to an aggrieved party in an anational arbitration. For parties before the Tribunal, that might include recourse to the Dutch courts.¹⁷ More and more arbitrations are, in fact, being established without reference to a particular national law. The decision of the court of appeals means that the awards emanating from these proceedings will not be found inherently defective.

This decision undoubtedly comes as a relief to the United States Government, which was obliged under the Algiers Accords to provide some enforcement machinery to Iranian parties awarded damages based on counter-claims. Iran will now be able to seek enforcement of awards in five other cases.¹⁸ The Ninth Circuit has provided not only a useful analysis to other U.S. courts facing such Iranian enforcement actions but also a well-articulated contribution to the dialogue under the Convention regarding non-national arbitrations.

DAVID J. BEDERMAN
Of the District of Columbia Bar

Sovereign immunity—waivers of immunity—agency—apparent authority of ambassador—default judgment against foreign sovereign

FIRST FIDELITY BANK, N.A. v. GOVERNMENT OF ANTIGUA & BARBUDA—
PERMANENT MISSION. 877 F.2d 189.
U.S. Court of Appeals, 2d Cir., June 7, 1989.

Plaintiff First Fidelity Bank brought an action to enforce a default judgment and consent order against defendant, the Government of Antigua and Barbuda. The default judgment held the defendant liable on a note signed by the defendant's ambassador to the United Nations and validated his purported waiver of the defendant's sovereign immunity in the consent order. Defendant moved to dismiss the claim for lack of subject matter jurisdiction, arguing that it could not be bound by the unauthorized and fraudulent actions of its ambassador. The district court denied defendant's motion. The U.S. Court of Appeals for the Second Circuit reversed and *held* (2-1) (per Oakes, C.J.) that factual issues relevant to whether the ambassador had the apparent authority to obtain the loan and to waive the defendant's sovereign immunity warranted setting aside the default judgment. Judge Newman dissented on the ground that the ambassador had "inherent agency power" to commit his government to private third parties in a commercial matter.

In November 1983, Antigua's ambassador to the United Nations, Lloydstone Jacobs, obtained a loan for \$250,000 from First Fidelity's predecessor, First National State Bank of New Jersey. He signed the note as the

¹⁷ Cf. Convention, *supra* note 2, Art. 5, para. 1(e). The possibility that Tribunal awards can be successfully challenged in Dutch courts is not settled. See Lake & Dana, *supra* note 16, at 759-82. See also Caron, *The Nature of the Iran-United States Claims Tribunal and the Evolving Structure of International Dispute Resolution*, 84 AJIL 104 (1990), who argues that they can be. To date, none has been. See 10 Y.B. COM. ARB. 181 (1985).

¹⁸ See Lewis, *supra* note 13, at 516 n.9.

ambassador representing the "Government of Antigua & Barbuda—Permanent Mission," stating that the loan would be used to renovate Antigua's Permanent Mission to the United Nations in New York. When First Fidelity stopped receiving payments on the loan in mid-1985, bank officials contacted government officials in Antigua. According to the bank, the permanent secretary to Antigua's Prime Minister told a bank officer that Ambassador Jacobs and Robert Healy, counsel for Antigua's Permanent Mission, were authorized to negotiate a settlement. Antigua later disputed that this authorization was given.

No settlement having been reached, First Fidelity sued Antigua for repayment in July 1986. Antigua did not answer the complaint. More meetings took place, during which, according to the bank, Jacobs and Healy confessed that the proceeds from the loan had been invested in a casino and admitted that Antigua had no defense against the action; but there was still no settlement.

The District Court for the Southern District of New York granted the bank's motion for default judgment. When the bank then attempted to levy on Antigua's bank accounts in New York, Jacobs agreed to a consent order that included a complete waiver of Antigua's sovereign immunity from jurisdiction, attachment and execution. The order was signed on behalf of the Government of Antigua and Barbuda by Jacobs, as "Ambassador Extraordinary and Plenipotentiary," and by Healy as the Government's attorney.

When payments again ceased in January 1988, First Fidelity sought to attach the bank accounts maintained by Antigua's Embassy in Washington, D.C. Moved to action, the Government of Antigua brought a motion under Federal Rule of Civil Procedure 60(b) requesting that the district court set aside the default judgment and dismiss the complaint for lack of subject matter jurisdiction or, in the alternative, vacate the consent order. Antigua argued that it was not responsible for Jacobs's fraudulent activities and therefore retained its sovereign immunity. The district court denied the motion and Antigua appealed.

For purposes of its analysis, the Second Circuit panel assumed that Ambassador Jacobs possessed the authority to borrow money and to waive Antigua's sovereign immunity. It addressed only the question whether his illicit actions could be attributed to Antigua. The court rejected First Fidelity's argument that an ambassador's actions in his official capacity always bind the state the ambassador represents. In support of its conclusion, the court cited section 331 of the *Restatement (Third) of Foreign Relations Law*, which lists circumstances in which his signature of a treaty may not be binding on the state an ambassador represents even though he was authorized to conclude it.¹ The court emphasized that Jacobs's commercial transaction with First

¹ 877 F.2d 189, 192–93. Sec. 331(1) of the *Restatement* provides that a state's consent to an international agreement is invalid if the fraudulent conduct of another negotiating state or the corruption of the state's own representative by another negotiating state induced its consent. Sec. 331(2) provides that such an agreement is void if the state's consent was procured by the coercion of the state's representative. *RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES* §331(1) and (2) (1987) [hereinafter *RESTATEMENT (THIRD)*].

Fidelity did not have the dignity of an international agreement. "If the circumstances surrounding an ambassador's signature of a treaty may be grounds for invalidating that treaty," the court reasoned, "then surely a state cannot *automatically* be bound by its ambassador's settlement of a lawsuit by a non-sovereign third party arising from a commercial transaction."² Instead, the question whether the conduct of an ambassador under color of law may be attributed to his state requires, the court found, an examination of the facts involved.

"[T]he proper framework for that examination," said the court, was "the agency law of developed states, here our own."³ For those general principles of agency law, the court relied on the *Restatement (Second) of Agency* and, in particular, the sections dealing with apparent authority. Under the *Restatement*, a principal causes his agent to have apparent authority by conduct that, reasonably interpreted, causes third persons to believe the principal has consented to have an act done on his behalf. Such conduct may include the appointment of that person to an office with generally recognized duties.⁴ Moreover, under New York law, the court must inquire whether the person relying on apparent authority fulfilled in the particular transaction his "duty of inquiry."⁵ While the fact that Jacobs was Antigua's ambassador to the United Nations did not by itself make his settlement of First Fidelity's lawsuit binding on Antigua, his status was relevant to any determination of whether First Fidelity's reliance on his authority was reasonable.

Antigua argued that Jacobs had exceeded even his apparent authority in borrowing the money and in waiving Antigua's sovereign immunity. Antigua would therefore retain its sovereign immunity, despite the fact that the loan itself was a commercial transaction within the meaning of the Foreign Sovereign Immunities Act (FSIA),⁶ because Antigua was not responsible for the loan. Under the FSIA, a district court's subject matter jurisdiction depends upon the existence of an exception to sovereign immunity.⁷ In consequence, Antigua's argument concluded, the default judgment was void for want of subject matter jurisdiction and Antigua was entitled to relief under Federal Rule of Civil Procedure 60(b)(4).

First Fidelity argued that Antigua could not raise the substantive defense that Jacobs lacked authority because only purely jurisdictional defects could be grounds for relief under Rule 60(b)(4). In rejecting that argument, the

² 877 F.2d at 192-93 (emphasis by court).

³ *Id.* at 193 (citing RESTATEMENT (THIRD), *supra* note 1, §311 Reporters' Note 4 (noting that the provision concerning apparent authority to conclude international agreements is analogous to national laws on the authority of agents)).

⁴ RESTATEMENT (SECOND) OF AGENCY §27 and comment a, §49 comment c (1958).

⁵ 877 F.2d at 194 (quoting *General Overseas Films, Ltd. v. Robin Int'l, Inc.*, 542 F.Supp. 684, 689 (S.D.N.Y. 1982), *aff'd*, 718 F.2d 1085 (2d Cir. 1983)). The court also cited §456 comment *b* of the RESTATEMENT (THIRD), *supra* note 1, which states that a party relying on a waiver of sovereign immunity has the burden of showing that the person executing the waiver had the authority to bind the state.

⁶ 28 U.S.C. §§1603(d), 1605(a)(2) (1982) (defining commercial activity exception).

⁷ 28 U.S.C. §1330 (1982).

court relied on *Verlinden B.V. v. Central Bank of Nigeria*⁸ and *Carl Marks & Co. v. USSR*,⁹ which had noted that decisions concerning subject matter jurisdiction under the FSIA may require resolution of substantive issues because the FSIA makes such jurisdiction dependent upon the existence of an exception from immunity under the substantive provisions of the Act. Thus, the court determined that it was proper to examine the extent of Jacobs's authority and the validity of his waiver of Antigua's sovereign immunity in the consent order in the context of a Rule 60(b)(4) motion.

This examination was inconclusive. While the court agreed that First Fidelity had alleged facts sufficient to establish Jacobs's apparent authority under New York law, there was also enough evidence that First Fidelity had mistrusted Jacobs's and Healy's bona fides to cast doubt upon the reasonableness of the bank's reliance on that apparent authority. The inconclusiveness of the facts weighed in favor of setting aside the default judgment. Yet without additional evidence the court could not rule that the interwoven jurisdictional and substantive issues justified dismissing the complaint under Rule 60(b)(4). Instead, the court turned to Rule 60(b)(6), under which a default judgment can be set aside for "any other reason justifying relief." Observing that default judgments against foreign sovereigns are disfavored, the court ruled that the district judge abused his discretion in not setting the default judgment aside pursuant to that rule. The parties would have to proceed to discovery and perhaps to trial before the jurisdictional question could be resolved.

In his dissent, Judge Newman argued that the United States, as host country to the United Nations, has an obligation to the foreign states that send ambassadors here to develop a uniform body of federal law specially addressed to "the sensitive subject of a UN ambassador's authority to bind his government on ordinary commercial matters,"¹⁰ rather than leaving them subject to the vagaries of state contract and creditor's rights laws. He emphasized that this case was not about the authority of an ambassador to commit his government on matters of international affairs. In this narrow context, he maintained, federal common law ought to ensure that a foreign state is bound by the actions of its ambassador even when it neither authorized nor condoned his acts.¹¹ Otherwise, third parties who supply ordinary goods and services to embassies or missions will have to ascertain in each case whether

⁸ 461 U.S. 480, 493 & n.20 (1983).

⁹ 665 F.Supp. 323, 332-33 (S.D.N.Y. 1987), *aff'd per curiam*, 841 F.2d 26 (2d Cir.), *cert. denied*, 108 S.Ct. 2874 (1988).

¹⁰ 877 F.2d at 197.

¹¹ In addition to actual and apparent authority, the *Restatement (Second) of Agency* also describes something called "inherent agency power," a type of power derived not from actual authority, apparent authority or estoppel, but from the agency relation itself, which exists to protect persons harmed by, or dealing with, an agent. RESTATEMENT (SECOND) OF AGENCY, *supra* note 4, §8A. This is the source from which Judge Newman derived his federal common law rule. He admitted, however, that the government-ambassador relationship did not fall neatly within the examples of inherent agency power set forth in comment b to that section.

the ambassador has actual authority, an inquiry that "foreign governments generally will not appreciate" and that might have the "unfortunate consequence" of making some vendors unwilling to deal with foreign embassies.¹² Such results, in turn, would be far more disruptive to U.S. foreign relations than occasional instances in which a state is held accountable for a debt fraudulently incurred by its ambassador.

* * * *

In several recent cases, foreign governments have claimed immunity from the consequences of commercial or tortious acts, not themselves entitled to immunity under the FSIA, on the ground that the government's agent or representative proceeded without authority.¹³ As the Second Circuit's opinion in this case demonstrates, federal courts have been generally unreceptive to motions to dismiss for lack of subject matter jurisdiction grounded in a claimed lack of authority under agency law. Instead, the courts have preferred to rule on the basis of complete factual records.

Under the majority's rule, foreign governments will not be allowed to use the subject matter jurisdiction provisions of the FSIA to circumvent the commercial activity and noncommercial tort exceptions of the Act in cases arising from ambassadorial commitments. Only after establishing by evidence its absence of responsibility under agency law will a foreign government be able to seek immunity from suit on such underlying contracts or for such tort liability. Thus, the burden of policing the conduct of ambassadors and other official representatives sent to the United States falls in the first instance upon the governments that send them—not on innocent tort victims or on merchants who deal with them in good faith.

Judge Newman argues in dissent that the court should have adopted the even more stringent standard of "inherent agency power." He also notes the apparent refusal of the Department of State to appear as amicus on behalf of Antigua. The majority never joins issue on these points. However, the majority's view of the likely outcome on remand is perhaps suggested by the condition it imposed on its reversal of the lower court's default judgment—that Antigua post a bond equal to the full amount claimed by plaintiff, including interest.

SHARA L. ARANOFF

Of the District of Columbia and New York Bars

¹² 877 F.2d at 199.

¹³ See *Morgan Guaranty Trust Co. of N.Y. v. Republic of Palau*, 657 F.Supp. 1475 (S.D.N.Y. 1987) (denying Government's motion for summary judgment made on the ground that the President of Palau's signature on a loan agreement was *ultra vires*); *Liu v. Republic of China*, 892 F.2d 1419 (9th Cir. 1989) (allegations by widow that Republic of China actually authorized murder of her husband and that his assassins were agents of China acting within the scope of their authority were sufficient to avoid dismissal of her suit under the FSIA); *Skeen v. Federative Republic of Brazil*, 566 F.Supp. 1414 (D.D.C. 1983) (claim arising out of tortious assault of plaintiff by grandson of Brazilian ambassador who was also an employee of the Brazilian Government).

Treaties of friendship, commerce and navigation—subsequently enacted legislation—Civil Rights Act of 1964—Age Discrimination in Employment Act of 1967

MACNAMARA v. KOREAN AIR LINES. 863 F.2d 1135; *certiorari denied*, 58 U.S.L.W. 3285.

U.S. Court of Appeals, 3d Cir., December 21, 1988; U.S. Supreme Court, October 30, 1989.

Plaintiff sued defendant Korean Air Lines, his former employer, alleging discrimination. The federal district court dismissed. The United States Court of Appeals for the Third Circuit (per Stapleton, J.) reversed, and *held* that plaintiff could argue intentional disparate treatment, based on federal civil rights and age discrimination statutes enacted after the conclusion of a treaty between the United States and Korea. However, defendant could not be made to face liability for mere impact without intent, because such a ruling would violate the treaty. The United States Supreme Court denied *certiorari*.

Thomas MacNamara, a United States citizen, worked for Korean Air Lines and had been promoted to district sales manager for several states in the eastern United States. After 8 years with KAL and at age 57, he was discharged and replaced by a younger Korean citizen. MacNamara first exhausted his administrative remedies and then sued KAL in the appropriate federal district court. His complaint alleged that KAL had violated several federal statutes by firing him, especially title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000e *et seq.* (1982)) and the Age Discrimination in Employment Act of 1967 (29 U.S.C. §621 *et seq.* (1982)) (ADEA). Plaintiff alleged discrimination based on age, national origin and race.

Defendant KAL replied that its conduct as an employer was permitted according to the terms of the 1956 Treaty of Friendship, Commerce and Navigation between Korea and the United States.¹ KAL claimed that under Article VIII of the Treaty,² it could hire whatever executives it desired. The language of that provision—"executive personnel of their choice"—allowed these employment decisions to be made unfettered by any U.S. statutes dealing with employment discrimination.

Although the district court dismissed plaintiff's claim, MacNamara—with the assistance of the United States as *amicus*—had more success on appeal.

¹ Treaty of Friendship, Commerce and Navigation, Nov. 28, 1956, United States-Korea, 8 UST 2217, TIAS No. 3947 [FCN Treaty].

² Article VIII(1) provides:

Nationals and companies of either Party shall be permitted to engage, within the territories of the other Party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice. Moreover, such nationals and companies shall be permitted to engage accountants and other technical experts regardless of the extent to which they may have qualified for the practice of a profession within the territories of such other Party, for the particular purpose of making examinations, audits and technical investigations for, and rendering reports to, such nationals and companies in connection with the planning and operation of their enterprises, and enterprises in which they have a financial interest, within such territories.

See FCN Treaty, 8 UST at 2223.

In a complex opinion, the Third Circuit considered the broader issues raised by decisions of three other federal appellate courts in the *Spiess*,³ *Sumitomo*⁴ and *Wickes*⁵ cases. The court endeavored to interpret the FCN Treaty so that its terms could be reconciled with both title VII and ADEA.

The court first rejected MacNamara's argument that KAL could not rely on Article VIII of the FCN Treaty.⁶ The court then looked at the history of FCN treaties, suggesting that their aim was to accord foreign investors equality under a national treatment standard.⁷ The court noted, however, that Article VIII(1) provided foreign companies with more protection than the simple assurance of national treatment. That was sufficiently clear from the "absolute character" of the language in that provision that neither party disputed it. Article VIII(1) clearly gave KAL the right to choose Korean citizens as its executives "because of their citizenship."⁸ The issue, in the court's view, was whether the Treaty also gave KAL the right to retain its own citizens as executives for other purposes—for example, to employ younger, male executives—that were contrary to U.S. antidiscrimination laws.

Under a similar FCN treaty with Japan, the Fifth Circuit in *Spiess* had held that the Treaty provided Japanese companies with a complete defense. "The absolute language of Article VIII(1) . . . fully insulated the company from domestic anti-discrimination laws with respect to the hiring of executives."⁹ *Spiess*, however, was not the only appellate court decision on the issue. The Second Circuit had adopted a much more flexible approach in *Sumitomo*. It suggested that the FCN clause reviewed in *Spiess* provided a certain amount of latitude to hire foreign nationals for management positions, but that such decisions were not completely beyond the reach of U.S. antidiscrimination laws. In particular, the foreign employers would have to show that the company's employment decision was "reasonably necessary to the successful operation of its business" in light of the pertinent factors bearing on the selection.¹⁰ The Third Circuit also noted the Supreme Court's dictum in *Sumitomo*: "The purpose of the Treaties was not to give foreign corporations greater rights than domestic companies, but instead to assure them the right

³ *Spiess v. C. Itoh & Co. (America)*, 643 F.2d 353 (5th Cir. 1981), *vacated*, 457 U.S. 1128 (1982).

⁴ *Avigliano v. Sumitomo Shoji America, Inc.*, 638 F.2d 552 (2d Cir. 1981), *vacated*, 457 U.S. 176 (1982).

⁵ *Wickes v. Olympic Airways*, 745 F.2d 363 (6th Cir. 1984).

⁶ In brief, MacNamara argued that he was terminated and the Treaty refers only to engaging employees. He also maintained that he was not an "executive" under the Treaty provision. The court reasoned that the proposed interpretation would impermissibly "tend to freeze a foreign business' initial management structure and discourage any experimentation with host country executive personnel." 863 F.2d at 1141. On the status point, the court relied heavily on the type of visa held by the Korean replacement, which is available only to personnel performing supervisory or executive functions.

⁷ The court referred to, and quoted from, an important article by Herman Walker, *Treaties for the Encouragement and Protection of Foreign Investment: Present United States Practice*, 5 AM. J. COMP. L. 229 (1956).

⁸ 863 F.2d at 1144 (emphasis by court).

⁹ *Id.* at 1139.

¹⁰ *Id.* (quoting *Sumitomo*, 638 F.2d at 559).

to conduct business on an equal basis without suffering discrimination based on their alienage."¹¹ Additionally, the *Wickes* opinion, as understood by the court, also stood for flexibility because it denied the claim of Olympic Airways to complete immunity from a state antidiscrimination law.

The court then felt free to hold that the Treaty could be reconciled, at least partially, with title VII and ADEA. Reviewing Article VIII(1), it concluded that "[i]f the first sentence had been intended to give a foreign employer the right to engage a citizen of its own country without regard to domestic laws that would otherwise impinge on that decision, the second sentence [specifically allowing one party's accountants and technical experts to render services in the other's country without meeting local professional qualifications] would have been unnecessary."¹² The Treaty was intended to permit foreign businesses to favor personnel and prospective personnel only on the basis of citizenship, which, the court added, is not the same as national origin, the land of one's ancestors. Thus, employees in the United States have a right to seek remedies under title VII and ADEA for their claims of intentional discrimination based on race, national origin or age.

Plaintiff's victory, however, was incomplete. A plaintiff under title VII or ADEA is normally not limited to relief from intentional wrongs, but also can prevail upon a showing of disparate or discriminatory effect and impact of an employer's action. The court reasoned that such an impact could be created if the foreign corporation merely exercised its right to hire its citizens under Article VIII of the Treaty. Such a statutory claim would violate the Treaty and could not be permitted.

In conclusion, the Third Circuit held that the district court's dismissal was incorrect. Plaintiff MacNamara could bring a claim under title VII and ADEA, despite the FCN Treaty, so long as the claim was limited to intentional acts of statutorily disallowed discrimination. Under the court's ruling, plaintiff could not recover, as a United States plaintiff might in domestic litigation, simply by showing disparate impact upon a statutorily protected group.

* * * *

One might conclude that the Third Circuit solved the problem by cutting the baby in half. Indeed, it appeared that way to the parties. Both, in fact, petitioned for certiorari in the United States Supreme Court. At this point, the United States parted company with MacNamara, filing an amicus brief opposing the grant of certiorari.

In the end, MacNamara is left with the need to prove intentional discrimination. As generations of civil rights cases have shown, this is a much more difficult task than merely proving an adverse impact. KAL claimed that the decision would discourage both foreign investment in the United States and U.S. investment in foreign countries. KAL was left with part, but certainly not all, of the costs faced daily by businesses operating in the increasingly

¹¹ *Id.* at 1140 (quoting *Sumitomo*, 457 U.S. at 187-88).

¹² *Id.* at 1145.

litigious atmosphere in the United States. The court expressly noted that KAL could not have expected otherwise since "defending personnel decisions is a fact of business life in contemporary America and is a burden that the domestic competitors of foreign enterprise[s] have been required to shoulder."¹³

Why did the Supreme Court deny certiorari? Both parties had suggested that there was a conflict between appellate circuits, a well-established basis for the Supreme Court to grant review. In its amicus brief, the United States suggested that there was no real conflict between the circuits: because of the dictum in *Sumitomo* and subsequent Department of State interpretations, the absolute defense allowed in *Spiess* is no longer the recognized approach to this provision in FCN treaties. The Third Circuit in *MacNamara*, however, was certainly less confident that *Spiess* was no longer good law.

WILLIAM P. WEINER
Thomas M. Cooley Law School

Foreign affairs powers—preemption—apartheid—state and local divestiture laws
BOARD OF TRUSTEES v. MAYOR OF BALTIMORE. 317 Md. 72, 562 A.2d 720.
Court of Appeals of Maryland, September 1, 1989.

The Trustees of Baltimore City's pension systems and two employee beneficiaries filed suit in the Circuit Court for Baltimore City against the Mayor and City Council challenging the validity of ordinances that required the pension funds to divest their holdings in companies doing business in South Africa.¹ After a trial focusing on the financial impact of this legislation, the circuit court upheld the ordinances. Upon a writ of certiorari, the Court of Appeals of Maryland, the state's highest court (per Eldridge, J.), held unanimously, inter alia: (1) that the ordinances were not preempted by the Comprehensive Anti-Apartheid Act of 1986 (Anti-Apartheid Act);² and (2) that the ordinances did not intrude on the federal Government's exclusive power to conduct foreign policy.

¹³ *Id.* at 1147.

¹ Ordinance No. 765, amending Baltimore City Code, Art. 22, §§(7)(a), (35)(a) (1976, 1983 Repl. Vol., 1986 Cum. Supp.); Ordinance No. 792, amending Baltimore City Code, Art. 22, §23(b) (1976, 1983 Repl. Vol., 1986 Cum. Supp.).

² The Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, 100 Stat. 1086, codified in relevant part at 22 U.S.C. §§2151, 2346(d), 5001-5116 (Supp. V 1987), imposes various economic sanctions on South Africa, including: a ban on new investment by U.S. interests in South Africa; a ban on the importation of certain South African products, including Krugerrands, uranium and coal; a ban on the export of computer technology to the South African security forces; a limitation on new U.S. loans to the South African Government; and a restriction on nuclear trade with South Africa. See 22 U.S.C. §§5051-5060. The Act also requires U.S. businesses with more than 25 employees in South Africa to comply with the Sullivan Principles, a code of fair employment practices for companies operating in South Africa. *Id.* §§5034-5035. These sanctions may be terminated, modified or suspended if the South African Government makes progress toward abolishing apartheid. *Id.* §5061.

The ordinances passed by the Baltimore City Council prohibited current or future investment of funds from the City's three pension funds in banks or financial institutions that make loans to, or companies "doing business in or with," either South Africa or Namibia.³ The ordinances also empowered the Board of Trustees to suspend divestiture temporarily if the Board found the rate of return on the funds to be substantially lower than the average of the annual earnings on the funds over the preceding 5 years or if divestiture under the program would cause serious financial loss or cause the pension fund Trustees to act contrary to their fiduciary obligations.

In challenging the validity of the ordinances before the court of appeals, the Trustees and beneficiaries⁴ argued that federal law preempted the ordinances.⁵ First, the Trustees contended that the Anti-Apartheid Act "touch[es] a field in which the federal interest is so dominant that the federal system [must] be assumed to preclude enforcement of local laws on the same subject."⁶ The court of appeals, however, viewed regulation by Baltimore City of investments by its employees' pension funds to be clearly a matter of traditional local regulation. In such areas, there is a strong presumption against finding federal preemption. To overcome this presumption, the Trustees had to present compelling evidence of congressional intent to preempt.⁷

After reviewing the legislative history of the Anti-Apartheid Act, the court of appeals found scant evidence that Congress had intended the Act to have preemptive effect.⁸ Indeed, the court found significant evidence to the contrary. Section 5116 was particularly revealing of Congress's intent. This section exempts state and local governments from the penalties that ordinarily apply when federally funded contracts are not awarded to the lowest bidder, if the contract award was required "by reason of the application of any State or local law concerning apartheid to any contract entered into by a

³ Section 1(ii) of Ordinance No. 765, *supra* note 1, states that such companies shall be identified by reference to the most recent annual report of the Africa Fund entitled "Unified List of United States Companies with Investments or Loans in South Africa and Namibia." The court held that this was not an impermissible delegation of legislative authority to a private entity because, even though the list is subject to revision, the pension fund Trustees are free to reject the findings of the Africa Fund regarding any particular company. 561 A.2d 720, 732.

⁴ In addition to the two beneficiaries that joined in the lawsuit, four others were allowed by the court of appeals to intervene.

⁵ The Trustees advanced numerous other constitutional arguments as well, each of which the court of appeals ultimately rejected. The court held that the ordinances did not unconstitutionally impair the obligations of the City's pension contracts with pension beneficiaries; did not constitute a taking without just compensation in violation of the Fifth and Fourteenth Amendments; and did not violate the Commerce Clause.

⁶ See *Pennsylvania v. Nelson*, 350 U.S. 497, 504 (1956) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

⁷ 562 A.2d at 741.

⁸ The only concrete evidence the court of appeals could identify was a claim by Senator Lugar that the Anti-Apartheid Act preempted local legislation. The court balanced this against the view of Senator Kennedy, the legislation's coauthor, who strongly insisted that it was to have no preemptive effect. *Id.* at 742-43 n.47.

State or local government for 90 days after [October 2, 1986]."⁹ The court found the preemptive effect of section 5116, if any, to be limited to state or local procurement legislation that, as applied, might cause a federally funded contract not to be awarded to the lowest bidder. The court agreed with Professor Laurence Tribe, who, in a memorandum to Congress, observed that this left "the negative implication" that investment decisions and disbursements not using federal funds are not preempted.¹⁰ The court further noted that it would be unnecessary to penalize states or localities for applying their own laws if the Anti-Apartheid Act had already invalidated those laws. In short, section 5116 would be superfluous if Congress had intended to preempt state or local antiapartheid legislation.

Additional strong evidence that Congress did not intend to preempt was provided by House Resolution 549, passed by an overwhelming margin at the same time as the Anti-Apartheid Act. It stated in pertinent part that, "in passing the bill, . . . it is not the intent of the House of Representatives that the bill limit, preempt, or affect, in any fashion, the authority of any State or local government . . . to restrict or otherwise regulate any financial or commercial activity respecting South Africa."¹¹

The court next considered whether the ordinances were preempted through direct conflict with federal law. The Trustees argued that the ordinances imposed inflexible "sanctions" on South Africa, in conflict with the "carrot and stick" approach embodied in the Anti-Apartheid Act.¹² The court disagreed. First, it noted that, unlike the federal statute, the ordinances were not aimed directly at the actions of the South African Government but, rather, at the conduct of companies listed in the United States in which the City has investments. In the court's opinion, "the Ordinances do not attempt to impose sanctions on South Africa."¹³ Additionally, the court could find nothing in the Anti-Apartheid Act suggesting that Congress meant to preclude divestment efforts on the part of state and local governments.

In addition to arguing federal preemption, the Trustees contended that the ordinances impermissibly intruded upon the federal Government's con-

⁹ 22 U.S.C. §5116 (Supp. V 1987).

¹⁰ 562 A.2d at 742 (citing Tribe, *Memorandum on the Nonpreemptive Effect of the Comprehensive Anti-Apartheid Act of 1986 Upon State and Local Measures*, 132 CONG. REC. S12,534, 12,535 (daily ed. Sept. 15, 1986)).

¹¹ *Id.* at 743 (quoting H.R. Res. 549, 99th Cong., 2d Sess., 132 CONG. REC. H6758 (daily ed. Sept. 12, 1986)). The court of appeals recognized that the resolution merely expressed the sense of the House and therefore lacks the force of law. However, it noted that the House leadership had anticipated a presidential veto and had put the Anti-Apartheid Act on an expedited schedule. The bill was not sent to a conference committee and members were not permitted to offer amendments. Under these circumstances, the House sponsors of the Act drafted the resolution to express the House's view on the preemption issue.

¹² Specifically, the Trustees pointed out that the ordinances contain no provision for termination or modification of divestiture in the event progress is made, whereas the Anti-Apartheid Act provides that the President may suspend or modify its sanctions under certain conditions. Appellants' Brief at 46.

¹³ 562 A.2d at 743.

stitutional prerogative to determine and implement the foreign policy of the United States. The court rejected this argument, noting that, while the federal Government's paramount authority in the realm of foreign affairs is well established, many state laws that involve foreign relations are entirely valid. In distinguishing permissible from impermissible regulation in this area, the court relied heavily on two landmark Supreme Court cases, *Zschernig v. Miller*,¹⁴ which struck down an Oregon statute, and *Clark v. Allen*,¹⁵ which upheld a California statute. The Supreme Court reconciled the two cases by reasoning that the application of the Oregon statute had "led into minute inquiries concerning the actual administration of foreign law" in a way that the California statute did not.¹⁶

The court endorsed the circuit court's finding that the Baltimore ordinances, unlike the statute in *Zschernig*, "require[] no continuing investigation, assessment or commentary by local government officials or employees into the laws or operations of [a foreign] government."¹⁷ Rather, the ordinances represent a single, general decision by the City, which places them "beyond the scope of *Zschernig*." In the court's view, "Baltimore City's purpose in enacting the Ordinances was simply to ensure that the City's pension funds would not be invested in a manner that was morally offensive to many Baltimore residents and many beneficiaries of the pension funds."¹⁸

Besides being motivated by a proper purpose, the ordinances were found to have a "minimal and indirect" economic effect. The court agreed with one commentator who observed: "When a state sells its stock in a corporation doing business in South Africa, it has no immediate effect on foreign relations between South Africa and the United States."¹⁹

The court discussed at length three cases from other jurisdictions that the Trustees advanced in their favor. First, in *Springfield Rare Coin Galleries, Inc. v. Johnson*,²⁰ the Illinois Supreme Court invalidated an Illinois law creating an exemption from state occupation and use taxes for coins and currency

¹⁴ 389 U.S. 429 (1968).

¹⁵ 331 U.S. 503 (1947). The California statute at issue in *Clark* allowed a nonresident alien to inherit personal property only if, under the laws of the alien's nation, U.S. citizens had a reciprocal right to inherit personal property on the same terms and conditions as the alien's fellow citizens. In *Zschernig*, the Court struck down a similar Oregon law on the ground that the history and operation of the statute established that it was "an intrusion by the State into the field of foreign affairs." *Zschernig*, 389 U.S. at 432.

¹⁶ 389 U.S. at 435.

¹⁷ 562 A.2d at 746 (quoting the circuit court).

The court of appeals cited for support the opinion of Maryland's Attorney General that Code (1985), §6-208 of the State Finance and Procurement Article, generally prohibiting the deposit of state funds in financial institutions with loans to the South African Government, "does not call for the level of state intrusion found repugnant in *Zschernig*," 69 Op. Att'y Gen. Md. 87, 90 (1984).

¹⁸ 562 A.2d at 746.

¹⁹ *Id.* at 747 (quoting Note, *State and Municipal Governments React Against South African Apartheid: An Assessment of the Constitutionality of the Divestment Campaign*, 54 U. CINN. L. REV. 543, 574 (1985)).

²⁰ 115 Ill. 2d 221, 503 N.E.2d 300 (1986).

issued by the United States and any foreign country except South Africa. In *New York Times Co. v. City of New York Commission on Human Rights*,²¹ the Court of Appeals of New York held that the City's Commission on Human Rights could not apply the antidiscrimination law to the newspaper's conduct in that case, since the agency "was without jurisdiction to make and enforce its own foreign policy."²² Last, in *Tayyari v. New Mexico State University*,²³ the district court held that the State University Regents had invaded the exclusively federal province of foreign affairs by denying admission to Iranian students during the Iranian hostage crisis.

The court found all of these cases to be distinguishable from the one before it. *New York Times Co.* and *Springfield Rare Coin Galleries* both involved efforts by a state or local government to structure relationships between its residents and South Africa or South African nationals. The court contrasted these efforts with those by Baltimore City to structure its own financial affairs. In mandating divestiture of the City's pension funds, Baltimore did not curtail the rights of South Africa or its citizens or any foreign national. As for *Tayyari*, the court emphasized the strong federal interest in avoiding interference from state measures that went beyond the sanctions already imposed by the federal Government during the Iranian hostage crisis. In contrast, the federal Government had not voiced any formal objection to state and local divestiture laws.

* * * *

Following the decision, the Trustees decided not to appeal the case further because the ruling had addressed their chief concerns, the legality and validity of the ordinances.²⁴ A petition for certiorari to the Supreme Court, however, was filed by an employee beneficiary.²⁵ Not surprisingly, the Court denied review.²⁶ Without strong congressional or executive branch support, it is difficult to sustain the argument that divestiture laws constitute a usurpation of the federal Government's prerogatives. As for the preemption argument, the murky legislative history of the Anti-Apartheid Act and the different focus of that legislation significantly undermined the Trustees' position.

The Court of Appeals of Maryland is the first state supreme court to consider the constitutionality of such laws. Its decision may encourage other municipalities or states to adopt similar legislation. However, recent developments and trends in South Africa may render the entire issue moot.

DAVID M. BILLINGS

Of the Virginia and District of Columbia Bars

²¹ 41 N.Y.2d 345, 353, 393 N.Y.S.2d 312, 318, 361 N.E.2d 963 (1977).

²² 562 A.2d at 747 (quoting 41 N.Y.2d at 352, 393 N.Y.S.2d at 317, 361 N.E.2d at 968).

²³ 495 F.Supp. 1365 (D.N.M. 1980).

²⁴ PENSIONS & INVESTMENT AGE, Nov. 13, 1989, at 32.

²⁵ 58 U.S.L.W. 3457 (U.S. Jan. 16, 1990) (No. 89-889).

²⁶ 58 U.S.L.W. 3522 (U.S. Feb. 20, 1990) (No. 89-889).

ITALIAN CASE NOTE*

Sovereign immunity—immunity from execution—customary international law—Vienna Convention on Diplomatic Relations—embassy bank accounts—aircraft belonging to state-owned airline

BENAMAR v. EMBASSY OF THE DEMOCRATIC AND POPULAR REPUBLIC OF ALGERIA. 72 *Rivista di Diritto Internazionale* 416 (1989).

Corte di cassazione, plenary session, May 4, 1989.

SOCIALIST PEOPLE'S LIBYAN ARAB JAMAHIRIYA v. ROSSBETON S.R.L. 72 *Rivista di Diritto Internazionale* 691 (1989).

Corte di cassazione, plenary session, May 25, 1989.

In these two decisions, the Italian Supreme Court, sitting in plenary session, for the first time squarely addressed state immunity from enforcement jurisdiction,¹ an issue that lower courts in Italy, as well as courts in many other countries, are increasingly confronting. In *Benamar*, the Court held that Italian courts lack jurisdiction to enforce a judgment against a foreign state by ordering execution against bank accounts in the name of that state's embassy because customary international law forbids measures of execution against the property of foreign states located in the territory of the forum and used for sovereign purposes. In *Libyan Jamahiriya*, the Court held that, although present customary international law does not afford foreign states immunity from execution against assets not actually used for a public function or power, such as commercial aircraft, execution against property of a foreign state is permissible in Italy only if authorized by the Italian Government pursuant to Law No. 1263 of 1926.

The petitioner in *Benamar*, a judgment creditor of the Democratic and Popular Republic of Algeria, obtained a garnishee order against balances standing to the credit of a bank account in the name of the Algerian Embassy in Rome. The lower court vacated the garnishee order, finding it void on the basis of protections provided by the 1961 Vienna Convention on Diplomatic Relations, to which Italy and Algeria are parties. On appeal, the petitioner argued that the lower court had incorrectly applied the Convention. The Supreme Court found the Convention irrelevant in the instant case, primarily on the ground that the agreement relates only to activities carried out by diplomatic envoys in their personal capacity.

The Court held, however, that general international law forbids the forum state from proceeding to execution on the assets of foreign states. According to the Court, states differ with respect to the specific content of this rule, especially regarding whether execution is permissible against prop-

* Andrew I. Schoenholtz of the District of Columbia Bar assisted with the editing of this case note.

¹ The Court had touched upon the issue incidentally in a number of earlier cases, notably in *Mininni v. Istituto di Bari del Centro internazionale di alti studi agronomici mediterranei*, No. 2316 (Corte cass., plen. sess., Apr. 4, 1986), 69 *RIVISTA DI DIRITTO INTERNAZIONALE* [RDI] 576 (1986). There the interpretation of the rule on immunity applicable to states was relevant to the application of an agreement with an international organization that expressly referred to the rule.

erty "devoted to commercial uses or employed in commercial activities." With respect to assets used in the exercise of sovereignty or for public purposes, the tendency, the Court found, is in favor of immunity. The Court reasoned that the principal argument in support of restrictive immunity from execution, which distinguishes between the public and private use of state property, seems to be one of consistency: if a foreign state may be sued before the courts of another state, there is no reason to rule out enforcement if it fails to comply with the judgment. In this way, jurisdictional activity can attain its proper goal. The Court referred expressly to the United States Foreign Sovereign Immunities Act of 1976 as a source for this line of reasoning. The Court found that the contrary position rested upon the view that the purpose of all state activities is public and that immunity should be allowed for all assets because of the consequent difficulty in distinguishing the public from the private use of these assets.

Despite this reasoning, the Court held that under prevailing international law, bank deposits in the name of foreign embassies *are* absolutely immune from either execution or attachment. Any attempt to verify whether such assets are actually used in whole or in part for sovereign purposes would constitute an undue intrusion into the affairs of the diplomatic mission. The Court recalled that, despite other state jurisprudence to the contrary relying on the nature of the particular claim or on the ground that embassy bank accounts can be readily replenished, it had adhered to this view in two earlier decisions, which related to bank accounts of an international organization and NATO, respectively.² On those occasions, the Court had recognized that the absence of a specific use for a particular bank account should be distinguished from mixed uses for such an account. Any attempt by the courts to identify the portion of the account not used for sovereign purposes would be impermissible. Failing any evidence of a solely nonsovereign use, the funds are immune.

The Court then considered Law No. 1263 of 1926, which prohibits measures of attachment or execution against a foreign state without authorization by the Minister of Justice, which in turn depends upon certification by the Minister that the state provides reciprocal treatment to Italian governmental assets.³ The Court acknowledged that this statute has been criticized by some scholars.⁴ It recalled, however, that the constitutionality of the legislation was upheld by the Italian Constitutional Court in a 1963 decision.⁵ In any case, the Court found that in light of the previously mentioned rule of international law, which is directly applicable pursuant to Article 10 of the Italian Constitution, the statute applies only with respect to assets not used for sovereign or public purposes. According to the Court's characterization of the rule, execution against assets used for sovereign or public pur-

² Cf. *Mininni; Lo Franco v. NATO General Headquarters in Verona*, No. 1920 (Corte cass. Mar. 22, 1984), 67 RDI 672 (1984).

³ See 18 RDI 407 (1926).

⁴ The Court quoted verbatim, without giving the source, B. CONFORTI, *DIRITTO INTERNAZIONALE* 228 (3d ed. 1987). See generally Condorelli & Sbolci, *Measures of Execution against the Property of Foreign States: the Law and Practice in Italy*, 10 NETH. Y.B. INT'L L. 197 (1979).

⁵ *Governo Britannico v. Guerrato*, No. 135 (Corte cost. July 13, 1963), 46 RDI 451 (1963).

poses is forbidden even when the reciprocity requirement of the statute can be satisfied and the Minister could grant authorization.

The Court concluded that because the account was in the name of the embassy and therefore destined for public purposes, the lower court lacked jurisdiction to order execution on funds in the account. The Court also based its result on the absence of ministerial authorization in the instant case, despite the apparent contradiction with the Court's assertions on the inapplicability of the 1926 statute to such funds.

In *Libyan Jamahiriya*, the issue was whether the Court of Genoa had jurisdiction to grant prejudgment attachment against two aircraft owned by the Libyan state airline. The attachment had been requested by the plaintiff, Rossbeton, in connection with a claim for goods sold to Union Productive pour la Place Verte (UPPV), a Libyan entity. Rossbeton maintained that both the state airline and UPPV were organs of the Libyan state without independent legal personality. The creditors of one entity were entitled, Rossbeton maintained, to attach such assets of the state as those of the other entity.

In support of its petition to the Supreme Court, the Libyan Government (1) contested the identification of the entities in question with the state; (2) contended that Italian courts lacked jurisdiction to grant the attachment even if the assets were to be considered as belonging to the state, because all state activities constitute an exercise of sovereignty and thus fall outside the jurisdiction of Italian courts; and (3) argued that no attachment could be granted in any event because the Italian Minister of Justice had not consented to the measure of attachment, as required by the 1926 statute.

In an even clearer fashion than in *Benamar*, the Supreme Court stated its views on the rule of international law with respect to immunity from execution. In *Benamar*, the Court had echoed the dictum of the Constitutional Court,⁶ referring to the differences in state practice and recognizing a rule of restrictive immunity only by implication. In *Libyan Jamahiriya*, the Court expressly stated that immunity from execution and attachment extends solely to assets "used in the exercise of sovereign functions or devoted to public purposes," and that there is no usage followed by the majority of states forbidding such measures with respect to other types of property. The Court cited the U.S. Foreign Sovereign Immunities Act, the United Kingdom State Immunity Act and the Canadian State Immunity Act as evidence of this position. The Court found further support for its holding in the 1926 statute, which, it confirmed, is applicable only with regard to assets held for nonsovereign purposes. The Court reasoned that inasmuch as the statute foresees execution, albeit subject to executive authorization, the legislation is obviously based on the assumption that in certain circumstances execution is allowed under international law.

Here the Court more forthrightly espoused the justification of the restrictive view of immunity from execution previously discussed in *Benamar*: if

⁶ *Guerrato*, 46 RDI at 456, where the Constitutional Court held that there was no unanimity in the laws and jurisprudence of states with respect to immunity from attachment and execution of foreign state property not devoted to functions connected with the exercise of sovereignty.

absolute immunity is rejected insofar as jurisdiction over foreign states is concerned, there is no reason to deny execution against foreign state property in those cases. To do otherwise would deprive judgments rendered against states of their value and make restrictive immunity with respect to jurisdiction worthless. In the Court's view, restrictive immunity strikes an acceptable balance between the forum state's interest in not compromising its relations with foreign states and the private party's interest in seeking relief for commercial claims.

The Court again stressed that the connection between assets and state activities, which is relevant in establishing whether specific assets are entitled to immunity, must be a present and actual one. It also attempted to define the activities for which immunity is not available: these are "private law activities, that is to say those activities that could be carried out by any private party."

The Court flatly rejected the Libyan Government's contention that all state activities are sovereign. It reasoned that because states routinely engage in commercial activities, courts should rely on objective criteria (i.e., the actual destination of the assets) and not subjective criteria (e.g., whether title to the assets is held by the state directly or through a public agency). Applying this test to the property at issue in the case before it, the Court had no doubt that aircraft belonging to the Libyan state airline were used for commercial purposes.

In finding that the lower court had jurisdiction over the attachment proceedings, the Court seems to have accepted by implication Rossbeton's argument that neither UPPV nor the state airline was to be regarded as a separate entity.⁷ Alternatively, the Court's finding on this point can be seen as lending support to the view—in favor of which there are precedents—that, regardless of whether state entities have legal personality, their assets are available for the satisfaction of the obligations of the state. These controversial issues did not receive the thorough discussion they deserved.

Finally, the Court added that in deciding whether to grant the attachment, the court of first instance would have to verify whether the ministerial authorization had been obtained. The practice of the Italian Government⁸ has been to deny authorization for measures of execution or attachment against Libyan state assets,⁹ thereby depriving the Court's judgment on the issue of international law of practical effect to the plaintiff.

* * * *

Unlike most Italian decisions, which tend to treat state immunity from execution primarily from the perspective of the 1926 statute, these two

⁷ This argument was upheld on the strength of Libyan law applied pursuant to Italian conflicts-of-law principles, in *CO.FA. S.R.L. v. Giamahiriya araba libica popolare socialista* (Corte di Milano Dec. 3, 1987), 24 *RIVISTA DI DIRITTO INTERNAZIONALE PRIVATO E PROCESSUALE* 755 (1988).

⁸ See Condorelli & Sbolci, *supra* note 4.

⁹ Decree dated Mar. 29, 1989, 25 *RIVISTA DI DIRITTO INTERNAZIONALE PRIVATO E PROCESSUALE* 477 (1989).

recent rulings approach the matter from the standpoint of international law. The Supreme Court's reading of the basic tenet of international law on the subject—that states are immune only with respect to assets directly related to sovereign activities—is broadly in line with today's predominant view. The Court's views on embassy bank accounts, assets used for mixed purposes and aircraft belonging to state-owned airlines are also consistent with a considerable body of case law and other authorities.

These two decisions, however, like most other material on immunity from execution, leave one with the sense that many questions regarding the exact scope and content of the corresponding rule of general international law are still unanswered. There appears to be an emerging consensus that the distinction between public and private assets is important; yet, with the exception of a limited number of assets generally considered immune (e.g., embassy premises and warships), there is little certainty as to which state property is to be assigned to one category rather than to the other. This seems to lead to what amounts to a strong presumption in favor of immunity, as demonstrated by the Supreme Court's view that assets used for mixed purposes are immune.

Perhaps some answers to the open questions could emerge from a different reading of state practice and the rationale behind it. This type of analysis might well demonstrate that very often the concession of immunity is not dictated by international law, but by other types of considerations. In turn, this might cast serious doubt on many of the prevailing theories on the extent to which states are under an international obligation to accord each other immunity from execution.

The impact of considerations beyond international law—notably political expediency—in the realm of immunity from execution is possibly nowhere as apparent today as in Italy. Italy played a pioneering role in the acceptance of the restrictive theory of immunity from execution and, as the two decisions show, it cannot be considered a supporter of the view that absolute immunity is prescribed by international law. Yet owing to the Executive's political concerns, measures of attachment or execution against foreign state property are in practice out of the question in Italy. In this respect, the situation would not be modified by amendments to the 1926 statute currently before the Italian Parliament,¹⁰ although from a purely practical viewpoint, these amendments could significantly improve the position of the private litigant. The bill purports to provide for indemnification for private parties whose attempts at execution are unsuccessful as a result of the denial of executive authorization. In any event, the bill suggests that in Italy, extra-legal concerns will have the upper hand in the foreseeable future.

LUCA G. RADICATI DI BROZOLO
University of Turin

¹⁰ See the bill introduced in the Italian Senate on Dec. 13, 1988, 72 RDI 500 (1989), with a comment by Starace, *id.* at 320. For an earlier version of the bill, see 68 RDI 491 (1985), with a comment by Gaja, *id.* at 345.

CURRENT DEVELOPMENTS

THE UN BODY OF PRINCIPLES FOR THE PROTECTION OF DETAINED OR IMPRISONED PERSONS

Background

On December 9, 1988, the United Nations General Assembly adopted, without a vote, a "Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment."¹ The preparation of this text was started in 1976 within the Sub-Commission on Prevention of Discrimination and Protection of Minorities of the Commission on Human Rights.² On the basis of a project prepared by Mr. Erik Nettel of Austria,³ the Sub-Commission approved a Draft Body of Principles in 1978.⁴ After being submitted to the General Assembly's Third Committee, it was referred to a working group, which considered it in 1980 but could not complete its task.⁵ The item was then moved to the Sixth Committee, which entrusted it to an open-ended working group. This working group met during every session of the General Assembly from 1981 until 1988, and slowly progressed toward the completion of its task.⁶

While the Body of Principles was being elaborated, various developments influenced the negotiation. First, the Convention on Torture was opened for signature in 1984,⁷ which removed some difficulties deriving from the partial overlap between the two instruments. Second, the phenomenon of "disappearances" reached a peak and then receded with the return of democratic government to some Latin American countries such as Argentina and Uruguay.⁸ This permitted the working group to focus on the problem and to

¹ GA Res. A/43/173 (Dec. 9, 1988).

² The early history of the Body of Principles is summarized in UN Doc. A/34/146 (1979).

³ For the text, see UN Doc. E/CN.4/Sub.2/395 (1977).

⁴ See Annex to UN Doc. A/34/146, *supra* note 2.

⁵ For the report of the Third Committee's working group, chaired by Mr. Nordenfelt of Sweden, see UN Doc. A/C.3/35/14 (1980).

⁶ The reports of the working group are rather detailed documents that summarize the discussions and publish the text of the Body of Principles at each stage of its elaboration. See for each year between 1981 and 1988, respectively, UN Docs. A/C.6/36/L.16 (1981); A/C.6/37/L.16 (1982); A/C.6/38/L.8 (1983); A/C.6/39/L.10 (1984) [hereinafter 1984 Report]; A/C.6/40/L.18 (1985) [hereinafter 1985 Report]; A/C.6/41/L.19 (1986) [hereinafter 1986 Report]; A/C.6/42/L.12 (1987) [hereinafter 1987 Report]; and A/C.6/43/L.9 [hereinafter 1988 Report]. The working group was chaired from 1981 to 1983 by Mr. Luigi Ferrari Bravo of Italy, and thereafter by the present writer, in his capacity as the Representative of Italy to the Sixth Committee.

⁷ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, GA Res. 39/46 (Dec. 10, 1984), *draft reprinted* in 23 ILM 1027 (1984), *substantive changes noted* in 24 ILM 535 (1985).

⁸ "Disappearances" have not ended altogether in Latin America, as emerges from the Judgment of the Inter-American Court of Human Rights of July 29, 1988, in the *Velásquez Rodríguez* case, ser. C: Judgments and Opinions, No. 4, *reprinted* in 28 ILM 291 (1989).

be vigorously supported in its consideration by the delegates of those states. Third, the Soviet Union moved through the years from a rather negative attitude—which could be explained if one considers that one of the original political objectives of at least some Western states was to embarrass the USSR—to a more cooperative one. During the last year or two, the Soviet Union took a serious interest in a text that could become a term of reference for impending reforms in that country.

Participation in the working group varied over the years and even during the sessions. However, it was always well attended by representatives of East European and Western states, as well as by a small nucleus of representatives of developing states, among whom the most active were delegates with experience in United Nations human rights bodies.

Especially in recent years, the political divergencies were generally kept in the background and the overall atmosphere was cooperative. Nevertheless, the discussion was quite difficult and the attainment of generally agreed formulations never easy, because the Body of Principles touches upon sensitive questions considered in the domestic criminal and constitutional law of all states. As such law uses precise concepts and terminology that vary from state to state, the main difficulty for every state was to avoid the temptation of seeking to obtain full correspondence between its own tradition and legal system and the formulations to be included in the Body of Principles. Sometimes the delegations had to be reminded that the main objective of the Body of Principles was the protection of the human rights of men and women deprived of their liberty and not the elaboration of a uniform code of criminal procedure or uniform prison regulations. The attention devoted to the activity of the working group by a nongovernmental organization as influential as Amnesty International, as well as by the Sub-Commission on Prevention of Discrimination and Protection of Minorities,⁹ was instrumental in keeping delegations constantly aware of this main objective.

The Scope of the Body of Principles

The working group's mandate was to draft a body of principles "for the protection of all persons under any form of detention or imprisonment." This point is repeated in the opening paragraph, entitled "Scope of the Body of Principles." Nonetheless, the most contentious point in the whole elaboration of the Body of Principles was the definition of its scope of application. Should the Body of Principles include persons deprived of their liberty only within the framework of criminal proceedings, or should administrative detention also be included? Should it include only lawful deprivation of liberty by act of the authorities, or also arbitrary deprivation of liberty by the authorities?

⁹ The Sub-Commission considered the Draft Body of Principles in 1987 and 1988. In its Decision 1987/107 the Sub-Commission, on the basis of work done by concerned nongovernmental organizations, raised three questions for the working group, which considered them in 1987. See 1987 Report, *supra* note 6, paras. 65–73. The Sub-Commission addressed another series of questions to the working group in its Decision 1988/107. The working group considered some of them in its final session. See 1988 Report, *supra* note 6, para. 4.

The discussion of these questions centered on the definition of the term "arrest," to be included in a provision on the "use of terms" at the beginning of the Body of Principles. In the text it had approved in 1978, the Sub-Commission had adopted an "instantaneous" definition of arrest, as "the act of apprehending" a person. In this way, "detention" could include "the period of deprivation of personal liberty from the moment of arrest up to the time when the person concerned is either imprisoned as a result of a final conviction for a criminal offence, or released," and "imprisonment" could include "deprivation of personal liberty as a result of final conviction for a criminal offence." In 1986, when the working group decided to tackle the definitions, which had up to then been left in abeyance, it agreed that the "instantaneous" notion of "arrest" was the best way to avoid the difficulties deriving from the differences among the various legal systems that it would have encountered had it chosen to define "arrest" as a period subsequent to apprehension. In adopting this definition, however, the working group was unable to agree to the formulation given by the Sub-Commission, which was as follows: "The word 'arrest' means the act of apprehending a person under the authority of law or by any authority." Instead, the working group provisionally adopted the following definition: "'Arrest' means the act of apprehending a person for the alleged commission of a [criminal] offence."¹⁰ This formulation seemed to various delegations (as well as to the Sub-Commission) to imply that the arbitrary deprivation of liberty was excluded. It was pointed out that the Body of Principles reflected the concern of the international community "not so much over the fate of persons charged with a criminal offence, who were already protected by many international instruments, as over that of innocents who were picked up by the authorities and put away in safe houses all over the world."¹¹

This view prevailed in the end, although the final formulation is more cumbersome than the one proposed by the Sub-Commission. According to the Body of Principles as adopted, "'Arrest' means the act of apprehending a person for the alleged commission of an offence or by the action of an authority." The retention of the alternative "or" before the words "action of an authority" has the effect of including the apprehension of a person by an authority independently of criminal proceedings. "Arbitrary" arrest is thus included. This conclusion is reinforced by the definition of "detained person," which was adopted at the working group's last session and applies to all cases of deprivation of liberty other than those resulting from conviction—to which the definition of "imprisoned person" applies. The former definition provides: "'Detained person' means any person deprived of personal liberty except as a result of conviction for an offence."

"Authority" seems to correspond to the concept developed in international law as regards the imputability to states of acts of their agents. As the Inter-American Court of Human Rights put it in the *Velásquez Rodríguez* case in 1988: "under international law a State is responsible for the acts of its

¹⁰ 1986 Report, *supra* note 6, paras. 61–69. See also, for the further development of the discussion, 1987 Report, *supra* note 6, paras. 82–98.

¹¹ 1987 Report, *supra* note 6, para. 91. See also *id.*, paras. 71 and 92–98.

agents undertaken in their official capacity and for their omissions, even when those agents act outside the sphere of their authority or violate internal law."¹² This definition widens the scope of many of the principles to include forms of deprivation of liberty that—though imputable to the state—are against the law. The practice of "disappearances," to which the *Velásquez Rodríguez* case is addressed, is thus encompassed, even beyond the scope of Principle 34, which specifically deals with it.

General Provisions on Human Rights of Detained or Imprisoned Persons

The contents of the Body of Principles are set forth in 39 principles that follow the provisions on scope and the use of terms. The principles range from very general formulations of the human rights of persons under any form of detention or imprisonment, to more specific guarantees of a procedural nature, to provisions on particular rights to be ensured in places of detention or imprisonment.

Among the most noteworthy formulations of basic human rights are Principle 1, according to which "[a]ll persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person"; and Principles 2 and 4, which provide that arrest, detention and imprisonment shall be carried out in accordance with the law and by "competent officials or persons authorized for that purpose," and that measures affecting the human rights of detained or imprisoned persons "shall be ordered by, or be subject to the effective control of, a judicial or other authority."

Principle 6 contains a forceful prohibition of the use of torture and of "cruel, inhuman or degrading treatment or punishment." A footnote—which is part of the Body of Principles—explains that the terms just quoted

should be interpreted so as to extend the widest possible protection against abuses, whether physical or mental, including the holding of a detained or imprisoned person in conditions which deprive him, temporarily or permanently, of the use of any of his natural senses, such as sight or hearing, or of his awareness of place and the passing of time.

This footnote, which was inspired by the treatment of "disappeared" persons, seems to cover new ground. It should also contribute to the interpretation of the corresponding, and undefined, terms in the 1984 Torture Convention.¹³

Treatment of Detained or Imprisoned Persons

Among the principles concerning the treatment of detained or imprisoned persons, those tackling the subject of incommunicado detention or imprisonment posed the most problems in the negotiations. On perhaps no

¹² *Velásquez Rodríguez* case, *supra* note 8, para. 170. See also Article 10 of the Draft Articles on State Responsibility adopted by the International Law Commission on first reading, [1980] 2 Y.B. INT'L L. COMM'N, pt. 2 at 30–34, UN Doc. A/CN.4/SER.A/1980/Add.1.

¹³ Convention against Torture, *supra* note 7, Art. 14. See also N. RODLEY, *THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW* 91–95 (1987).

other matter was it so difficult to strike a balance between the protection of the human rights of detained and imprisoned persons and the interest of societies in fighting against crime, at a time when organized crime and terrorism are at the forefront of many states' concerns. Consequently, Principle 16 provides that "[p]romptly after arrest and after each transfer from one place of detention or imprisonment to another," the detained or imprisoned person is entitled to notify members of his family or other appropriate persons; and Principle 18 provides that he will be entitled to communicate with his legal counsel and be visited by him without delay or censorship and in full confidentiality. Both rules, however, are qualified by exceptions. While the notification mentioned in Principle 16 shall be "without delay," the competent authority may delay it "for a reasonable period where exceptional needs of the investigation so require" (Principle 16, paragraph 4); and while contact with the legal counsel may not be suspended or restricted, this prohibition does not hold "in exceptional circumstances, when it is considered indispensable by a judicial or other authority in order to maintain security and good order" (Principle 18, paragraph 3).

While each exception, if taken on its own merits, was felt to be justifiable, it appeared that their cumulative effect could make it possible to hold the detained or imprisoned person incommunicado for indefinite periods.¹⁴ To avoid this possibility, Principle 15 was introduced. It provides that, "[n]otwithstanding the exceptions contained in principle 16, paragraph 4, and principle 18, paragraph 3, communication of the detained or imprisoned person with the outside world, and in particular his family or counsel, shall not be denied for more than a matter of days."

Various principles aim at discouraging authorities from inflicting torture or other forms of ill treatment on detained or imprisoned persons. Not all of the relevant principles, however, are as devoid of limitations as Principle 21, which states that "[i]t shall be prohibited to take undue advantage of the situation of a detained or imprisoned person for the purposes of compelling him to confess, to incriminate himself or to testify against another person," and to use violence or other methods "which impair [the detained or imprisoned person's] capacity of decision or his judgement" during interrogations.

So it is that, according to Principle 23, the duration of interrogations, the intervals between interrogations and the identity of the interrogators and other persons present shall be recorded and access to these records shall be given to the detained or imprisoned person, as well as to his counsel, "when provided by law"; clearly, this proviso weakens the principle. So it is that a medical examination shall be "offered," rather than performed, as promptly as possible after admission to a place of detention (Principle 24); and the detained or imprisoned person or his counsel shall have the right to request, or petition a judicial or other authority for, a second medical examination or opinion, "subject only to reasonable conditions to ensure security and good order in the place of detention or imprisonment" (Principle 25). The fact

¹⁴ See 1988 Report, *supra* note 6, paras. 8 and 9.

that the examination is only offered and not given automatically, as provided in Rule 24 of the Standard Minimum Rules for the Treatment of Prisoners,¹⁵ results both from the observation by some delegates from developing countries that not all prisons have medical officers permanently attached to them¹⁶ and from the insistence by other delegates on the need to respect the freedom of decision of detained and imprisoned persons.¹⁷ Nevertheless, the final report of the working group explains this difference by arguing that the scope of the Body of Principles, being wider than that of the Standard Minimum Rules, makes a "flexible formulation" appropriate; the report further states that "it is however understood that principle 23 [now 24] would not be interpreted as modifying in any way rule 24 of the Standard Minimum Rules."¹⁸ As regards the limitations attached to the right to a second medical examination or opinion, they resulted from a compromise made to accommodate the opposition voiced by delegates of socialist countries to the very idea of a second medical opinion.¹⁹

Finally, Principle 27 provides that "[n]on-compliance with these principles in obtaining evidence shall be taken into account in determining the admissibility of such evidence against a detained or imprisoned person." While this provision, like those mentioned above, may function as a deterrent to torture and ill-treatment, it is certainly weaker than the Sub-Commission's original proposal, which stated that "any evidence obtained in contravention of these principles shall not be admissible in any proceedings against a detained or imprisoned person." The weaker formulation was adopted out of concern that the principle be compatible with national rules on evidence and the discretion of judges regarding the admissibility of evidence.²⁰

Procedural Safeguards

Among the principles on procedural safeguards, Principles 9 to 13 concern the rights of persons after arrest. They provide that the authorities that arrest a person or keep him under detention shall exercise only the powers granted to them under the law and that the exercise of those powers shall be subject to review by a judicial or other authority. They extend to the arrested person the right to be informed of charges at the time of arrest, the right to legal counsel, and the right to be heard promptly by a judicial or other authority.

These principles are completed by Principles 36 to 39, which concern persons detained on a criminal charge. Thus, the safeguards they provide apply only to criminal proceedings. They include the presumption of inno-

¹⁵ Adopted by the First UN Congress on the Prevention of Crime and the Treatment of Offenders, Aug. 30, 1955, approved by ESC Res. 663C (XXIV) (July 31, 1957), and amended, by adding new Rule 95, by ESC Res. 2076 (LXII) (May 13, 1977); *reprinted in* N. RODLEY, *supra* note 13, at 327-41.

¹⁶ 1984 Report, *supra* note 6, para. 35.

¹⁷ *Id.*, para. 33.

¹⁸ 1988 Report, *supra* note 6, para. 24.

¹⁹ See the summaries of the relevant debates in the 1984 Report, paras. 40-47, and the 1986 Report, para. 9, both *supra* note 6.

²⁰ See 1984 Report, paras. 53-57, and 1986 Report, paras. 10-13.

cence,²¹ the entitlement of persons detained on a criminal charge to a prompt decision by a judicial or other authority on the lawfulness and necessity of the detention,²² and the right to trial "within a reasonable time or to release pending trial."²³

Principle 32 contains a rule on habeas corpus, which provides: "A detained person or his counsel shall be entitled at any time to take proceedings according to domestic law before a judicial or other authority to challenge the lawfulness of his detention in order to obtain his release without delay, if it is unlawful." The Sub-Commission had proposed that when the detained person is unable to exercise this right himself, it could be extended to a member of his family or to any citizen who has reliable knowledge of the case; and that this right should include challenges to the necessity of detention, as well as to its lawfulness.²⁴ Both proposals were rejected because the delegations were reluctant to depart from Article 9, paragraph 4 of the International Covenant on Civil and Political Rights (to be discussed further below).²⁵ Moreover, it was observed that "in a number of legal systems, detention was either lawful or unlawful and that a detention which was unnecessary was *ipso facto* unlawful."²⁶

Members of the family and persons with knowledge of the case, however, are allowed a role in two other circumstances: first, to submit complaints to the authorities responsible for the administration of the place of detention regarding the treatment of the detained or imprisoned person, in particular in case of torture or other cruel, inhuman or degrading treatment (Principle 33); and second, to request an inquest on the disappearance or death of a detained or imprisoned person during his detention or imprisonment or shortly thereafter (Principle 34).

The above-mentioned Principles 32 (on the right to initiate proceedings to challenge the lawfulness of detention) and 37 (on the right of a person detained on a criminal charge to be brought before a judicial or other authority promptly after his arrest) were seen as unsatisfactory by various delegates because they fell short of the corresponding provisions of the International Covenant on Civil and Political Rights. While these two principles speak of "judicial or other authorities," Article 9, paragraph 4 of the Covenant, which corresponds to Principle 32, speaks of "a court," and Article 9, paragraph 3, which corresponds to Principle 37, speaks of "a judge or other officer authorized by law to exercise judicial power." Agreement was reached, only after rather arduous discussions, to use the expression "judicial or other authority" throughout the text (thus, such authorities as "procurers," who in various systems do not belong to the judiciary, are included); and, further, to define in the "use of terms" article such "judicial or other authority" as "a judicial or other authority under the law whose status

²¹ GA Res. 43/173, *supra* note 1, Principle 36.

²² *Id.*, Principle 37.

²³ *Id.*, Principles 38 and 39.

²⁴ Principle 28, in Annex to UN Doc. A/34/146, *supra* note 2.

²⁵ Dec. 16, 1966, 999 UNTS 171.

²⁶ 1986 Report, *supra* note 6, para. 38.

and tenure would afford the strongest possible guarantees of competence, impartiality and independence."

Although the proposal of some delegations that the terminology of Principles 32 and 37 be made more consistent with that of the Covenant was not accepted, it was agreed that "care should be taken not to call into question the norms established in the International Covenant on Civil and Political Rights."²⁷ Consequently, a savings clause was included in the "general clause" that appears at the end of the Body of Principles. It states that "[n]othing in the present Body of Principles shall be construed as restricting or derogating from any right defined in the International Covenant on Civil and Political Rights."²⁸

This savings clause certainly has the effect of avoiding, as among parties to the Covenant, any interpretation implying that the "judge" or "court" mentioned in paragraphs 3 and 4 of its Article 9 is anything other than a person or group of persons entitled to exercise judicial functions. One may wonder whether it also has the effect of permitting Principles 32 and 37 to be interpreted as providing that the "judicial or other authorities" concerned must fully correspond to the "judge" and "court" mentioned in paragraphs 3 and 4 of Article 9 of the Covenant. Such an effect would be quite important as regards states that are not parties to the Covenant.

Legal Effect of the Body of Principles

The preceding observations prompt one to reflect on the value in international law of the Body of Principles. Not being a treaty, but a document annexed to a General Assembly resolution, it obviously has no binding force as such. Its force resides in the fact that it was approved by consensus by the United Nations General Assembly, which in so doing "adopted" it and urged that "all efforts be made" so that it would "become[] generally known and respected."

The main immediate effect of the Body of Principles seems to be twofold. On the one hand, it can serve as a guideline for the shaping of national legislation and domestic practice. On the other hand, it can serve as a statement of basic international legal and humanitarian concepts to which everyone can refer. The latter function will be particularly important in providing arguments to states or nongovernmental bodies such as Amnesty International whenever abuses require them to bring political pressure to bear on certain governments.

One must recall, however, that the development of the international law of human rights has proceeded through the consolidation of "soft" into "hard" law, be it treaty or customary. The Body of Principles may thus contribute, as an element of state practice, to the crystallization of some principles into customary law. It may also contribute to the development—

²⁷ 1987 Report, *supra* note 6, para. 77.

²⁸ For the discussion summarized in the text, see 1985 Report, para. 81; 1987 Report, paras. 74–81; and 1988 Report, para. 13; all *supra* note 6.

by making them more detailed—of existing principles and give useful assistance in their interpretation; the footnote on “cruel, inhuman or degrading treatment or punishment” mentioned above is a good example of this possibility.²⁹ Last, the Body of Principles may be the first step toward the elaboration of new treaty obligations.

The Body of Principles, however, is far from perfect. Many exceptions are appended to the rights recognized and many principles contain language that is vague or open to different interpretations. These shortcomings resulted from the need to accommodate the requirements of states with different legal traditions and systems, not to mention political positions; they also reflect the tension within states between the desire to ensure respect for the human rights of detained or imprisoned persons and the need to fight crime. Though lamentable, these defects do not seem to be as prejudicial to the effect and value of the Body of Principles as they would be if it had been a treaty. The usefulness of the Body of Principles in furnishing guidelines for domestic law reform, its function as a set of concepts individuals and governments can invoke when applying political pressure, and its possible importance to the general development of the law—all are elements that make the “small print” less weighty than it would be in a treaty.

TULLIO TREVES*

ALL'S WELL THAT ENDS WELL. OR IS IT? MORE ON THE PUBLICATIONS OF THE INTERNATIONAL COURT OF JUSTICE

In 1987 I drew attention to a report published in 1986 by a member of the Joint Inspection Unit (JIU) of the United Nations, recommending a number of changes, some of them fundamental, in the presentation by the International Court of Justice of its judgments and advisory opinions.¹ I indicated the principal objections that the Court had expressed on those recommendations, and pointed out that the implementation of some of them could constitute violations of the Charter, of which the Statute of the Court is an integral part. The matter was also the subject of a resolution adopted on April 9, 1987, by the American Society of International Law, reproduced in part in note 30 on page 695 of my Note. It is now possible to bring the story up-to-date and close an unfortunate chapter in the history of the Joint Inspection Unit.

At the 42d session (1987) of the United Nations General Assembly, that report of the JIU was, in the normal course of events, allocated to the Fifth

²⁹ See text at note 13 *supra*.

* Professor of Law, University of Milan. The author is currently on leave and serves as a Legal Adviser to the Permanent Mission of Italy to the United Nations. The views expressed here are his own and do not represent the official position of the Italian Government.

¹ Rosenne, *Publications of the International Court of Justice*, 81 AJIL 681 (1987). In that connection, for a most authoritative account of current practices in the Court on the preparation of its judgments and advisory opinions, see Sir Robert Jennings, *The Internal Judicial Practice of the International Court of Justice*, 59 BRIT. Y.B. INT'L L. 21 (1988).

Committee (Administrative and Budgetary Questions), one of the main committees of the General Assembly.

In the course of the examination of that report, the Chairman of the Fifth Committee inquired of the Chairman of the Sixth Committee (Legal Questions) regarding any views that the Sixth Committee might wish to express on the report of the JIU. No substantive discussion took place in the formal meetings of the Sixth Committee, and the question was examined informally. At its 45th meeting in that session, the Sixth Committee decided to elicit the views of the chairmen of the five regional groups. At the 52d meeting, the Chairman of the Sixth Committee announced that the committee had received a letter from the Legal Counsel "which might assist the Committee in formulating its response to the Fifth Committee." That letter, too, was then transmitted to the chairmen of the five regional groups. At the 56th meeting, the Chairman informed the Sixth Committee that he had received only one reply, from the Chairman of what he termed the Group of Latin American States. He had also received another letter from the Legal Counsel containing suggestions for the reply to the Chairman of the Fifth Committee, and that, too, had been communicated to the chairmen of the five regional groups. The Sixth Committee thereupon accepted the proposal of its Chairman to transmit to the Fifth Committee the views of the Group of Latin American States and the comments received from the Legal Counsel.

That was accordingly done, the documents in question being issued by the Fifth Committee.²

The Chairman of the group designated in that document as the Group of Latin American and Caribbean States indicated that his group "supports the conclusions and recommendations of the [JIU] report; to the effect that the judgments and advisory opinions of the International Court could be published in all official languages of the United Nations [Arabic, Chinese, English, French, Russian and Spanish] at no additional cost." In fact, given the language usages of the Caribbean states, that was a reference to the publication of the material in Spanish, a matter to which I will return.

The substance of the matter, on which the Court itself had commented in 1986, was the subject of the letter of the Office of Legal Affairs, which warrants full citation:

2. As appears from the observations of the Court, the latter, while clearly sympathetic to proposals designed to achieve wider dissemination of its judgments and advisory opinions, and sympathetic to the objective of achieving savings whenever possible, has several specific concerns about the proposals by Inspector Ferrer-Vieyra. The United Nations Office of Legal Affairs shares these reactions, which are discussed briefly below, and considers that the Sixth Committee might also wish to endorse them.

3. The Sixth Committee may wish to welcome proposals to increase and broaden the propagation of the judicial products of the Court through their publication in additional languages and in cheaper edi-

² UN Doc. A/C.5/42/50 (Dec. 4, 1987).

tions. However, due account should be taken of the points made below; furthermore, the Committee would not be in a position to consider the administrative and financial implications of these JIU proposals.

4. For the reasons indicated by the Court (A/41/591/Add.1, annex II, paras. 6–12), it would be unacceptable for any publication issued by the Court, or otherwise by the United Nations, to reproduce only the majority judgments and advisory opinions of the Court, without including therewith any separate and dissenting opinions. Article 57 of the Statute of the Court gives every Judge the right to deliver separate opinions, and without their inclusion in any publication setting out the decision of the Court it is not feasible to understand fully its judicial conclusions in respect of the matter to which its judgment or opinion pertains. For similar reasons, in those national judicial systems that allow separate opinions, they are reproduced together with the principal one.

5. The Court has repeatedly emphasized that its judicial work consists both of the rendering of judgments in contentious cases and of issuing advisory opinions in respect of questions addressed to it by competent international representative organs. For the reasons it stated (A/41/591/Add.1, annex II, para. 13), it would therefore be inappropriate to publish these two types of decisions in separate official collections.

6. Again for the reasons given by the Court (A/41/591/Add.1, annex II, paras. 21–24), the Sixth Committee may also wish to record its opposition to any official unilingual English or French version of the judgments or advisory opinions of the Court. The reason the latter performs its judicial work in these two languages lies in Article 39 of its Statute. As, in fact, the Court does work equally and in parallel in those two languages, its output can be fully understood only from a bilingual edition; reproducing an opinion of the Court, even together with the separate and dissenting opinions (see para. 4 above), in one language only, would confusingly combine authentic and non-authentic texts and, as to passages worked out in both English and French, would reduce the number of perspectives on the text. Paragraph 2 of Article 39 of the Statute specifically states that “the decision of the Court shall be given in French and English”.

7. As to the continuation of the practice of reproducing bilingual texts in an *en regard* fashion (i.e. parallel passages on facing pages), although this is merely a matter of convenience to the reader, it is a sufficiently useful device that it should not be lightly abandoned.

8. While there can be no doubt about the value of publishing the full judgments and opinions of the Court also in languages other than its official ones, it must be understood that such translations, even if prepared and published by the Registry, could not engage the responsibility of the Court. Any expansion or change in the languages specified in Article 39 of the Court's Statute (French and English) would require a formal amendment of that Article.

In the Fifth Committee itself, a somewhat desultory discussion of the matter took place at its 10th, 42d and 59th meetings during the 42d session. That led to part IV of General Assembly Resolution 42/225 of December 21, 1987 (footnote references inserted in the text), as follows:

The General Assembly,

Having considered the report of the Joint Inspection Unit entitled "Publications of the International Court of Justice" [A/41/591] and the related comments of the Secretary-General and the International Court of Justice [A/41/591/Add.1],

Recalling the views of Member States expressed in the Fifth Committee in regard to the conclusions and recommendations of the report of the Joint Inspection Unit, as well as the communication addressed to the Chairman of the Fifth Committee by the Chairman of the Sixth Committee concerning the report [A/C.5/42/50],

1. *Takes note* of the report of the Joint Inspection Unit and the related comments of the Secretary-General and the International Court of Justice,

2. *Invites* the International Court of Justice to continue to examine the question of the dissemination of judgments and advisory opinions of the Court,

3. *Requests* the Secretary-General to report on this matter to the General Assembly not later than at its forty-fourth session.

Following that resolution, the matter was again examined by the Court and was the subject of a Note by the Secretary-General issued in connection with the standard agenda item "Proposed programme budget for the biennium 1990-1991."³ That Note contained the further comments of the Court itself, and of the Secretary-General.

The Court itself commented that it "has found no reason to alter in any way the position it originally took." It proceeded to summarize that position, without repeating it in full, and added:

10. The Court deems it also opportune to recall that, thanks to the co-operation of the Departments of Conference Services and Public Information of the United Nations Secretariat, and occasionally with the assistance of national organizations devoted to the cause of international law, substantial handbooks and brochures of the Court have been or are in the process of being published in Arabic, Chinese, Russian, Spanish, German and Japanese.

The "comments" of the Secretary-General were succinct (and perhaps wry): "Consequently, the Secretary-General does not intend to implement the recommendations contained in the JIU report." In its Resolution 44/201A II of December 21, 1989, the General Assembly took note of the Secretary-General's comments in that Note.

All's well that ends well. Yet the question may well be asked why the Secretary-General had to wait until 1989 to reach a conclusion that ought to have been reached in 1987.

This satisfactory outcome of an unfortunate and ill-conceived report by a member of the Joint Inspection Unit does not, however, settle the real problem which experience shows exists in connection with the availability and

³ UN Doc. A/C.5/44/13 (Oct. 23, 1989).

dissemination of the judgments and advisory opinions of the Court (and, it might be added, substantive orders), in languages other than the two official languages of the Court, English and French.

* * * *

In this connection, interest also attaches to the report of the 24th session of the Advisory Committee on the United Nations Programme of Assistance in the Teaching, Study, Dissemination and Wider Appreciation of International Law (October 1989), presented to the Sixth Committee at the 44th session of the General Assembly.⁴ The Secretary-General had reported briefly on the earlier discussion on the report of the JIU, and in that context some delegations had asked for further consideration to be given to the proposal concerning the translation of the judgments and advisory opinions "into official languages of the Organization other than English and French."

The discussion on this item led to a decision by the General Assembly requesting that the Secretary-General study alternative means of making the publications of the Court available in all the other official languages "within existing appropriations in a way which meets the concerns expressed by the Court." The Secretary-General is to present the results of his considerations to the General Assembly.⁵ This agenda item will next be discussed in 1991.

* * * *

The issue raised by the Chairman of the Latin American and Caribbean Group in his reply to the Fifth Committee cannot be so easily dismissed, especially as regards his group's specific request that the relevant materials of the International Court be made available by the United Nations in Spanish.

Since 1946, Spanish-speaking states have been parties in the following contentious cases: *Asylum* and *Haya de la Torre* (three cases), *Nottebohm*, *Arbitral Award made by the King of Spain*, *Barcelona Traction*, *Military and Paramilitary Activities in and against Nicaragua*, *Border and Transborder Armed Actions*, and *Land, Island and Maritime Frontier Delimitation* (this latter before an *ad hoc* Chamber)—a formidable number of contentious cases, some of which directly involved regional Latin American law, and others both the Charter of the Organization of American States and other relevant inter-American regional agreements. At least one advisory opinion was requested on the initiative of a South American state—*Competence of the General Assembly for the Admission of New Members*—and Spain was directly concerned in the *Western Sahara* case. The participation in contentious and advisory litigation before the International Court by Spanish-speaking states is thus considerable.

⁴ UN Doc. A/44/712 (Nov. 7, 1989).

⁵ GA Res. 44/28, para. 14 (Dec. 4, 1989). In the preamble, the General Assembly recalled the provisions of Article 39 of the Statute, on the Court's official languages, and took into account the circumstances encountered by the recommendations of the Joint Inspection Unit to publish in languages other than English and French the Court's judgments "and, in particular, the difficulties to which the Court has drawn attention."

It is really nothing more than a fluke of history that the majority of the new states that have gained their independence during the present century were formerly under the domination of England or France and commonly use English or French (and in some cases both) both for international intercourse and, to some degree at least, for internal purposes. By the same whim of history, most of those states which gained their independence during the 19th century, the Latin American states (with few exceptions), are Spanish speaking. Leaving aside the particular problem of two of the official languages of the United Nations that are used by one country only (both of them permanent members of the Security Council), it does not seem appropriate today that two large language groups of states do not have made available to them if they so wish (and the Spanish-speaking states have formally expressed their wishes in this respect) the judgments and advisory opinions of the Court in their languages—official languages of the United Nations, of which the Court is a principal organ. In 1920 only the English-speaking world was politically strong enough to be able to insist that English be one of the official languages of the Court; and in 1945, when the Court was reconstituted, no other language group was in a position to add to the official languages of the Court. The fact that English and French are, and always have been, the official languages of the Court is properly interpreted as requiring *the Court* to make its documents available in those two languages, and has exerted a profound influence on the internal judicial practice of the Court, as well as on the structure and composition of the Registry. But this has nothing to do directly with any possible duty of the United Nations to make important documentation of the Court available in other languages, especially when other language groups have formally so requested. The responsibilities of the United Nations in this respect can be exercised without impinging on the responsibilities of the Court under its Statute.

It would be a fitting “international law happening” if during the last decade of the 20th century, now denominated the United Nations Decade of International Law⁶—during the first decade of which the Spanish-speaking states of Latin America made their first collective appearance at a major international conference—an appropriate method could be found, one within the intellectual and material resources at the disposal of the United Nations, of making the judgments and advisory opinions of the International Court of Justice, in their integrity, available to practitioners and students of international law who are not at home in either of the official languages of the Court, and who wish to see this important material placed at their disposal in an adequate manner in Spanish.

* * * *

The report of the JIU received its just desserts when the Secretary-General formally decided that he would not implement its recommendations. The fact that such an ill-conceived document could have issued from so respected a body as the Joint Inspection Unit indicates that all may not be

⁶ GA Res. 44/23 (Dec. 17, 1989).

well with the inspectorate system as it is developing within the United Nations. It is also curious that so serious a matter as the JIU's report on the publications of the International Court should only be examined by the Fifth Committee, as though only administrative and budgetary considerations were involved. That, however, is not our problem here. On the other hand, it may be acknowledged that the JIU's report has brought to light the disenchanting fact that some very large language groups in the United Nations, largely in consequence of accidents of history, are deprived of some of the more important documents issued by one of the principal organs of the United Nations, while their "in trays" are crammed to overflowing with pure ephemera, often of doubtful veracity, which the Rules of Procedure of other principal organs require to be distributed simultaneously in all six of the official languages of the United Nations. *Difficile est* . . .

SHABTAI ROSENNE*

* Honorary member, American Society of International Law; Visiting Scholar, University of Virginia.

BOOK REVIEWS AND NOTES

EDITED BY DETLEV VAGTS

An Introduction to Contemporary International Law: A Policy-Oriented Perspective.

By Lung-chu Chen. New Haven and London: Yale University Press, 1989. Pp. xii, 500. Index. \$45, cloth; \$19.95, paper.

Lung-chu Chen, a student of Myres McDougal and Harold Lasswell, has provided us with his own perspective on contemporary international law, drawing deeply and extensively on the lifetime, policy-oriented work of his two mentors. As with many of the scholars who have followed this path, Chen offers a restatement of the policy-oriented approach, modified somewhat to express his own perspectives. In those terms, his book is a useful introduction, largely as an outline of the "map" that was used by McDougal and his associates (sometimes referred to as the New Haven School).

This book is not, and was not intended to be, a work of scholarship. Unlike Chen's earlier works, including a book on human rights written with McDougal and Lasswell, the present book is aimed at readers and students new to international law. For them the text serves as a useful introduction.

Chen introduces the working and technical vocabulary of policy science and calls upon the policy-oriented international lawyer to clarify the claims and preferred values of peoples and the elites that represent them. He then calls for an appraisal of the security and other values that peoples seek and identifies the conflicts that arise when they must compete for the scarce resources that are needed to provide that security.

The chapters of Chen's book offer separate assessments of the participants (states and others), their perspectives (expectations, demands and identifications), the arenas of authority, the bases of power, the strategies for dealing with conflicts and the outcomes of such conflicts. This approach breathes life into law, enabling the reader to move closer to the decision-making process and the decisions that emerge from it.

In a concluding chapter, Chen considers the prospects: peoples everywhere, he argues, are demanding a world community that respects human dignity. Moreover, he asserts that the demand is both internal (within the local or municipal communities the peoples inhabit) and transnational (transcending those local communities and finding expression on a global scale). In fact, realization of the security implicit in this demand for respect for human dignity depends upon such demands being satisfied in all communities. The outcomes may turn out to be different if different goals and preferred values are chosen by different nation-states, but recent events indicate that peoples, when they have the freedom to choose their representatives, want to optimize their opportunities for human dignity. However, as experience from the Second World War seems to suggest, vying for power may be the only realistic option if states find themselves in the grip of a major strug-

gle over ideologies and other related claims, and, without power, are largely unable to achieve their goals.

The advantage of adopting the New Haven approach, according to its supporters, is that it lays bare the overall framework in which problems among states arise. The interactions among states, the evolving flourish of claims and counterclaims by which states seek to legitimize their decisions and actions before the world at large and the business of appraising this process are described in this book in simple terms, illustrating the approach that has been used most recently in order to address the problems as they have occurred, almost in "real time."¹

For this reviewer, there are inherent limitations in pursuing the "science" of law, unless, of course, we can rely upon strongly affirmed common interests. Moreover, the argumentative element is foremost in the dynamic flux of state interactions and claims, softening the articulation of hard law. In addition, there is a feature not unlike that which gave rise to the "indeterminacy principle" applied to observations in the "hard" sciences. As described by Heisenberg with reference to scientific observations, the principle refers to the phenomenon that the observer cannot observe external, "scientific" facts without disturbing and therefore modifying them. We quickly sense the inherent uniqueness of observations and commentary by scholars who reflect on the questions of global law (let alone municipal law) and the strengthened relevance of patterns of state practice as the primary source for our policy assessment.

But, as Chen argues, in shaping global processes, we cannot avoid policy orientation. The lawyer's work begins with a policy that he must clarify and ends with the support of, or an effort to reshape or replace, that policy. Such an orientation sharpens our awareness of the scarcity of resources and talent, and of choices, at our disposal and shifts our attention to making the most of those we have. It is only too evident, for these reasons and others, that the black-letter rules of traditional law rapidly become the fossils of the policy of another era and that the law we apply, even if we mouth the language of traditional rules, must assimilate the policy we are demanding for a new and changing era.

To review the policy impact of decisions, consider the controversies around the *Nicaragua v. United States* case. Many of us felt that the wrong issues were raised in the wrong forum. The issues were "legislative," demanding the development of law by the practice of states rather than in the closets of judicial learning. The wrong authority was asked to judge the policy context of state interactions in Nicaragua. Pressed by the conditions and constraints that are imposed upon the adjudicatory process and absorbed in the jurisprudence of abstract principle, the World Court was unable to work with law emerging against larger policies. It was unable to recognize that the application of the traditional rules of law was part of the problem. We discovered that this Court under such constraints could, even

¹ See 10 YALE J. INT'L L. 1 (1984) (selecting incidents involving interactions among states as the means to consider the application of international law).

at best, only convey the decision flow of state practice, the primary source for shaping the future law of armed conflict.

Chen does not go deep enough to work out these problems, but that is not his objective in writing this text. He provides a brief and useful map of the policy-oriented approach, but for this reviewer at least, the book would be enhanced by working through and working out the implications of the map of the New Haven School. The book, as it lies before us, fails to elaborate the full content inherent in the vocabulary of policy. Thus, it does not provide for that larger purpose. However, it affords us the guidance of a talented scholar like Chen in making more effective our own approach to the multi-fold, policy-oriented problems that are now coming before us in an ever-growing stream.

In a sense, all of our scholars have become policy oriented; law always was identified with policy, and legal policy with the broader demands of a society in which law was one of the instruments for achieving social goals. But by drawing upon identifiable values and providing his insights into the framework for working with these values, Chen has provided insights of his own that are useful to the general reader and the student alike. Law is a collegial enterprise, and in this book Chen has shown that he can rightly claim a place in that enterprise, promoting the objectives that law is expected to serve.

HARRY H. ALMOND, JR.
National Defense University

Mezhdunarodnoe pravo (International Law). Edited by N. T. Blatova. Moscow: "Juridicheskaya Literatura," 1987. Pp. 543. 1 ruble, 30 kopeks.

Mezhdunarodnoe pravo (International Law) (5th ed.). Edited by F. J. Koshevnikov. Moscow: "Mezhdunarodnye Otnosheniya," 1987. Pp. 591. 1 ruble, 40 kopeks.

These two collective Soviet textbooks of international law, which we will refer to as "Blatova" and "Koshevnikov" for the sake of brevity, appeared in quick succession: the first in early 1987, the second in the autumn of that year. They remain, as a research stay in Moscow in the fall of 1989 confirmed, the most recent Soviet general texts in our field.

Reviewing them, one could embark on a number of criticisms. For instance, there is the distracting continuation of the "decorating" of the text with quotations from Lenin—e.g., on the very first page of Blatova, Lenin is cited simply as saying, "we live not only in a State, but also in a system of States." One could ask why, also in Blatova (p. 342), Laos is mentioned as a member of COMECON, which it is not. Or why the important subdiscipline of international economic law is not treated in Koshevnikov.

However, it is more important for us to concentrate on two particular chapters in Blatova and one in Koshevnikov. In the first case, these are chapter 10, "International law in relations between socialist countries," contributed by E. T. Usenko, and the concluding chapter by Blatova herself. In the second case, we refer to chapter IV, "A new type of international relations and international law," contributed by V. I. Kuznetsov.

Chapter 10 in Blatova, as well as chapter IV in Koshevnikov, deals with the so-called principles of proletarian/socialist internationalism. The most notorious of them is what Usenko calls "the principle of socialist mutual assistance," mostly associated with what is popularly referred to, in the West, as the Brezhnev Doctrine. We dwelt on this perversion of international law in previous reviews of Soviet and East German publications in this *Journal*.¹ Abandoning these "principles," preferably coupled with profound self-criticism, is considered to be the acid test for any serious "new thinking" in Soviet literature on international relations and international law.

Unfortunately, no such change can be detected in the reviewed books. In the case of Blatova, one reads old, long-compromised banalities like the following: "Relations between the socialist countries represent a new, higher type of international relations" (p. 184); "The basis for mutual relations of the countries of the world socialist system are the life-proven principles of Marxism-Leninism, of proletarian (socialist) internationalism" (p. 189); and "[T]he distinction of the principle of socialist internationalism at the present stage lies in its being the main principle underlying relations between sovereign socialist states" (p. 191).

Later on, discussing the individual "constituent principles," Usenko refers to the ill-famed "principle of socialist mutual assistance" and maintains, *inter alia*, that

[i]n contrast to imperialist "help" . . . [socialist help] represents the mutual help of free, equal and sovereign states . . . Mutual help between socialist countries is of important significance in the struggle for peace and in repelling the aggressive schemes of imperialism, as well as in hindering its attempts to realize the export of counterrevolution. A clear example of this is the internationalistic actions of the USSR and of other socialist countries during the period of the events in Hungary (1956), in Czechoslovakia (1968) . . . [p. 197].

(Incidentally, one does not know what "other socialist countries" participated in the quelling of the 1956 uprising in Hungary.)

Let us add that concrete references to "fraternal help" in the form of the Soviet violations of international law in 1956 and 1968 have been rather tactfully avoided, with a few exceptions only (especially Tunkin), in the pertinent Soviet literature during the last few decades. Usenko, who wrote his chapter during Gorbachev's proclaimed era of "new thinking," shocks the reader with such crudeness. He concludes: "In this way, the principles of socialist international relations represent a new, higher stage of development of international law, and it is precisely to them that the future belongs" (p. 200).

In her concluding chapter, Blatova speaks, among other things, about the "undeclared [Western] war against Afghanistan" (p. 510), without, of course, mentioning the pertinent resolutions of the UN General Assembly

¹ See in particular the reviews of the East German VOELKERRECHT. LEHRBUCH in 78 AJIL 511, 512 (1984), and of the Soviet SLOVAR MEZHDUNARODNOGO PRAVA in 79 AJIL 849, 849-50 (1985).

(e.g., Resolution 41/33). She evidently regrets that "modern international law has not, as of yet, become socialist" (p. 512). Basing her comments on what Lenin wrote a few generations ago, she dreams about the "transition of the world community to socialism" (p. 515). And she boldly diagnoses that "[i]mperialist states, due to their aggressive nature, are not interested in solving the problems of peace and disarmament, in peaceful coexistence and in other important global problems" (p. 515). To top it all, the very last sentence of her chapter—and of the whole book—refers to Gorbachev's "new political thinking"!

Turning to chapter IV in Koshevnikov, it is slightly more moderate, in form, than chapter 10 of Blatova, discussed above. And the book, fortunately, does not contain a Blatova-style concluding chapter. However, in essence, this chapter tries to sell the same "principles," representing the old hegemonic position of the USSR, that go against the most elementary wishes of the people of the "fraternal countries"—as amply demonstrated recently by the people of Central and Eastern Europe.

Here, also, at least a few samples are in order: "Sovereignty cannot be considered apart from Lenin's teaching on international relations of a new type. A class approach to the institution of sovereignty . . . is indispensable" (p. 77); "The State and its sovereignty are not an aim in itself, but a device for the realization of given class purposes" (*id.*); and finally:

Bourgeois jurists in the field of international law gladly took up the thesis of Western propaganda that socialism, for its stabilization, allegedly needs to limit sovereignty. The political meaning of this concept and the demand, based on it, for so-called full sovereignty for the socialist countries, do not leave any doubts. The aim here is to attempt to introduce corrosive ideological nationalism into the socialist community, isolating the socialist states from one another, and, above all, from the Soviet Union as the main guarantor of the security of the world socialist system; to hamper the process of socialist integration; and, in the final analysis, to weaken the world position of socialism [p. 78].

Finally, there is the unequivocal statement that "[f]rom the legal point of view, the principle of socialist mutual assistance represents the right and duty of each socialist country to receive help from, and to give it to, other socialist countries" (p. 79). And in order that not the slightest doubt may arise that this help should, perhaps, be limited to economic, technical, cultural and similar matters, such "extraordinary events" as "the repelling of imperialist aggression" or "counterrevolution" are referred to (p. 80).

Summing up, there is no trace in the newest available Soviet textbooks in international law of any new thinking, or of any intellectual or moral *perestroika*, in the most crucial, dangerous and painful field of relevant Soviet "theory."

Writing this review, as it happens, in Warsaw, and comparing pertinent Soviet textbooks with Polish ones, one is relieved that the latter do not contain anything similar. Concerning the Soviet-imposed participation of Polish troops in the August 1968 aggression, resolutions have been passed, 21 years later, by both chambers of Parliament, condemning the military

"intervention," explaining that it took place against the will of the Polish people, and conveying expressions of regret and sympathy.² This was followed by a pertinent resolution of the East German Volkskammer a few months later.³

Until December 1989, neither the supreme state organs nor Gorbachev himself had condemned the aggression against Czechoslovakia. It was only after the revolutionary events in that country, and the resultant demands, that Moscow, apparently, could not wait any longer without gross loss of face internationally. This was the reason for the two declarations of December 4, 1989.⁴ The first of these, issued by the "leaders" of Bulgaria, Hungary, the GDR, Poland and the USSR, gathered in Moscow, states that the "introduction" of their troops "was interference in the internal affairs of sovereign Czechoslovakia, and should be condemned." The second declaration, issued by the Soviet Government alone, is watered down, referring, e.g., to "times of sharp confrontation between East and West." It concludes that "in the light of all the facts now known," the August 1968 decision "was a mistake."

At the time of this writing (January 1990), there is still no official rejection by Moscow of the Brezhnev Doctrine. Let us recall that there was no trace of any such trend in Gorbachev's well-known book.⁵ When meeting with Polish intellectuals at the Warsaw castle in July 1988, he was specifically asked by two speakers about the Brezhnev Doctrine (and in one case also about his position concerning the invasion of 1968). Unfortunately, there was no satisfactory answer to these questions in his written reply, sent a few months later, and included in a subsequently published booklet.⁶

In July 1989, speaking to the Parliamentary Assembly of the Council of Europe in Strasbourg, Gorbachev perhaps made a step in the right direction. He declared, among other things, that "[a]ny intervention in internal matters, any attempts at limiting the sovereignty of states—whether it be of friends and allies or of anyone else—are intolerable."⁷ What may be interesting here is his reference to "friends" and "allies." Nevertheless, any direct renunciation of the Brezhnev Doctrine (and the 1956 aggression against Hungary) is still lacking. This should be pressed for as an indispensable corollary to the Soviet "new thinking" that is now so much publicized.

But even if such a formal declaration were issued, Soviet practice and way of thinking being what they are, a word of caution is in order. One must recall that on October 30, 1956, a declaration was issued by the Soviet

² For the resolution of the Senate, see *Gazeta Wyborcza*, Aug. 15, 1989, at 1; for the resolution of the Sejm, see *id.*, Aug. 18–20, 1989, at 1. Both resolutions stated that the 1968 "intervention" was "a violation of the inalienable right of every nation to self-determination and of the natural longing for democracy, for freedom and for the respect of human rights."

³ *Berliner Zeitung*, Dec. 2–3, 1989, at 1.

⁴ The texts of both of these documents were published in *Pravda*, Dec. 5, 1989, at 2.

⁵ See my review of his *PERESTROIKA. NEW THINKING FOR OUR COUNTRY AND THE WORLD*, 82 *AJIL* 878 (1988).

⁶ See *THE INTELLIGENTSIA IN THE FACE OF NEW PROBLEMS OF SOCIALISM. MEETING OF MIKHAIL GORBACHEV WITH REPRESENTATIVES OF THE POLISH INTELLIGENTSIA* (in Polish) (1988).

⁷ *Pravda*, July 7, 1989, at 2.

Government on "[t]he principles for the development and further strengthening of friendship and cooperation between the USSR and other socialist states."⁸ It condemned the "errors" in mutual relations of the Stalinist era and guaranteed, particularly to the "fraternal countries," that relations with them would be based "only on the principles of full equality, respect for territorial integrity, of state independence and sovereignty, and nonintervention in internal affairs." Just a few days later, the Soviet attack on Budapest began.

The final reflection that comes to mind after reading the two books reviewed here is that a fully "civilized" Soviet text in our field, up to the present standards of international law, free from the preaching of the lethal "principles of proletarian/socialist internationalism," is still to appear.

RICHARD SZAWLOWSKI
Vancouver, B.C.

Treaty Conflict and Political Contradiction: The Dialectic of Duplicity. By Guyora Binder. New York, Westport, Conn., London: Praeger, 1988. Pp. 226. Indexes. \$39.95.

This is a very difficult book about which to be fair. It is immensely erudite. The text is 134 pages, while the references constitute pages 135 to 206. The balance is, in my view, an indication of an immense effort to rethink the framework of analysis used by international lawyers, but an effort not yet completed and only partially digested.

This shows above all in the extraordinarily overarching treatment of a single issue—the fact that Egypt's Camp David Agreement commitment to peace with Israel could be incompatible with its agreements with other Arab nations. To consider this question (which he leaves in the text at page 15, and returns to at page 123, with frequent mention in between, e.g., pp. 29, 112, 119) with a sufficient level of penetration, the author ranges through a history of treaty conflict in the 19th and early 20th centuries; an elaborate and original construction of a conceptual framework for the consideration of the notion of illegality as it might apply to treaties (itself based on state practice and the theories of legal writers); a formidable deconstruction of the work of the International Law Commission (ILC) on the legal status of conflicting treaties; and (neither last nor least) an enormous reconstruction of the possible implications for the theory of international law and relations of a purportedly exhaustive account of the outlines of modern state theory from the time of the Renaissance, put together in terms of a republican and an imperial model, somehow synthesized by Hegel (a synthesis that is itself reflected in 19th-century state practice). Two chapters follow that amount to a revitalization and clarification of the monism-dualism debate, and, as with the chapter on the ILC, very detailed criticism of texts of legal theory and international law. Only at this point does the author return to the series of

⁸ Pravda, Oct. 31, 1956, at 1.

Egyptian treaties, leaving that subject immediately to launch into an exhaustive exposition of the roots of Israeli and Palestinian nationalism. The book ends with a plea for a new ontology of national community. In terms of structure, this book is exasperating.

However, in my view, the work merits close reading as an important effort to deepen the powers of analysis international lawyers should acquire to understand how an "irregularity" such as Egypt's conflicting treaties can arise and simply be left in the air. What I propose to do for the remainder of the review is give some idea of what I consider to be the high quality of much of the author's conceptual work, before I take issue with his central thesis about history, liberalism and nationalism. In my view, the thesis, however difficult, should be read and debated by international lawyers.

Binder treats legal argument as the articulate and reflective expression of visions of the good society, and only partly as a function of their interests. He opposes this both to a legal formalism that treats decision making as a technical matter of rule application, and to instrumentalists who claim knowledge about the consequences of legal rules that no human being could have and who neglect their content (p. 2). Given this framework for the analysis of a vast panorama of practice, he concludes that his investigation has revealed a discourse divided against itself, because international law contains contradictory propositions resting upon profound ambivalence about the legitimacy of international institutions (p. 120). I think Binder amply demonstrates this thesis.

For instance, in the examination of treaty conflict before the ILC, he states that setting out the case for the preferred rule involves mapping the political culture of international society rather than simply describing a theory. He has already elaborated a framework for classifying treaty conflict in terms of a property rule and a liability rule. The former makes treaty conflict an unallowable interference with an objective right, while the latter does not affect treaty validity and merely gives a right to compensation for injury. He points out that conventional legislative history will not be revealing, because statements by ILC members are usually laconic and vague.

Instead of conventional analysis, Binder engages in deconstructive analysis, employing the techniques of structuralism, not to expose stable structures of meaning that make communication possible, but to expose the conflicts that enable misunderstanding (pp. 50-51). Thus, Binder sets out to identify, from a close examination of the work of two rapporteurs, ambivalence between the property view (which attributes validity to the first treaty) and the liability view (which attributes validity to the second treaty), with indifference as to which of the two treaties should be performed. Such ambivalence between the property and liability views has been interpreted as an attribution of equal validity to both treaties; yet the equal validity of both treaties would entail a view of treaty expectations as liability entitlements. Why did the ILC accept this? The property view is dependent upon the claim that performance of treaties is a peremptory norm. Since the ILC would not go this far, it drew back to the ground that strong institutions of international law were lacking. The final draft is not so much an endorsement of a liability rule as a decision not to protect treaty entitlements at all (pp. 63-64).

A second, and rather more problematic, if stimulating, style of argument appears in Binder's interpretation of Article 62 of the Vienna Convention on the Law of Treaties. Taking paragraph 1(a) and 1(b) together, it may appear that the article gives effect to two opposing theories of contract and the doctrine of *rebus sic stantibus*, viz., that adjudication may discover and give effect to the intentions of the parties, or it may violate them by engaging in a substantive review of the treaty's terms. However, this conundrum can be avoided if one adopts a German metaphysics of contract rooted in the organic imagery of Romantic political thought. Within this tradition, law, embodying the consciousness of the community, transcends its written expressions. It gives effect to communal, rather than individual, will. If one rereads Article 62, one could then give paragraph 1(a) the interpretation that the parties are not bound by the exact terms of the treaty. Paragraph 1(b) provides a criterion for the application of paragraph 1(a): the circumstances essential to the intent of the parties are those that affect the fairness of the bargain between them. This is, in my view, a skillful and erudite task fulfilled by doctrinal commentary.

However, Binder is on weaker ground when he says that some members of the ILC showed support for this view. Yugoslavia does not stand as particularly authoritative against the firm adherence of many Western jurists to a stricter view of the importance of the intention of the parties, which favors the unavoidable existence of the conundrum with which Binder began his analysis. Even more questionable is his sweeping statement that the method of interpretation that he prefers is an outgrowth of the intellectual milieu of 19th-century nationalism. There are immense theoretical difficulties in Binder's method of doing intellectual history.

I take chapter 7, "The Case Against a Property Rule," to be crucial. I agree completely with Binder's determination to tackle the question whether a state can irrevocably commit itself to a treaty at the level of the political philosophy of freedom of contract and of state autonomy as related to this freedom. Equally, I agree that it is essential, if one is to understand this as a problem of "Western legal culture," to look to the Roman, especially public, law tradition and to the transition from the feudal to the Renaissance approaches to public law, in particular the power or capacity of public authority to contract. As well, there is no doubt that "Western legal culture" has also been influenced by doctrines of state necessity or reason of state, which have become linked to some modern theories of nationalism. Consequently, one can see why Binder traces what he calls republicanism, which he links to nationalism, through Machiavelli to Rousseau. Yet even without going on to follow Binder's elaboration of an imperial model of the state and public order through Bodin and Hobbes—implying a view of freedom as individual, with the state favoring the market and possibly supporting a cosmopolitan international order anxious to encourage free trade—one can see the difficulty that Binder gives himself.

How do you offer a comprehensive understanding of state autonomy as a subspecies of freedom in Western political culture in about 18 pages (pp. 67–85)? In fact, the text is supported only by about two pages of notes. Many of these refer to other parts of the work. A major part of the analysis con-

cerns the so-called great thinkers and Binder has certainly considered them. However, the outcomes in terms of statements about history are not acceptable as objectively verifiable analysis. For instance, Binder sums up the medieval period with such phrases as "[v]irtue was omnipresent in the feudal world and since everything was virtuous, nothing could be changed." It is Pocock who is taken to explain that the Renaissance civic humanists conceived of virtue and fortune as agonistic forces, which leads, after a number of steps, to the conclusion that the republican, and also nationalist, model of the state is essentially concerned to preserve identity. Hegel's interpretation of the relation of civil society to the state is, a little later, taken to explain in large measure how the needs of international commerce were not enough to guarantee an international order from the late 19th century to the world wars. To be fair to Binder, he has more to say about how national identity may be reconciled to some kind of international community in concluding sections on dialectic history and dialectic identity.

If I return to the task that Binder originally set himself, I may be able to unravel what is happening here. Legal argument is to be the articulation of visions of the good society. It is therefore better to engage in arguments as to the merits of the good society. These will not be coherently stated in the so-called state practice, which is only going to yield diplomatic history. It cannot be grasped from legal writers, who after Grotius, and perhaps Vattel, are too mediocre to understand the issues. Hence, one resorts to the works of really serious thinkers such as Rousseau and Hegel and tries to understand how they may have had an impact on international society or may be used to grasp the structure of that society. This is why the heart of the book is to be found here, rather than in the technically more familiar, and therefore professionally safer, deconstruction of the meager output of the ILC. I think the effort is commendable. I could not agree more with the author that legal formalism is sterile and (sociological) instrumentalism too ambitious. Yet the task that Binder has set himself is a work of generations and thousands of pages. As such, it is not recognizable as international law work in the modern, "professional" sense and it is none the worse for that.

ANTHONY CARTY
University of Glasgow

A Diplomat's Handbook of International Law and Practice (3d rev. ed.). By B. Sen. Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1988. Pp. xli, 606. Index. Dfl. 225; \$125; £65.

Recent years have brought a surge of activity in international law concerning diplomatic and consular practice and relations. This third edition of the *Handbook* is intended both to reflect the steady evolution of law and practice and to identify specific trends. The *Handbook* in no way attempts to exhaust the topics; instead, it is intended only as a reference work. As such, it is useful not only for the diplomatic or consular official, but also for the legal practitioner or student. The book is well organized and consists of three main

parts: diplomatic relations, consular functions and selected international law topics. There is a complete table of cases, a fine index and an excellent bibliography.

Part three, "Selected Topics," is especially valuable in that it treats a host of currently important and controversial issues. These range from dual nationality and the rights of aliens to cross-border business and professional activity, and also include recent developments in recognition of states, asylum and the perennial question of state immunity. For each of these topics, Dr. Sen examines the latest treaties, cases and commentary and, in this reviewer's opinion, succeeds in identifying some very important points of evolution in the law.

If one were to criticize the *Handbook* on any score, it might be that it may attempt too much. Almost throughout, the book suffers from a certain tension between the size of the topic and the depth of analysis. At the same time, it does clearly achieve much more than its title implies and, accordingly, is an extremely valuable reference work.

JOHN R. LACEY
Of the Connecticut Bar

International Human Rights (in a Nutshell). By Thomas Buergenthal. St. Paul: West Publishing Co., 1988. Pp. xxiv, 283. Index. \$12.95.

"In a nutshell," says the dictionary, means putting something concisely, epitomizing it, capturing its essence. Such is the promise of the West "nutshell" series. To this enterprise, brevity is vital. Given titles like the present one that embrace whole fields of law, authors must struggle to fit broad coverage into tight space. This book's author has impeccable credentials for such a task. Thomas Buergenthal, distinguished professor and scholar, respected international judge, broadly experienced as to human rights in each of these capacities, fits the bill.

Buergenthal spells out his two goals. First, he means to write a "concise overview" that will emphasize the field's institutional, as well as doctrinal, aspects. Such a book, providing students with essential background information, would free classes to probe conceptual and policy problems. As a companion goal, the author intends this nutshell to be a "self-contained introduction" that could be used as a basic text for a survey course, and as a text to which the uninformed, but interested, could turn.

In stressing doctrine, Buergenthal remains within the traditional framework of the nutshells. They emphasize substantive rules, the law's black-letter material, often to the exclusion of institutional, process-oriented, policy-oriented or philosophical considerations. Systematic presentations of court-made, legislative or administrative rules, they read like miniature treatises about what "the law" is. Law, in brief, is doctrine, shorn of context and history. The exceptions in the nutshell series, like the broader-ranging volume on administrative law, only highlight the general practice.

Buergenthal warns us that such an approach would be fatally flawed in the international arena. One cannot stop at restating the legal norms regulating

conduct, the oughts and ought-nots for states or individuals. International organizations, radically different in structure and function from their state equivalents, form part of a basic understanding of human rights law. They are the "principal actors and lawmakers."

This book's emphasis, then, differs from the usual nutshell, in that much text describes international human rights bodies. Nonetheless, the spirit remains within the nutshell tradition. Whether summarizing the norms expressed in major treaties, or sketching the institutions created by the United Nations and regional human rights systems, Buergenthal stresses and often looks exclusively at treaties' formal frameworks: the catalogs of rules about rights and duties, and rules about the constitution, processes and powers of human rights institutions.

The chapters bursting with so much information carry us through a historical introduction, the international bill of rights and other UN-related treaties, the UN Charter-based institutions, the substantive norms and constitutive rules of the European, inter-American and African human rights systems, the Geneva Conventions, the U.S. record with respect to international human rights, and nongovernmental organizations. Occasionally, the text breaks from the formal, rule-descriptive model. The sections on the historical background to modern human rights law, and on the U.S. human rights record, point briefly toward more conceptual and policy-oriented themes.

How does the book measure up against this first goal of providing background information? Buergenthal describes tersely and comprehensibly some very complex matters, such as the relation between the Charter and convention-based systems in the inter-American arena, and the relations among the Geneva Conventions and the two Additional Protocols. He writes lucidly and organizes clearly. He keeps the text lean. Students' recourse to it will spare the teacher informational lectures, or the burden of compiling similar descriptive material from many different primary and secondary sources.

Within this first goal, the book will serve students better if examined on specific problems rather than read in its entirety as an introduction. Its paraphrasing of the basic norm- and institution-creating treaties is generally bare, uninformed by descriptions of historical, political or other contexts. The sheer weight of so much doctrine, the endless variations among treaties and institutions, make it unlikely that readers would want to attempt the book as a whole. Without organizing themes or a comparative framework to serve as guide, it would be impossible to grasp and retain this mass of information.

What the author describes as his second goal is more complex. A "self-contained introduction" or a book for novices constitutes a radically different undertaking. These purposes are close to the concept of a "nutshell" sketched above—the capturing of the essence.

If the book realizes Buergenthal's first goal, it falls well short of this second, more ambitious one. The paramount problem lies in its tenacious hold on the norms formally governing the world of human rights. Buergenthal

barely treats the realities of human rights—the realities, so often, of their violations—or of the institutions meant to articulate and enforce them. We stay with law on the books in its most formal expressions.

There are related problems. Descriptions are not located within a thematic framework, even of basic themes like the conflict between state sovereignty and international regulation. The text rarely notes the indeterminate, porous quality of rules, and thus the significant disputes over the meanings of basic human rights norms. It barely hints toward the deep dilemmas in contemporary human rights—problems of justification, of cultural relativism, of tensions between the advocacy of civil-political and economic-social rights, or between the advocacy of individual and group rights. The book gives little sense of the extent to which reach has exceeded grasp, to which norms of conduct have gone beyond effective means for their implementation. For all the vibrant successes over four decades of the human rights movement in standard setting and institution building, we still must take a gloomy view of international enforcement and protection.

But are these reasonable criticisms of a book prepared within the tradition of the nutshells? The missing themes that I have noted are, after all, much discussed. Literature about them, good and bad, abounds. Choice is necessary, and rules constitute the core of law, the background for deeper study. Nutshells on fields like tort or welfare law concentrate on rules made by courts, legislatures and administrative agencies. They do not trespass on “other” domains like political theory, geopolitics, moral justifications, economic analysis, legal realism or critical theory. They do not probe the workings of institutions. Why should we hold a volume on human rights to a more exacting standard?

Whatever the inadequacies of nutshells on domestic law subjects, a rule-oriented approach there has more to recommend it. Even if descriptions of rules are as formal as *Restatements*, students provide some of the cultural and political context within which rules are debated and applied and some sophistication about the arguments and powers of courts. Moreover, authors of such nutshells rarely hold to bareboned descriptions of rules. Whether describing common law, regulatory fields like antitrust, or constitutional law, these books cannot escape judicial decisions. When summarizing the reasoning of courts, they necessarily raise basic problems like contradictions in legal argument and the resulting rules, or choice among justifications and policies. Buerghenthal notes several judicial decisions, but he does so briefly and descriptively rather than in an analytic or exploratory way. When he does penetrate the surface of rules to ponder their meaning and import, as with common Article 3 of the Geneva Conventions, the discussion is helpful.

Outside the group of relatively homogeneous countries within the European liberal tradition and system, human rights law does not offer comparable judicial sources of argument and interpretation. National or international court opinions that wrestle with treaty norms are remarkably few. Other institutions, principally the committees and commissions and councils of international organizations, must assume these tasks as best they can—most prominently, the comments and views of the Human Rights Commit-

tee under Article 40 of the International Covenant on Civil and Political Rights or its Optional Protocol.

The indeterminate meanings and conflicting understandings of treaty provisions are starkly portrayed, then, not by courts but in other relevant forums: debates of delegates or experts within international human rights bodies, working groups engaged in drafting declarations, reports of investigatory bodies constituted by intergovernmental (IGO) or nongovernmental (NGO) organizations, pronouncements by national executives or legislatures, scholarly or polemical writings. What is the reach of a right to life, to political participation, to protection against private-sector discrimination, to food? What limits can be imposed on speech or association? In the culturally and politically diverse international arena, how does one tackle such issues?

Paraphrasing the treaty lists of rights and duties offers of itself no insight into these problems of human rights law, some of them shared with law in general, some distinctively strong or puzzling because of the international and comparative context in which human rights issues arise. If anything, catalogs of norms create an illusory sense of completeness and consensus, particularly when unaccompanied by examples of the notorious gaps between treaty commitments and state practices.

If a nutshell is meant to epitomize, would it not be preferable to abandon the effort at formally complete descriptions of many treaties, and instead to illustrate a few major issues? The general coverage of human rights conventions could be rapidly communicated to students, who could then be introduced to characteristic problems in the typical forms in which they arise—perhaps analyzing problems through an account of an IGO or NGO report relating (perhaps uncertain) norms to (surely disputed) facts, or an account of a few decisions of committees or courts drawn from different organizations that would underscore the differences between national and international frameworks for decision. Views of astute critics and defenders of the international human rights system could enrich such illustrations. Ideologies, geopolitics, liberal and authoritarian governments, competing national and international orders, strong and weak states—such factors could be grasped as central, rather than peripheral, to the understanding of treaty rules, or of whatever counts as “human rights law.”

What attention should be given to institutions and processes? I agree with Buergenthal that an introductory book must deal with the institutional context. But if we seek to capture the essence, would it not be preferable to hold the abstract and ahistorical paraphrasing of constitutive rules to a minimum, and to be attentive to the dialectic between rules and performance, to questions of function and effectiveness? Little purpose is served by giving the student bare detail about the intricacies of one or another institution’s procedures, such as time periods or paths toward appellate review.

Here, too, suggestive illustrations would serve better than extensive descriptions of rules. One might identify themes to be examined comparatively among a few institutions—themes like the choices between a membership of governmental delegates or of independent experts, between different ways of arranging voting procedures or between different enforcement tech-

niques—and then discuss how such choices were resolved and why they were so resolved in the selected institutions. One might follow a given case in any human rights body from, say, the formation of an investigatory group to the debate about the resulting report and attempts to implement it. At times, as when noting the politicization of the Human Rights Commission, Buerghenthal starts in such a direction, but his comments are brief. We lack illustrations, concrete facts and countries, that would explain descriptions of processes like petitions under Resolution 1503.

A book of the type that I have described would not be meant to serve as a reference work, but rather as a conceptual and policy-oriented introduction. Through its analysis and description, enriched by particulars and contexts, it would address today's basic issues and dilemmas. It would question and provoke, providing a framework for study that would give significance to the details later acquired by students. Surely it would signal the major issues today in the world of human rights, such as conflicts between developed world and Third World views of basic rights. Surely it would illustrate the tensions between claims of universality and of cultural contingency in fields like religious freedom or gender discrimination. And such a book would underscore the ways in which today's international human rights law, despite all its defects, represents an astonishing advance. If much remains a promise to be realized, at least human rights law now has a place, with its aspirations rooted in a new discourse and new institutions whose first four decades may be a prelude to larger achievements.

What I have done, of course, is less to criticize Buerghenthal's execution of his primary program, which is by-and-large excellent, than to criticize that program itself. His book brings together a great amount of basic information, lucidly and concisely. It thereby realizes a pedagogical purpose that will aid teachers. But this is not the significant purpose. Human rights law needs an introduction of the type sketched above, both for starting students and for outsiders who want a good look at a mystifying field. Someone ought to write that book and say it all in, well, a nutshell.

HENRY J. STEINER
Harvard Law School

Article 15 of the European Convention on Human Rights: Theoretical and Jurisprudential Approach. By Paroula Naskou-Perraki. Athens: Editions A. Sakkoulas, 1987. Pp. xxiv, 276. In Greek.

This book has all the welcome characteristics of international law books written by the present generation of Greek lawyers. It is written in the popular Greek language (*demotiki*), it refers extensively to Anglo-American publications, it is critical rather than merely descriptive, and it relies on a thorough case study (referred to as "jurisprudence" in civilian terminology). The author is the product of one of the universities that sprang up in Greece during the last 40 years, complementing the traditional law schools of the University of Athens and the more modern University of Salonika.

As the title indicates, the book deals with Article 15 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention). Article 15 says:

(1) In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

(2) No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.

(3) Any High Contracting Party availing itself of this right of derogation shall keep the Secretary-General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary-General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

The book has a short introduction arguing in general terms that states of siege and public emergency justify the suspension of some constitutional provisions. Chapter 1 of part I deals with a normative comparison of the Universal Declaration of Human Rights, the Constitution of the International Labour Organisation (ILO) and the European Social Charter, on the right to derogate from their respective obligations. Neither the Universal Declaration nor the Constitution of the ILO contains derogation clauses. Article 29 of the Universal Declaration provides that everyone has duties to the community in which he or she lives, and that the exercise of rights and freedoms is only subject to such limitations as are determined by law for securing recognition and respect for the rights and freedoms of others and for meeting the requirements of morality, public order and the general welfare in a democratic society, as well as the purposes and principles of the United Nations.

Chapter 2 of part I deals generally with international humanitarian law. It covers common Article 3 of the four Geneva Conventions of 1949, together with the Additional Protocols of 1977, which require minimum standards in the treatment of wounded, sick or shipwrecked members of the armed forces, prisoners of war and civilians during international or other armed conflicts. The minimum standards apply a fortiori to a state of public emergency not amounting to an armed conflict.

The second part of the book focuses on the right of derogation in Article 15 of the European Convention, Article 4 of the 1966 Covenant on Civil and Political Rights and Article 27 of the 1969 American Convention on Human Rights. The comparison is followed by an incisive analysis of the prerequisites for the application of Article 15 of the European Convention.

The book frequently refers to decided cases including, as expected, the cases against Greece before the European Human Rights Commission in 1967 and before the ILO in 1968. Both cases concerned violations by the military dictatorship of April 21, 1967. The case before the European Human Rights Commission dealt with alleged violations of the European

Convention, and the case before the ILO with violations of the freedom of association and the right of collective bargaining. In both cases, Greece unsuccessfully raised as a defense the right to derogate from its obligations, because of an alleged state of public emergency caused by a "communist" threat.

There are several additions to the text, including a very useful appendix containing the facts of the five cases in which the European Human Rights Commission and the European Human Rights Court considered Article 15 of the European Convention; a list of territories relative to which, and time periods during which, contracting states to the European Convention took measures, pursuant to Article 15, that derogated from their obligations under the European Convention; and finally, a comprehensive Greek and international bibliography. There are minor omissions in the citations to law reviews, in one case by the inadequate reference "A. Bar A.," and in others by giving only the year and not the number of the volume.

The book contains an excellent and comprehensive analysis of normative and institutional interrelations. The introduction could have included some reference to the state of necessity as providing the jurisprudential background to the state of siege. A short comparison between constitutional law treatment and public international law treatment of the state of siege, either in the introduction or elsewhere, would have strengthened the leading theme of the book—that some inalienable rights are not affected by states of public emergency. Parallel considerations apply to some international obligations that are not subject to a right to derogate. An example, not mentioned in the book, is the obligations under the 1965 International Convention on the Elimination of all Forms of Racial Discrimination.

Reference should have been made in part I to Article 1(3) of the Charter of the United Nations as providing the most important basis for promoting and encouraging respect for human rights and for fundamental freedoms. These, however, are minor criticisms that hardly detract from the excellence of the book.

The author shows a commendable restraint when referring to the violations committed by the military dictatorship of April 21, 1967, violations that any Greek deeply resents and condemns both as inhuman and un-Greek.

GEORGE A. ZAPHIRIOU

George Mason University School of Law

A Future Preserved: International Assistance to Refugees. By Yéfième Zarjevski. Oxford and New York: Pergamon Press, 1988. Pp. xiv, 280. Index. £38; \$65.

In the foreword of this book, the then High Commissioner Poul Hartling refers to the pioneer work of Fridtjof Nansen, the first High Commissioner for Refugees of the League of Nations. Nansen, even without funding, gave refugees protection and created the "Nansen Passport," the first interna-

tional travel document for refugees. Today, Hartling says, the High Commissioner does not have to threaten to resign, as Nansen did in 1923, to have his appeals for funds heard; the international community seems to have accepted responsibility for helping the thousands who flee from their home countries.

In his first chapter, Zarjevski, who has held various positions in the Office of the United Nations High Commissioner for Refugees (UNHCR) and is thus an expert on the refugee problem, describes the tortuous development of work for refugees. Both the First and the Second World Wars left masses of people unsettled. One and a half million left Russia alone after the Soviet Revolution and during the following civil war. This led, on the initiative of the International Committee of the Red Cross (ICRC), to the creation, by the League of Nations, of the Office of High Commissioner for Russian Refugees, whose first incumbent was Nansen. Between 1924 and 1929 the tasks of relief were entrusted to the International Labour Organisation (ILO), while the protection of refugees and the definition of their legal status became Nansen's main responsibility. In 1929 both tasks were again combined in the Office of High Commissioner placed under the authority of the Secretary-General of the League. After Nansen's death in 1930, the legal and political protection of Russian and assimilated refugees ("Nansen Refugees") was assumed by the regular organs of the League. The Nansen International Office was created as an autonomous body, under the authority of the League, for the humanitarian tasks relating to relief. When people started leaving Germany, and later Austria, a High Commissioner for Refugees from Germany was also appointed.

Both the Nansen and the Germany offices were liquidated in 1938 and replaced by the High Commissioner's Office for All Refugees under the protection of the League of Nations. In existence for 5 years, it undertook the protection of some 800,000 refugees from Russia, Armenia, Assyria, Germany, Austria and the Sudetenland, most of whom had become refugees because of revolutions and territorial changes. The High Commissioner had to choose implementing agencies and to entrust them with the use of material aid, made available by governmental and private sources.

On the initiative of President Franklin D. Roosevelt, a conference was held at Evian in July 1938 to set up an Intergovernmental Committee for Refugees (IGCR) (particularly for German and Austrian refugees). During the war, Sir Herbert Emerson, in his capacity as High Commissioner of the League and Director of the Intergovernmental Committee, was the liaison between the League of Nations High Commissioner and the Director of IGCR; both offices had their seat in London and cooperated closely.

When 30 million persons were displaced during and after the Second World War, the United Nations Relief and Rehabilitation Administration (UNRRA) was established for the material reconstruction of war-torn Europe and the repatriation of displaced persons.

On December 12, 1947, the UN General Assembly placed the refugee problem on its agenda but left the effort of finding a solution to the Economic and Social Council and a special ad hoc committee. After 3 months of

discussion, the committee created the International Refugee Organisation (IRO), a temporary specialized agency of the United Nations.

The new organization assumed financial and operational responsibility for the work done by IGCR and UNRRA on behalf of refugees. The major tasks were repatriation, care and assistance, legal and political protection, and the resettlement and reestablishment of refugees within its mandate. Only 75,000 chose repatriation; more than a million were resettled, mainly in the Americas and Australia. Some 400,000 remained in Europe, and there were 5,000 European refugees in the Far East. As IRO's work neared completion, its General Council warned the United Nations that the task of legal and political protection would continue and drew attention to the "hard core" of refugees still living in camps in Europe.

This led the UN General Assembly to establish a High Commissioner's Office to provide international protection for refugees, and to seek "permanent solutions for the problem of refugees by assisting Governments, and, subject to the approval of the Governments concerned, private organizations to facilitate the voluntary repatriation of such refugees, or their assimilation within new national communities."

The mandate of UNHCR extends, according to its Statute, not only to the so-called statutory refugees, i.e., those considered as refugees in the prewar Instruments and the Constitution of IRO, but also to

[a]ny person who . . . owing to well-founded fear of being persecuted for reasons of race, religion, nationality or political opinion, is outside the country of his nationality and is unable or, owing to such fear or for reasons other than personal convenience, is unwilling to avail himself of the protection of that country¹

Dr. van Heuven-Goedhart of the Netherlands was the first High Commissioner. He found it impossible to find permanent solutions for refugees without funds and declared himself "unable to administer misery." The Ford Foundation donated \$3 million for durable solutions for refugees, and the success of this operation led the General Assembly to authorize the High Commissioner to appeal for funds, an activity that was institutionalized in 1957. The governments benefiting from the aid were expected to make matching contributions. The African countries did so by placing land at the disposal of rural refugees for cultivation.

The specific responsibilities of the High Commissioner continue to develop. While competent to determine whether an *individual* falls within his mandate, it is much more difficult for him to do so in mass movements such as those that have occurred in Africa, Asia and Latin America. By 1966, the UN General Assembly made clear that it wished the High Commissioner to "continue to provide international protection to refugees who are his concern and to promote permanent solutions to their problems." This mandate exceeded his original mandate and was to cover displaced persons in refugee-like situations and victims of man-made disasters outside their country of origin.

¹ GA Res. 428, 5 UN GAOR Supp. (No. 20) at 46, UN Doc. A/1775 (1950).

The author provides a lively description of three cases that were solved by the High Commissioner's protection activities. The 1951 Convention Relating to the Status of Refugees is an important tool in these efforts. Particularly important is the principle of *non-refoulement*, i.e., that no refugee may be forcibly returned to his country of origin, a principle that by now may be regarded as a general principle of international law. The definition of refugee in the Convention as amended by the Protocol of January 31, 1967, is very similar to the definition in the High Commissioner's Statute. His task is to promote accessions to the Convention—it has by now been ratified by 106 states—and to see to it that it is effectively implemented. While *non-refoulement* is the duty of states, it is not identical with the grant of asylum, which is a sovereign right of states. However, many countries use the definition in the Convention as amended by the Protocol as a yardstick for the grant of asylum.

In the following chapters, the refugee situation and the assistance given in Europe, Africa, Asia and Latin America are described. Two particularly tragic situations may be mentioned. First, the mass influx of refugees into Zaire (the Democratic Republic of Congo until 1970) in the early 1960s, itself torn by civil strife at that time. Many came from Angola, starting when that country was still a Portuguese colony and continuing after independence as civil war raged. Others came from Rwanda, Burundi and the Lumpa sect in Zambia. The ILO came in to establish a regional development plan that was to benefit the local, as well as the refugee, population. The operation was interrupted twice by internal unrest, rebel activities and the hostility of the local population toward Rwandan refugees. In November 1963, a UNHCR/ILO mission tried to start the plan again, but it had to be broken off because of rebel activities, disorder and violence. The UNHCR representative sought to transfer Rwandan refugees to a village in the south. While on a journey there, he and the director of the ILO project were killed by rebels. Two days later, the Government issued an expulsion order against foreigners, in particular Rwandan refugees. As a last resort, UNHCR organized the transfer of the Rwandan refugees to Mzawi in the mountains of Tanzania.

Another tragic story is that of the refugees from Indochina. In response to appeals from the Governments of Laos and Vietnam, UNHCR was the first in the field, even before the hostilities between the United States and the Vietcong came to an end. In 1970–1971, about 70,000 refugees returned to Laos by air, land and river, and were assisted by UNHCR in their reestablishment; about 82,000 traveled home by their own means. All were helped by UNHCR in their reintegration.

When the revolutionary party Pathet Lao overthrew the pro-Western government of Laos in a coup d'état in 1975, a mass movement of refugees from Laos into Thailand occurred. Thailand and Malaysia gave only temporary refuge to them on the understanding that they would be resettled elsewhere. Singapore accepted them for 3 months only, against payment by UNHCR and a written guarantee that they would be resettled. Some 270,000 ethnic Chinese living in Vietnam were integrated back into southern China with the help of UNHCR before the closure of the border in July 1978.

As to the Kampuchians fleeing into Thailand from the genocidal regime of the Khmer Rouge and the fighting between them and the pro-Vietnamese Government, about 40,000 were sent back into Kampuchea by force (*refoulé*), 9,000 returned voluntarily and hundreds of thousands were only allowed to remain at the border, receiving food and other care from an ad hoc body, the UN Border Relief Organization. In 1978 a new program established five refugee centers in the south of Vietnam at a cost of some \$10 million.

As to those fleeing by sea, mostly Vietnamese, many of them did so in boats that were not seaworthy and many drowned. Others of these "boat people" were picked up by passing ships, although many ships did not stop, fearing delays if they tried to disembark the refugees in ports. In 1981 UNHCR reached a Memorandum of Understanding with the socialist Government allowing for an orderly departure program of separated family members. Flights of "boat people" continued, however. Many boats were attacked by pirates who killed or raped the refugees before sinking the boats. After a conference held in Geneva on July 20 and 21, 1979, resettlement quotas went up—the resettlement countries soon recognized the adaptability of the refugees, which encouraged their willingness to accept more.

The book is well illustrated and provides maps. Annexes contain extracts from the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol and a list of states parties to these instruments; extracts from the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa and from the conclusions of the High Commissioner's Executive Committee on international protection; material on the geography of exile; and a list of UNHCR expenditures from 1965 to 1981.

Experts often write for experts. This book is different. It tells in a simple, narrative way about the present refugee situation and assistance given to refugees. It should prove an excellent means to acquaint the public at large with this situation and to promote understanding and sympathy for the needs of these victims of man's inhumanity to man.

PAUL WEIS
Geneva

Legal Responses to International Terrorism: U.S. Procedural Aspects. Edited by M. Cherif Bassiouni. Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1988. Pp. liii, 454. Dfl.225; \$120; £69.

M. Cherif Bassiouni, professor of law at De Paul University, has collected 17 scholarly essays by as many authors and added 7 documentary supplements that altogether introduce and analyze new governmental, mostly U.S., approaches to international terrorism. These new approaches seem primarily to respond to the troubles in Ireland and Israel/Palestine, but the authors have woven the new statutes, cases and conventions into more general fabrics of international criminal law, international humanitarian law, international conflict of laws, and the politics and morals of individual and state-sponsored terrorism.

The book, following an introductory essay, is broken up into four parts: four essays on "Legislative Aspects," six essays on "Enforcement Aspects," three essays and two documents on "Policy and Crisis Management," and three essays and five documents on "International Co-operation." Although the structural division and organization of the book are sound, the diverse essays and documents are not as well integrated as they deserve to be. The volume should have an introductory essay that weaves the essays into a meaningful whole. At the very least, this sort of book should have an index.

The essays are very different in character. Such contrasts make good reading. Bassiouni's *Introduction: A Policy-Oriented Inquiry into the Different Forms and Manifestations of "International Terrorism"* follows the New Haven School of jurisprudence, using its organizational schema (e.g., (1) Definition, Characterization and Context; (2) Identification of Certain Characteristics; (3) Classification of Motives and Strategies), and its language: "Distinctions as to goals, means, perpetrators and victims are based on socio-political judgments in order to devise modalities of social and legal controls" (p. xv).

Contrarily, Christopher L. Blakesley, professor of law at Louisiana State University, adopts a traditional Harvard categorization of legal forms in *Jurisdictional Issues and Conflicts of Jurisdiction* to organize and analyze cases and practices dealing with extraterritorial jurisdiction over terrorists. Robert Friedlander, then professor of law at the University of Oklahoma, gives a Washington insider's account in *The U.S. Legislative Approach*, while Christopher Pyle, professor of constitutional law and politics at Mount Holyoke College, views current politics from a philosophical Locke vs. Hobbes perspective in *The Political Offense Exception*. Each essay is perceptive in its own context. Watching the essays' contexts clash both illuminates the subject matter and tells us a fair amount about how differently one is permitted to "do" academic international law nowadays.

MARK W. JANIS
University of Connecticut

Međunarodno pravo mora i izvori međunarodnog prava (The International Law of the Sea and the Sources of International Law). By Vladimir-Đuro Degan. Zagreb: Informator, 1989. Pp. xii, 193. Index.

This textbook on the international law of the sea and the sources of international law has four main sections: "Sources of International Law," "The Development of the Law of the Sea," "The Legal Regime of Different Parts of the Sea, Sea Depths, and Sea Bottom" and "The Status of a Vessel at Sea." The author has designed the book to serve multiple purposes. Law students can use the first and third parts as replacements for outdated chapters of general international law textbooks. The second and third parts form a text for law school courses on the law of the sea. The fourth is meant primarily for use in maritime courses for future ships' officers and others. The author has succeeded in writing a book that is sophisticated and comprehensive

while remaining clear and concise. There is a useful list of awards by international arbitral and judicial tribunals and a comprehensive index. Extensive notes refer the student not only to Yugoslav works on the law of the sea, but also to leading articles and books in English, French, Russian and other languages. The author modestly suggests that readers wanting more comprehensive treatment refer to Darovin Rudolf's *Međunarodno pravo mora* (1985).

The author presents the law of the sea not as a static set of rules for students to memorize, but as an ongoing political process. He clearly demonstrates the conflicts of interest between countries with and without fishing fleets and with and without continental shelf resources. He shows the ongoing clashes and compromises of these interests. The text carefully distinguishes generally accepted rules from the many controversial issues. It presents balanced accounts of the different sides of the controversies and perceptive analyses of the economic and political interests behind different positions.

Yugoslav students are lucky to have such an excellent textbook in an accessible language. Others wishing to sample the work of the author may wish to read some of his English-language publications.¹

PETER B. MAGGS

University of Illinois at Urbana-Champaign

Negotiating the Law of the Sea. By James K. Sebenius. Cambridge and London: Harvard University Press, 1984. Pp. vii, 251. Index. \$20.

"This book is built around an interpretive account of a negotiation in which I took an active part." These opening words suggest both the strengths and the shortcomings of the book. Its principal strength lies in its detailed account of the negotiation of financial arrangements (that is, payments to the Sea-Bed Authority by investors in deep seabed mining) with respect to mining beyond the limits of coastal state jurisdiction. It was these negotiations in which the author participated and to which, in the opinion of many other participants including this reviewer, he made a significant and positive contribution. Anyone who wishes an informed and detailed understanding of the nature and complexity of the deep seabed mining negotiations will welcome this book as a significant contribution to the literature.

There was, of course, much more to the law of the sea negotiations than deep seabed mining. The attempt to broaden the scope of the work to a general review of the law of the sea negotiations is less successful, perhaps inevitably in any single-volume work that endeavors to probe deeply. The author's voice shifts from that of active participant to observer. Conclusions drawn from primary sources and firsthand experience become intertwined with those based on secondary sources and impressions of others. These conclusions are, nevertheless, carefully researched and well presented.

¹ See, e.g., Degan, *Internal Waters*, 1986 NETH. Y.B. INT'L L. 3; Degan, *Equitable Principles in Maritime Delimitations*, 2 ESSAYS IN HONOUR OF ROBERTO AGO 107 (1987).

This is followed by an ambitious attempt to draw some general conclusions about complex multi-issue multilateral negotiations, including some fascinating observations on "negotiation arithmetic" such as the effect of adding or subtracting participants and issues. There is a good deal of interesting material here. Those whose particular interest is the law of the sea might wish, however, for more precise substantive detail regarding law of the sea issues and objectives, and relationships between them, that may exist independently of particular negotiating dynamics.

There is an entire literature (not to mention much governmental policy) that proceeds on the assumptions that the Law of the Sea Conference was essentially about deep seabed mining and the questions of political economy evoked by that issue, and that the most important lessons to be derived from the conference are linked to the apparent failure of the negotiations regarding mining for hard minerals in the deep seabed beyond coastal state jurisdiction. This book fits largely, although not entirely, within that tradition, and significantly enhances its objectivity and erudition. Some observers, including this reviewer, nevertheless believe that this tradition pays insufficient attention to what most governments think are the most important interests engaged by the law of the sea, namely, defense, navigation and communication, fishing, hydrocarbon exploitation and environmental protection.

BERNARD H. OXMAN
Of the Board of Editors

The Theory and History of Ocean Boundary-Making. By Douglas M. Johnston. Kingston and Montreal: McGill-Queen's University Press, 1988. Pp. xiii, 445. Index. \$39.95.

In this book on maritime boundaries, Professor Douglas Johnston ranges far beyond the popular subject of maritime boundaries between opposite and adjacent states. While such boundaries are his major focus, he considers all other maritime boundaries, from the baseline for the measurement of the territorial sea to the seaward limit of the continental shelf. It is his thesis that all maritime boundary questions should be resolved by use of a "functional" theory of ocean management. To utilize this functional theory, it is necessary to consider the history of land and water boundary making, the purposes to be served by the maritime boundary in question, and the relevant technological, scientific, environmental and biological facts. As a consequence, this book covers a rather wide range of subjects.

We can be grateful to Johnston for placing maritime boundary making in context and for avoiding the limited perspective found in much modern literature on the subject. In the course of this study, the book does provide a thorough and comprehensive review of the modern cases in which maritime boundaries have been adjudicated. Johnston is rather critical of the state of the law and practice. He places much of the blame on Western-educated international lawyers and judges who, he says, favor "unitarian" rules divorced from "functional" and "facilitative" objectives.

The book, however, was not written merely to present another critique of contemporary maritime boundary issues. The author is more interested in heralding a new age in which maritime boundary issues would be resolved by use of functional solutions. His thesis eschews unitarian rule-based delimitations in favor of flexible management systems that would logically and efficiently manage the areas or resources that are the subject of modern ocean regimes. His is a world in which boundary lines rarely would be drawn; rather, cooperative arrangements and institutions would be established by interested states to address specified needs.

At present, Johnston is able to identify only a few arrangements that approach his preferred solution. He believes that these developments have started a trend away from unitarian boundary making towards more cooperative solutions. His preferred solution is found in the Torres Strait Treaty between Australia and Papua New Guinea and the report to Iceland and Norway of the Jan Mayen Conciliation Commission. Support is also drawn from passages in some maritime boundary judgments, and from the 1982 Convention on the Law of the Sea.

Unfortunately, he sees a trend that I am unable to discern. The Torres Strait and Jan Mayen solutions are only two of approximately 120 maritime boundary settlements. The others have limited, if any, functional elements. The trend may, in fact, be in the other direction. Notwithstanding the many general statements urging cooperation, the Law of the Sea Convention celebrates the triumph of expansionist coastal state jurisdiction over other, more functional solutions. The U.S.-proposed species-based fisheries regime was dead on arrival at the Third UN Conference on the Law of the Sea. The participating states quickly agreed to establish the arbitrary 200-mile exclusive economic zone. The Convention is replete with hortatory provisions calling for international cooperation and responsible management of ocean resources. Unfortunately, most of those provisions are joined neither with firm substantive obligations that would require that they be implemented, nor with compulsory dispute-settlement obligations.

Johnston suggests that the ICJ's refusal to permit Italy to intervene in Libya's continental shelf case with Malta led the Court to take a functional approach since it made reference to the geography of the Mediterranean region. While the Court did restrict the areas that were delimited as a consequence of third-state interests and did address the broad geographical context, it is hard to find support for the view that the boundaries themselves really were delimited on bases other than the geographical relationship between the two competing states. If the Court truly had been open to a functional solution, it would have permitted Italy to intervene and would have considered facts other than geography. More on point were the U.S. arguments to the ICJ in the *Gulf of Maine* case in support of a boundary delimitation based on resource conservation and management. These arguments were opposed by Canada and rejected out of hand by the Court, which only considered geography.

Johnston, however, is correct in prescribing a more functional approach to ocean management. Unfortunately, coastal states appear driven to continue

their territorialist approach to ocean issues. The road to functionalist solutions may first require that the lines be drawn and that jurisdiction be allocated among the coastal states. Once those allocations are made, states may find that they have a more tangible interest in the responsible management of resources and areas under their jurisdiction.

This may, in fact, be the lesson of the *Gulf of Maine* case. As the reader may know, the United States and Canada did negotiate a functional fishery management regime in an effort to sidestep the maritime boundary dispute. This solution was resisted by the affected U.S. fishermen. The agreements collapsed, leaving the United States and Canada with no choice but to address the boundary question. When negotiations failed, they turned to the ICJ to establish a line. The fishermen and their Governments have now learned that the line drawn by the ICJ did not solve the resource management problems. The United States and Canada are beginning to move toward reconsideration of the management issues. A functional solution may prevail, but first it required a resolution of the boundary dispute by unitarian, not functional, rules.

Over the long run, the functional demands do have substantial influence over ocean regime formation and change. Certainly, the EEZ and continental shelf regimes were the product of new technological developments, new resource exploitation activities and new resource management problems. These legal regimes will continue to change in response to new developments. The related boundary lines also will change over time in response to these real-world developments. In this way the boundaries do reflect the ideals of Johnston's functionalist approach. Viewed, however, from a short time perspective, the solutions are likely to appear to be reached largely in accordance with the unitarian rule-based approach, disfavored by Johnston.

Johnston points out that in the past, civilizations avoided fixed boundary lines and utilized the less precise concepts of boundary zones and frontiers. Today, with intense use of the earth and the increased ability of coastal states to map and monitor activities in adjacent ocean areas, it is unlikely that imprecise solutions will be acceptable. Except in unusual circumstances, states are likely to locate boundaries first and cooperate second. The rapid pace of adjudication and negotiation of maritime boundary lines in recent years stands as strong testimony in support of this view. The future probably lies in continued efforts to settle these boundaries by applying principles and practices as yet unclear. Functional arrangements will supplement those settlements in cases where the political relationships between the parties are suitable and the activities in particular ocean areas demand cooperation. Johnston's thesis would put cooperation first. While many will share his substantive goals, I am afraid that more will take a more cynical view of the possibilities.

The book presents a provocative and progressive thesis that is supported by much fact and theory. It is a valuable addition to the maritime boundary literature.

JONATHAN I. CHARNEY
Of the Board of Editors

Die Freiheit der Handelsschifffahrt: Eine Analyse der UN-Seerechtskonvention. By Cord-Georg Hasselmann. Kehl am Rhein, Strasbourg, Arlington: N. P. Engel Verlag, 1987. Pp. xx, 507. Index. English summary. DM 136.

"The Freedom of Navigation for Merchant Vessels: An Analysis of the UN Convention on the Law of the Sea," to render the title in English, by Cord-Georg Hasselmann, contributes markedly to the growing body of literature concerning the status of legal principles enunciated in this Convention. More than an excellent summary of those provisions of the Convention affecting international navigation by merchant vessels in time of peace, this treatise provides insightful and detailed analyses benefiting the scholarly reader in at least three further particulars.

First, the reader is treated to a thorough discussion of the relevant parts of the Convention, together with a documented review of current state practice. Part II (pp. 55-460) covers the present legal regime, with its application and recognition of the many principles expressed in the Convention, and is appropriately detailed. This section unfolds by presenting the rights and duties of both coastal states and foreign merchant vessels in each of seven zones, i.e., the high seas (pp. 68-108), the exclusive economic zone (pp. 109-227), the contiguous zone (pp. 228-43), the territorial sea (pp. 244-305), international straits (pp. 306-51), internal waters (352-64) and archipelagic seas (pp. 365-87).

The treatment of the exclusive economic zone proves especially instructive, due in large part to its relative novelty. The author departs from the tendency to focus on the coastal state's exclusive rights to explore and exploit the natural resources of the zone so as to critique, instead, the status of international navigation. Foreign merchant vessels enjoy virtually the same rights and duties there as on the high seas, with notable exceptions involving resource exploitation and marine scientific research. The rights and duties of both foreign merchant vessels and coastal states, together with their actual and probable implications, receive full consideration by Hasselmann.

The reader derives a second benefit from this book because it addresses events after the adoption of the 1982 UN Convention on the Law of the Sea. For example, the effects on international navigation resulting from agreements such as the UN Convention on Conditions for Registration of Ships (adopted in 1986) are also presented.

This reviewer especially appreciates the author's recognition of the constant interplay among the provisions of the Law of the Sea Convention and the principles of navigation, with the result emerging as customary international law. As a third benefit to the reader, this relationship is inherent in Hasselmann's analysis of the Convention and relevant state practice. Although it is discussed in general terms earlier in the text (pp. 45-54), the detailed treatment of the determination whether a given practice has ripened into a principle of customary international law most informs us as to the status of the current regime regarding the law of the sea. In each chapter, maritime zones taken by sequence are analyzed in terms not only of what they represent to international navigation as expressed by the Convention,

but also of whether they reflect the practices of states that engender an obligatory common acceptance.

Considering this theme of the interplay between convention and practice as engendering evidence of emerging rules of customary international law, the reviewer was constantly reminded of a comment by Lauterpacht:

Unilateral declarations by traditionally law-abiding states, within a province which is particularly their own, when partaking of a pronounced degree of uniformity and frequency and when not followed by protests of other states, may properly be regarded as providing such proof of conformity with law as is both creative of custom and constituting evidence of it.¹

The author observes that many states consider those provisions of the Convention that relate to navigation as constituting a part of customary international law, as evidenced by the states' practices and declarations.

In addition, Hasselmann discusses such related concerns as protection of the marine environment, together with the problems of vessel-source pollution, and the mechanism for dispute settlement provided by the Convention. Indeed, these issues require a chapter each (chapters 9 and 10, respectively). Furthermore, part I of the book provides an overview of the law of the sea from a historical perspective (pp. 13-24), a discussion of the Third UN Conference on the Law of the Sea (pp. 25-35) and additional background helpful to the reader in gaining the full benefit of the analyses that constitute the main part of the treatise.

The book also contains useful appendixes, including tables depicting the practices of coastal states regarding each of the discussed maritime zones (appendix 2) and a listing of international agreements of relevance to international navigation (appendix 3). A rather extensive bibliography serves to provide both documentation and further reading for the serious scholar. Unfortunately, the book is not illustrated (a somewhat minor criticism for a law book).

Because the work is apparently available in German only, many readers will find themselves deprived of its contents. However, to both practitioners and scholars able to read German and interested in the law of the sea, the book should be of considerable benefit, especially as it relates to international navigation by merchant vessels.

ERNEST S. EASTERLY III
Southern University Law Center

The Law of Piracy. By Alfred P. Rubin. Newport, R.I.: Naval War College Press, 1988. Pp. xiv, 444. Indexes. \$22.

Professor Alfred Rubin's *Law of Piracy* is more than a worthy 63d contribution to the unique and indispensable "Blue Book" series of the U.S. Naval War College. With its explanatory notes, extensive bibliographies and valuable documentary appendixes, the volume is—at a minimum—a welcome

¹ Lauterpacht, *Sovereignty over Submarine Areas*, 27 BRIT. Y.B. INT'L L. 376, 395 (1950).

addition to the monographic literature on the international law of the sea. The work ranges from the archaic and classical periods of antiquity down to more recent times. As the argument develops, increasing emphasis is put on the law and politics of the British Empire during the era of its naval predominance and Britain's impact on the law of its successor in naval preponderance, the United States.

From the angle of piracy, Rubin has given an inner unity to a wealth of historical, sociological and legal material. His critique of more "committed" scholarship (see, for instance, pp. 19–32) and post-1945 efforts at the codification of the subject (pp. 317–37) is augmented by Rubin's skill in the gentle art of understatement. The genesis of *The Law of Piracy* over nearly four decades is directly relevant to its assessment as an interdisciplinary masterpiece. In a prolonged process, Rubin has felt compelled, off and on, to explore more fully various facets of his central theme. This intellectual journey can be traced step by step in the *Analytical Indexes* of this *Journal* and in volume 7 of the *Thesaurus Acroasium* (1977) (pp. 103–06).

Two casual remarks in Rubin's own works provide shortcuts to the evaluation of *The Law of Piracy*. First, his recollection of the fascination exercised on a young U.S. naval officer more than three decades ago by the contradictions in the law and politics of former British paramountcy in the Malayan Peninsula.¹ Second, his reflections towards the end of *The Law of Piracy* (p. 337)—without affectation and with complete credibility—that his career and this volume both began "with no notion where [they] would lead." This approach has given a rare degree of integrity to the work and made it the accomplishment it is.

The quality of *The Law of Piracy* lends special weight to its startling conclusions:

It is possible to assert with some confidence that there is no international law of "piracy" at all, and it is possible that there never has been any such law except in the auto-interpretative projection of some States from time to time seeking either to expand their jurisdiction to safeguard their own trade or establish imperial interests, or in the theories of those who prefer to call their moral insights "law" as if universally applicable and not requiring a legislative decision by a "legislator" empowered within a legal order [p. 343].

In light of Rubin's interdisciplinary perspective, his conclusions are readily understandable. As already explicitly formulated in the subtitle of his 1974 work on the international personality of the Malay Peninsula, his study of piracy *jure gentium* is primarily concerned with the "international law of imperialism." Yet imperialism, whether limited to indirect domination or extending also to direct colonial control, is but one of a number of strategies available in systems of power politics since the dawn of recorded history. Moreover, fluctuations in the positions of powers in the outer and inner rings of international "aristocracies" and "oligarchies" tend to affect their selectiveness in submitting to normative rules. If, in accordance with abun-

¹ See preface to A. RUBIN, *THE INTERNATIONAL PERSONALITY OF THE MALAY PENINSULA* (1974).

dant evidence, piracy *jure gentium* is viewed in terms of jurisdiction, it means authority—but does not involve any duty—to deal with pirates.

If empire builders happen to be superpowers, their selectiveness in making use of this or any other jurisdictional authority and the element of auto-interpretation of what falls into the category of pirates may vary. Similarly, predominant powers may take a perhaps unduly self-centered view of their liberalism at home but consider themselves less inhibited on the fringes of their empires.

On lower rungs of international hierarchies, “consumers” of international security may prefer the formulation, illusion or pretense of exercising this or other jurisdictions under an “objective” international law. The smaller the number of superpowers and the greater the numerical differences at both ends of the spectrum, the more appropriate it appears to make allowances for the “majority” views among equals in status, if not necessarily in anything else.

The reviewer’s systemic perspective is wider than Rubin’s, but it is on the same interdisciplinary plane. Thus, the reviewer fully concurs with Rubin’s final verdict: the fatal sin of pirates and empire builders is the same. It is *hybris*, “the overweening pride of Greek myth that leads ultimately to destruction via the path of power” (p. 346).

GEORG SCHWARZENBERGER
University of London

Diritto aeronautico e spaziale. By Tito Ballarino and Silvio Busti. Milan: Dott. A. Giuffrè Editore, 1988. Pp. xvi, 879. Index. L. 62.000.

The book under review has a predecessor, namely, *Diritto aeronautico* (1983), also by Professor Tito Ballarino.¹ Those who follow the Italian legal literature will also recognize the name of Silvio Busti as the coeditor (together with the late Professor L. M. Bentivoglio) of a collection of air law conventions² and the author of, inter alia, a book on contracts for the transport of goods.³

In comparison with the 1983 version, the present one is much expanded, rearranged and supplied with an additional chapter on space law (hence the change of title). It is meant as a textbook in a broad sense, i.e., it is addressed not only to regular university students, but to all those interested in air law and in “an introduction” to space law, which, in the opinion of the authors, has been neglected in the Italian literature (preface, p. vii). The disproportion between the material on air law and that on space law (only about 12–13 percent of the total volume) thus appears to be in line with the intentions of the authors.

The book consists of eight chapters:⁴ “Air Law” (pp. 1–38); “The International Legal Regime of Flight” (pp. 39–137); “Space Law” (pp. 139–234);

¹ Reviewed at 79 AJIL 217 (1985). Some of his other publications are noted in that review. He has also produced two editions of *LINEAMENTI DI DIRITTO COMMUNITARIO* (2d ed. 1987).

² *DIRITTO AERONAUTICO. LE FONTI CONVENZIONALI* (2d ed. 1980).

³ *NUOVI DOCUMENTI DI CONTRATTO DI TRASPORTO DI COSE* (1983).

⁴ Translations in quotation marks hereinafter are by the reviewer.

"The Aircraft" (pp. 235-339); "The Municipal Regulation of Flight" (pp. 341-528); "Contracts on the Use of Aircraft" (pp. 529-575); "Air Transport" (pp. 577-736); and "Other Contracts on the Use of Aircraft" (pp. 737-65). The appendix contains the texts of the Chicago Convention of 1944 (in English and Italian); the Warsaw Convention of 1929, together with the Hague Protocol of 1955 (in French only); and the Space Treaty of 1967 (in English and French). For other texts, readers are referred to the above-mentioned collection of texts by Bentivoglio and Busti.

The authors indicate the complexity of the discipline of air law, which stems from the fact that it comprises elements of both international and municipal law and, at both levels, elements of public as well as private law. What links these heterogeneous elements is the kind of human activity forming the object of legal regulation (pp. 7, 42). Because of the distinct character of this activity, air law is an autonomous legal discipline (pp. 17 *ff.*).

The book thus represents a functional (rather than a spatial) approach to the discipline of air law, and the concept of "flight" acquires, consequently, a key position. While there can hardly be any quarrel about the soundness of the functional approach and the critical position of the concept of "flight," the question is how far it can be driven. One cannot help responding in this way when one sees purely institutional provisions concerning the organs of the International Civil Aviation Organization dealt with under the general heading "The International Regime of Flight" (subparagraphs 1.6.2. and 1.6.3.; pp. 82-95).

In the preface the authors ask how the material should be arranged (p. vii), and their arrangement is, as shown by this example, not beyond discussion. Perhaps still more questionable is the placement of the chapter on space law in the middle of the book, whereafter the authors revert to air law. Perhaps the intention was to dispose of the material pertaining to public international law in the first two chapters. But even so, the solution is not convincing, considering, on the one hand, the basic differences between air law and space law, and, on the other hand, the fact that recurrent references to public international law could not be avoided anyway (e.g., pp. 237-39, 247-48 and 255). Also, the sequence of chapters 5-7 with their present titles, although explained in the introductory passage of chapter 7 (p. 739), can give rise to some confusion since chapter 5, with its general title ("Contracts on the Use of Aircraft"), is not a general introduction to chapters 6 and 7 (on contracts for transport and "other contracts," respectively), but also deals with the substance of certain contracts "other" than contracts for transport (lease, charter, etc.).

The foregoing remarks are meant not so much as criticism (most things can be done in different ways, any one of which can be open to discussion) but, rather, as an exemplification of the methodological problems with which writers of textbooks on air law are confronted.

The contents of the book, naturally enough, are based almost as much on international law as on Italian national law, although the proportions between them are different in different chapters. The "heavy" chapter 4 is, by its very nature, based exclusively on Italian law; and almost the same can be said of chapters 5 and 7. By contrast, only a few pages are devoted to domes-

tic law in chapters 1 and 2. In chapter 5, the international law elements slightly predominate (the Warsaw Convention), and they decidedly predominate in the introductory chapter dealing with the methodology and sources of air law. Conversely, a similar prevalence of municipal law can be noted in chapter 3.

Rich comparative material from the law of the sea and maritime law permeates the book (e.g., pp. 42–48, 153–54, 166, 184, 227–33 and 250–52, not counting more cursory remarks). This comparative material is perhaps more extensive than might be warranted by the development of air law. The explanation apparently lies in the fact that the Italian Navigation Code deals with all kinds of navigation—aerial, as well as maritime and fluvial. The authors are scrupulous in pointing out both the analogies and the distinctions between the respective areas of legal regulation. Readers will also note comparisons with other means of surface transport (e.g., pp. 582, 604, 609, 760), as well as references to the Convention on International Multimodal Transport, not yet in force (e.g., pp. 588, 622). On the other hand, references to the law of the European Communities are scarcer than one might expect, considering both the interests of one of the authors and the material on the subject.⁵

In the preface (p. vii), the authors announce their intention not to overburden the book with the recitation of case law and bibliographical references. Insofar as the former is concerned, they remained true to this intention: some 60 to 70 Italian cases (concentrated mostly in chapters 4 and 6, and usually only briefly mentioned) and some further tens of foreign and international cases constitute a valuable ingredient of the narration and smoothly blend into it. In the case of bibliography, the authors were perhaps less faithful to their intentions. Bibliographical references, with some emphasis on the Italian literature (in chapter 4, for obvious reasons, Italian literature is cited exclusively), extend, in the opinion of this reviewer, much beyond what is usual in textbooks *sensu stricto* as recommended “further reading,” but this “infidelity” should be excused. Many a reader will be grateful for this ready-made, and at the same time comprehensive, selection of literature. But a grasp of the literature is not made easier by the fact that bibliographical information is placed sometimes at the beginning of chapters (chapters 2 and 6), but more often at the beginning of paragraphs or of subparagraphs, and at times inside the text (instead of in footnotes)—although one can see a certain logic behind this arrangement.

Certain paragraphs and subparagraphs deal with problems that are of interest not only to specialists in air law or to international jurists in general, but even to a broader public. Such, for example, are the paragraph on aerial intrusions and the subparagraph on space arms.

In the case of intentional intrusion by military aircraft, the state whose airspace is violated “may take all the measures necessary for safeguarding the integrity of its own territory” (p. 107); and the same “should be valid in respect of ‘state’ airplanes not possessing a military character” (p. 109). The

⁵ Among the recent Italian publications, one can mention I SERVIZI AEREI E LA C.E.E. (ATTI DEL CONVEGNO DI ROMA DEL 27 NOVEMBRE 1985) (Università degli studi di Roma 1987).

authors recognize, however, with reference to the U.S. argument in the U-2 incident, the difficulties in delineating the concept of "state aircraft" (*id.*). One may have some doubts about the proposition that the same rules apply to "airplanes which find themselves in *the proximity of* the airspace of the reacting State" (*id.*, italics added). As for unintentional intrusions by civil aircraft, the authors express the opinion that Article 3 *bis* of the Chicago Convention (not yet in force), adopted in connection with the KAL Flight 007 incident, only confirms the general conviction, also shared by the Soviet Union, that the use of armed force against civil aircraft is prohibited (pp. 113-14, 115); and, further, that this amendment to the Chicago Convention, "which establishes the duty of the contracting states to abstain from the use of weapons against civil aircraft in flight," should also apply to intentional overflights (pp. 106-07). Indeed, paragraph (b) of Article 3 *bis* provides that this duty will apply even "if there are reasonable grounds to conclude that [the aircraft] is used for any purpose inconsistent with the aims of this Convention." The authors recognize the difficulty in judging, with respect to both civil and military aircraft, whether an incursion is intentional or not (pp. 109, 111).

In their discussion of space arms, the authors consider the legality of both intercontinental ballistic missiles and the Strategic Defense Initiative (SDI). As to the former, the answer depends on whether their character as weapons *per se*, or the status of the space they traverse is taken as the decisive criterion. In the latter case, they would have to be considered illegal. But the authors add that the superpowers seem to adhere to the former criterion, which weakens the principle of the denuclearization of outer space (p. 218). The legality of SDI is discussed against the background of both the ABM Treaty and the Space Treaty. While the authors find arguments both for and against the compatibility of SDI with the *letter* of the ABM Treaty, they regard it as incompatible with the *purpose* of that Treaty (p. 225). They regard it as "certainly" incompatible with Article IV of the Space Treaty, inasmuch as the amount of energy needed for generating lasers requires small nuclear explosions in space (p. 227). It can be argued, however, that the nuclear devices required for that purpose are not "nuclear weapons."

On the whole, whatever critical comment one might make on one point or another, the authors successfully fulfilled their task of presenting a "clear and at the same time complete exposition" (p. vii) of the subject matter of the book. The clarity of the narrative and the systematization and explanation of notions and terms leave nothing to be desired. Nor can any complaint be raised about the completeness of presentation, even if the degree of attention devoted to particular questions might be debated. Moreover, the chapter on space law, meant as "introductory," gives a satisfactory tour d'horizon of the existing regulation and pending problems. The work by Ballarino and Busti certainly meets the needs of all those interested in the question of air and space law in Italy, but it will also find appreciative readers outside Italy.

JERZY SZTUCKI
Uppsala University

Badanie Ziemi z kosmosu w świetle prawa międzynarodowego (Remote Sensing of the Earth from Outer Space in the Light of International Law). By Renata Szafarz. Wrocław, Warszawa, Kraków, Gdańsk, Łódź: Ossolinum, 1987. Pp. 186.

The book under review deals with international legal problems resulting from the application of satellite sensing. This technique is of tremendous importance in meteorology, geology, ecology, and so forth. These operations take place in outer space, to which freedom of exploration and use applies, but are aimed—if one leaves aside the seas and oceans—at the territory of states, to which the principle of sovereignty applies. Hence the importance of the legal aspects.

Dr. Szafarz's book is probably the first to appear after the adoption of the basic UN General Assembly Resolution 41/65, Principles Relating to Remote Sensing of the Earth from Outer Space, of December 3, 1986. Her book was almost immediately followed by a more voluminous work by Claus Dieter Classen, *Fernerkundung und Völkerrecht* (1987). The latter also includes legal problems connected with remote sensing for military intelligence purposes, while this book is limited to the realm of civilian purposes.

The author analyzes the pertinent norms of outer space law, the practice of states and doctrine, as well as the work of the Legal Sub-Committee of the Committee on the Peaceful Uses of Outer Space and the above-cited General Assembly Resolution 41/65. She has made use of both Western and Eastern literature. Chapter I deals with general introductory problems, chapter II with the legal principles of conducting remote sensing, chapter III with the availability of the results of remote sensing, and chapter IV with a regional legal solution, represented by the Moscow Convention of May 19, 1978, concluded by the states of the "Intercosmos" group. These chapters are followed by conclusions and final remarks.

The author refers to the 1927 Judgment of the PCIJ in the *Lotus* case, where it was confirmed that any activity that is not prohibited is legal and, therefore, permitted. She states that contemporary international law does not prohibit remote sensing from outer space without the consent of states. She believes that, at present, a norm of customary international law is developing that allows remote sensing of the earth on condition that the international community is advised (through the registration of space objects).

She goes on to state that the principle of permanent sovereignty of all states and peoples over their own wealth and natural resources does not apply to information about those resources; and, further, that there are no customary rules regulating disclosure and dissemination of data and information obtained by remote sensing. The author considers it inexpedient to create a requirement that sensed countries consent to the release of data about their territory, as many states involved in remote sensing (by operating satellites or placing their sensors on them, as well as by operating ground stations) already possess that information. This opinion differs from the position, recently weakened, if not abandoned, that was taken by the states of the Warsaw Pact, and also voiced in the Eastern literature. At a symposium of jurists from the "Intercosmos" group in Moscow in September 1989, a

representative of the Soviet Ministry of Foreign Affairs indicated the need for pertinent amendments to the 1978 Moscow Convention.

Personally, I consider unrealistic the author's idea that prior notification of remote-sensing activities should be made a requirement of outer space law. I also cannot accept her rejection of the commercialization of remote sensing, already a large-scale fact of life in the Western world. Finally, the problem of state responsibility for damage that could result from remote sensing should have been elaborated on.

In sum, the book represents a valuable contribution to an underdeveloped realm.

RICHARD SZAWLOWSKI
Vancouver, B.C.

The Pollution of Outer Space, in Particular of the Geostationary Orbit: Scientific, Policy and Legal Aspects. By G. C. M. Reijnen and W. de Graaff. Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1989. Pp. xxii, 163. Dfl.125; \$67.50; £39.

This short book is the fourth study in air and space law sponsored by the University of Utrecht. Professor Reijnen has a legal background, while Professor de Graaf brings to bear his expertise in astronomy and physics. The title does not accurately describe the book's contents. Pollution in the normal sense of contamination producing environmental decay is barely mentioned. The focus is on space objects using the orbit/spectrum resource at geostationary elevations.

The six chapters are entitled "Scientific and Technical Data as Regards the Pollution of Outer Space, in Particular of the Geostationary Orbit (GSO)"; "The Importance of the Geostationary Orbit (GSO) for Communication on Earth"; "The Pollution of Outer Space, Inclusive of the Geostationary Orbit, and Space Law"; "The International Telecommunication Union and the Use of Outer Space"; "ITU Plenipotentiary and Administrative Conferences"; "The Pollution of Outer Space, Inclusive of the Geostationary Orbit, and the United Nations Committee on the Peaceful Uses of Outer Space (UNCOPUOS)."

The authors employ a historical and descriptive methodology. Sandwiched into their expositions are 4 appendixes and 10 annexes running to 61 pages. Included in the annexes is a 16-page table identifying the 1987 orbital positions of space objects in geostationary orbit. Also included are 12 pages of documentation related to the 1985 session of the World Administrative Radio Conference on the Use of the Geostationary Satellite Orbit and the Planning of Space Services Using It (WARC-ORB 1985-1988).

The subject of international telecommunication law is a complicated one, particularly since it has produced the terms "assignment," "allotment," and "allocation," which must be employed rigorously if an accurate understanding is to be conveyed. Unfortunately, in this volume a disciplined use of these terms is missing, which will confuse the novice and the unwary.

The book takes into account in a general way the contest between the first users of the orbit/spectrum resource and the claims of the more recently arrived developing countries. The essential policy prescription set forth is that the rights of states to use the orbit/spectrum resource should be effective or substantive rather than merely formal, legal or procedural.

The authors are aware that the world politics of telecommunications are influenced by formal international commitments to the "special needs of the developing countries and the geographical situation of particular countries."¹ They are also aware of the position promulgated by the equatorial states in Bogotá in 1976, in which special rights and preferences were asserted. Thus, while a sharing of orbit/spectrum uses through suitable procedures is prescribed by the authors, they also refer to decisions of the International Telecommunication Union (ITU) calling for the guarantee of equitable access to these resources by the developing countries. However, the ITU regime also requires that the resources be employed economically and efficiently. The authors make no effort to reconcile inconsistencies among the competing goals of equitability, efficiency and economy. The absence of analysis of the political-legal conditions under which the use of resources can take place also is evident respecting other issues that are identified.

Further clarification would have been helpful on such subjects as the legal status of resolutions of the UN General Assembly, the proposal that there be an international scheduling of launches, the details of information to be disclosed by launchers, the legal significance of the resolutions (as contrasted with the regulations) of WARCs and the meaning of the "equal rights" in the 1967 Space Principles Treaty and the "guaranteed equitable access" provision of the 1979 WARC Convention.

Additionally, the volume contains some observations that require further review before they are to be accepted. It is claimed that the common heritage of mankind principle, set forth in the 1979 Moon Agreement and thus applicable to the moon and to other celestial bodies, also governs the use of outer space, *per se*. This contention is based on the presence of the "province of all mankind" concept in the 1967 Treaty. The legal conversion of the latter into the former, in this reviewer's opinion, still remains to be done. Undoubtedly, this transfer, if it is to be achieved, will require, at the very least, the formal consideration and determination by such a body as the UN Committee on the Peaceful Uses of Outer Space or its equivalent. Unsupported commentary cannot bridge this gap.

The authors do not comment on the highly focused, but important, development in space law of the term "international," as compared to "state," responsibility. It is not always clear whether the authors are saying that states, under existing international telecommunication law and procedures, have gained exclusive rights respecting the orbit/spectrum resource, or whether in fact the use and exploitation of this resource has been based on an

¹ International Telecommunication Convention of 1982, Art. 33. See S. EXEC. REP. NO. 4, 99th Cong., 1st Sess. 40 (1985).

inclusive right to share in the use of such resources. This issue was considerably clarified in the 1988 session of the WARC-ORB 1985-1988, which took place just prior to the publication of this book.

The authors also volunteer the view that there is no valid legal boundary between sovereign airspace and nonsovereign outer space. Of course, many believe that an authoritative boundary has resulted from generally accepted international practice.

The authors touch on some measures that might improve a system that does not meet their standards of fairness. They propose that the powers of the ITU be reconstituted so that it could lease the right to use the orbit/spectrum resource to qualified entities. They favor the establishment of an international fund to be supervised by a regulatory agency. Its resources would be used to compensate those harmed by space activities, particularly where there is space debris or where the cause emanates from a nuclear power source.

No attempt was made to draw together in a conclusion suggestions for resolving the competing issues and attendant tensions affecting the right to use the orbit/spectrum resource. Yet it is clear that the authors hope that the injustices they now find in the international legal regime can be alleviated. Thus, they call for the development of a more effectively structured regime able to assure substantive benefits. They would place less reliance on procedural or legal considerations.

Despite its comparative brevity, the book is not easy to read. Some sentences are constructed in such a way that their meaning is not immediately clear. There is no index. This is somewhat compensated for by detailed subheadings accompanying the chapters listed in the table of contents.

CARL Q. CHRISTOL
University of Southern California

Acid Rain and Ozone Layer Depletion: International Law and Regulation. By Jutta Brunnée. Dobbs Ferry, N.Y.: Transnational Publishers, 1988. Pp. xviii, 302. Index. \$45.

Environmental degradation, in all of its myriad forms, threatens the future of the human species. Among the most threatening environmental issues are global climate change, stratospheric ozone layer depletion and acid rain. To illustrate the current operation of international environmental policy making and the directions that it might take to address environmental problems, Professor Brunnée focuses on the latter two issues.

Their differences and similarities provide excellent examples of what can be accomplished in an international framework and where international processes and structures fail to provide leadership or positive change. Acid rain tends to be a regional issue, while thinning of the ozone layer has greater and more obvious global implications. Eliminating acid rain requires massive economic shifts, including large capital outlays for retrofitting, as well as

changes in energy technology and public transportation systems. Protecting our precious ozone layer appears to be much easier and cheaper to accomplish, and the potential losses and benefits are shared worldwide, giving all nations a stake in protection. These are important issues that well illustrate Brunnée's discussion.

The book is helpful in giving a brief overview of the scientific background necessary to understand the environmental importance of acid precipitation and loss of stratospheric ozone. Perhaps more important, because less commonly understood, is her presentation of the workings of international law. Even for those with legal training, a grounding in the relevant rules and mechanisms of international law is critical to a deep understanding of just how difficult it is to achieve any change on an international level. The number of international organizations, bilateral and multilateral, is staggering and the acronyms overwhelming. (In this regard, the list of abbreviations the author provides is extremely helpful.) In addition, the wide divergence in interests among nations, polluters and victims, industrialized countries and developing countries, thwarts the policy-making process at every step.

In describing a great number of (primarily) North American and European environmental institutions and conventions, she gives the reader some insight into how particular processes are created and function, thus enabling an independent assessment of prospects for future environmental negotiations. For example, she contrasts the United States-Canada agreements with the United States-Mexico agreements, noting the inconsistency in the U.S. position on acid rain. Where the United States is damaged by acid deposition (United States-Mexico), it does not engage in debate on scientific certainty; conversely, where the United States is an exporter of acid rain (United States-Canada), it uses scientific uncertainty as a basis for refusing to take action.

This book is useful, but not without shortcomings. It would be a better research tool if it were expanded in certain key areas. For example, in discussions about multilateral agreements, Brunnée frequently cites the number of signatories without identifying them. That information should be provided in the notes. Painting with too broad a brush is also frequently a problem. She discusses the Federal Republic of Germany's change of position on atmospheric pollution, but provides almost no explanatory detail. Some readers may have independent knowledge of this important shift, but it is a telling detail and ought to be discussed in the book. In the same vein, when discussing attempts to get EC agreement on gaseous emissions from private cars, she indicates that Denmark found a particular proposal disadvantageous. Again, a brief discussion of the circumstances would be helpful.

The publishers should consider a second edition, which could use a good deal of editing to create a smoothly readable text. Awkward word choices and lost referents abound.

Acid Rain and Ozone Layer Depletion is recommended for persons wanting to acquire background in a highly complex and contentious area of international policy making. The author highlights the enormous political obstacles to achieving agreement and then actual change in an area where it is desper-

ately needed. Her conclusions offer nothing new, which is neither surprising nor disappointing. Given our global political realities, it may take a catastrophe to permit the forging of new directions.

TRACY DOBSON
Michigan State University

Armed Conflict and the New Law: Aspects of the 1977 Geneva Protocols and the 1981 Weapons Convention. Edited by Michael A. Meyer. London: British Institute of International and Comparative Law, 1989. Pp. xiv, 298. Index. £20.

This book will appeal primarily to those readers of this *Journal* who were interested in the *Agora* articles on the U.S. decision not to ratify the 1977 Additional Protocol I to the Geneva Conventions.¹ Most of the 11 essays deal with that Protocol. With a few exceptions, these papers were originally delivered at a discussion group held from 1985 to 1988 under the auspices of the British Institute of International and Comparative Law.

Those uninitiated into the mysteries of the law of war should be told that the Additional Protocols were negotiated at a conference of over a hundred states held in Geneva between 1974 and 1977. The mandate of the conference was to revise the 1949 Geneva Conventions on the wartime protection of the sick and wounded, prisoners of war and civilians. The Additional Protocols go beyond the 1949 Conventions, however, in that they attempt to regulate the conduct of combat operations. Additional Protocol I applies to international armed conflicts, and Additional Protocol II to civil wars and internal conflicts.

The 1981 Weapons Convention was negotiated at a second conference from 1979 to 1980, and applies some of the language and principles in the Additional Protocols to specific conventional weapons. To further confuse matters, the Weapons Convention has its own Protocols I, II and III. (Only one of the papers published here—Professor Kalshoven's—actually deals with the Weapons Convention; in that respect the book's title is somewhat misleading.)

Having read this far, the uninitiated should probably go no further; this book is not for them. After reading several of the papers, they will undoubtedly wonder how the various learned authors could be writing about the same Protocol.

Three of the writers, while applauding some of the Protocol's provisions, nevertheless find themselves deeply critical of it in one respect or another; three others apparently believe that the Protocol is virtually above criticism. The other five essays deal with narrower issues, and cannot be categorized as either supporting or criticizing the Protocol overall.

Turning to the last category of papers first, Brigadier Clarke, Lieutenant Colonel Glynn and Lieutenant Colonel Rogers offer a useful summary of the

¹ *Agora: The U.S. Decision Not to Ratify Protocol I to the Geneva Conventions on the Protection of War Victims*, 81 AJIL 910 (1987); and its continuation, 82 AJIL 784 (1988).

law on combatant and prisoner-of-war status, both before and after the negotiation of Additional Protocol I. Kalshoven discusses the negotiating history of the 1981 Weapons Convention, with emphasis on the 1974 Lucerne Conference of government experts. Françoise Hampson analyzes the relationship between the peacetime law of international human rights and the law of war (including Protocol II) applicable to internal armed conflicts.

Professor Roberts's essay on the international law of civil defense contains various interesting insights, including the suggestion that the United States, having decided not to ratify Protocol I, may be willing to apply certain portions of it in practice. Finally, Major General Scott's paper on the medical aspects of the rule against weapons causing unnecessary suffering serves as a caveat to those who would try to establish "scientific" parameters for the application of that rule.

The reluctant critics of the Protocol include the "grand old man" of British law of war studies, Colonel G. I. A. D. Draper. His paper, which opens the volume, traces the history of humanitarianism in the law of armed conflict. With regard to the Protocol, he is concerned that in it humanitarian ideals have so overwhelmed military requirements that it "may bring the law into disregard and thereby weaken its moral and legal force" (p. 19). He is especially critical of the "technical complexity" of the Protocol, of its restrictions on the use of reprisals to enforce the law of war, and of its denial of prisoner-of-war status to "mercenaries."

H. McCoubrey believes that the modern "renaissance" of just war doctrine threatens the traditional view that the law of war should protect the victims of war regardless of which side they are on. He finds this threat embodied in Article 1(4) of Protocol I, which declares certain wars of national liberation to be international armed conflicts rather than civil wars. It is also reflected in the extension under the Protocol of prisoner-of-war status to certain guerrilla fighters and its withdrawal from "mercenaries." In all of this he finds a "dangerous muddying of the legal waters" (p. 40) that, in the end, could make wartime more dangerous for civilians.

In *Reprisals and Reciprocity in the New Law of Armed Conflict*, C. J. Greenwood discusses a variety of issues beyond those suggested in the title of his paper. Protocol I would virtually ban reprisals in land warfare. While readily conceding that reprisals have often been abused, Greenwood points out that the threat of reprisals has been one of the relatively few sanctions available to enforce the law of war. In an area where so few sanctions are available, "the removal of even an imperfect sanction creates problems" (p. 238). He then examines the new enforcement mechanisms created by the Protocol as a replacement for reprisals and reciprocity, and finds them seriously lacking. In particular, it is "most unlikely . . . that the International Fact-Finding Commission will ever amount to an effective mechanism for the enforcement of the law" (p. 239).

The elimination of reprisals is particularly disturbing, in his view, because the Protocol is the first instrument of international law to prohibit reprisals against certain objects of military importance (e.g., waterworks, dams, dikes and nuclear power stations). Observing these rules "will restrict the options open to any army engaged in hostilities and will, in many cases, require such

an army to sustain greater casualties than it would otherwise do in order to minimise the loss of civilian life" (p. 241). Moreover, if one side in a conflict disregards the Protocol, it could gain a military advantage over an adversary that is rigorously following it. Yet this is what the absolute ban on reprisals seems to require. Greenwood correctly surmises that similar reasoning was a factor in the U.S. Government's decision not to ratify Protocol I.

The three writers who unreservedly support the Protocol are all connected to the Red Cross movement in some capacity. Michael A. Meyer of the British Red Cross walks the reader through the new provisions on relief operations. In a well-researched article, L. Doswald-Beck of the International Committee of the Red Cross's legal staff examines the history of efforts to control air bombardment, culminating in the conclusion of Protocol I. Rejecting criticism of the new limits on reprisal, she concludes that the Protocol, even though it does not address the use of nuclear weapons, represents a modern and realistic balancing of humanitarian and military needs. Even for nonparties, she predicts, it will have a major impact on the development of customary international law.

It is Hans-Peter Gasser, also with the legal staff of the International Committee of the Red Cross, who most directly confronts the critics of the Protocol. He expressly disagrees with Greenwood's conclusion that its application may result in a military disadvantage for one side in a conflict. Contrary to McCoubrey, Gasser regards the assertion that the Protocol has "politicized" the law of war as "completely unfounded" (p. 86). He also argues that the adoption of its provisions on wars of national liberation was not the product of an "automatic majority" of Third World and Eastern bloc states, pointing out that in the final conference vote adopting the Protocol, only Israel voted against the text as it was negotiated in committee. In making this argument, Gasser is being a bit disingenuous, since the crucial vote on Article 1(4) of the Protocol came not at the end of the Geneva Conference in 1977, but in 1974, at its first session.² In that vote the "automatic majority" was very much in evidence.

Gasser makes a very interesting proposal with regard to a criticism of the Protocol earlier raised by the author of this review. Articles 50 and 52 of Protocol I provide that, "in case of doubt" as to their status, persons and objects will be presumed to be civilian. It was argued that in a combat situation, where almost everything is "in doubt," this was an unrealistic standard for a military commander to apply.

Gasser replies that this criticism misreads the Protocol, since Article 57 only requires a military commander to do whatever is "feasible," i.e., practical under the circumstances, to verify that the targets of an attack are not civilians. He argues, in other words, that Article 57 controls the presumptions established by Articles 50 and 52. While there is nothing in the text of the Protocol itself to indicate that Article 57 controls the other two articles (if anything, the text suggests that the requirements are cumulative), the adoption of this reading, perhaps in statements of understanding by govern-

² See M. BOTHE, K. PARTSCH & W. SOLF, *NEW RULES FOR VICTIMS OF ARMED CONFLICTS* 43 (1982).

ments ratifying the Protocol, would certainly go a long way toward meeting this reviewer's criticism of it. The question would then arise, however, as to what function the presumption of civilian status is intended to serve. If Articles 50 and 52 are not to be applied by military commanders, then who is to apply them, and how can they protect the civilian population?

This exchange of views illustrates how so many readers of Additional Protocol I can reach such conflicting conclusions in regard to it. The problem, noted by many of the papers in this book, is that it is very difficult to say for certain what the Protocol means or, in some cases, whether it means anything at all. Indeed, its text is something of a deconstructionist's paradise.

The Protocol is full of long, complex, detailed provisions on the use of armed force in combat. (Again, several authors in this volume complain that parts of it are far too complex to be applied by military personnel in battle.) The natural assumption of conscientious lawyers is that long, complex, detailed rules must mean something and, if so, they must place significant restrictions on the activity they regulate.

Many of these rules, however, are also subject to vague modifiers that, if read with sufficient creativity, can often eliminate all practical effect of the long, complex rules. Article 56 provides a good example. Seven paragraphs long, it establishes a detailed regime protecting dams, dikes and nuclear power stations from attack, and creates a new special sign—three bright orange circles on the same axis—to designate objects so protected. But not all dams, dikes and nuclear power stations are entitled to this protection. Article 56 only applies to those so located or constructed that an attack on them "may" cause "severe losses among the civilian population." Neither the Protocol nor its negotiating history gives any guidance on what losses are "severe." The belligerent party possessing a dam, dike or nuclear power station and the belligerent party attacking it may legitimately have very different ideas on that issue.

In a sense, then, both the writers criticizing and those supporting the Protocol may be right. Whether that document is a good treaty or a bad treaty depends on the assumptions one is willing to make on how it will be interpreted and applied in practice. This book will not tell the student of Protocol I what those assumptions should be. It will, however, give him or her a good idea of what questions should be asked before making those assumptions.

BURRUS M. CARNAHAN
Of the Illinois Bar

Nuclear Weapons and Contemporary International Law (2d rev. ed.). By Nagendra Singh and Edward McWhinney. Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1989. Pp. xxvi, 611. Index. Dfl.295; \$155; £86.50.

This book presents a scholarly and knowledgeable treatment of an incredibly complex subject. A presentation of the legal problems would have

no meaning without a fairly detailed history of the shifting positions of the states that have developed nuclear weapons, those that may aspire to a nuclear capability, those with no such aspirations and the actions of international organizations such as the League of Nations, the United Nations and the Organization of American States (OAS).

The authors point out that it is easy to assert blithely that the first use of an atomic weapon is contrary to international law. It violates the Kellogg-Briand Treaty and resolutions of both the League of Nations and the United Nations, which some describe as "international legislation." All of this international legislation requires that before commencing bombardment, the commander should warn authorities on the other side, which was not done at Hiroshima or Nagasaki. On the first page, the author points out that the term "international legislation" is essentially a metaphor. In the ultimate analysis, international law depends on the will of each member of the international community.

For example, when the Germans were defeated in the Second World War, it was possible for the victors to stage trials and convict war criminals, and under established rules of international law, to prevent them from excusing their conduct by asserting that Hitler had ordered it. But if the victors refused to apply rules of international law, nothing could be done about it.

Similarly, as early as 1968 and continuing under the regime of both the League of Nations and the United Nations, there was international legislation against weapons that caused unnecessary suffering. However, this did not prevent the development of new devices to compensate for numerical inferiority. Each individual state offered its own interpretation of the application of this standard.

One of the great merits of Singh and McWhinney's book is its description of the changing attitudes of the United States and the USSR toward each other. There were alternating periods of confrontation and détente. Yet, even during the periods of confrontation, there was some progress; and during the periods of détente, political events limited the possible agreements. After great advances during President Nixon's first term, the Watergate scandals brought those developments to a halt. President Carter's moralistic approach to international problems did not appeal to Soviet pragmatists, who made progress toward détente only when they could silence the ideologues. On the Soviet side, some promising approaches by Andropov were thwarted by his illness and his replacement by Chernenko, who—like Andropov's predecessor, Brezhnev—was content to let everything drift.

The important idea in both editions of the book is that, to be effective, all conventions, treaties and other sources of international law must have "credibility." During Reagan's second term, he and Gorbachev made great progress in reducing East-West tensions on armaments questions.

Even here, progress was uneven. When Reagan became enamored of "Star Wars," he produced a new interpretation of the ABM Treaty to justify deployment—in effect, a unilateral attempt to modify a bilateral treaty. Furthermore, the Reagan administration refused to accept the World Court's unanimous Judgment against the United States on the admissibility



of the *Nicaragua* case. Nevertheless, the authors convincingly demonstrate that despite these aberrations, there are increasing areas of agreement between the United States and the USSR on atomic weaponry, with the corollary of increased credibility of contemporary international law on nuclear weaponry.

There are a few minor inaccuracies in the historical narrative of the early negotiations on arms control, the period when I was a member of the U.S. delegation conducting the negotiations, but they are unimportant. The book should be the definitive text for many years. This is emphasized by the fact that, in general, President Bush seems to be even more pragmatic than Reagan, which should increase the areas where international agreements will have credibility. If Gorbachev should fail in his policy after *perestroika* and *glasnost*, a third edition of the book would probably be necessary.

BERNARD G. BECHHOEFER
Of the District of Columbia Bar

Der nationale Befreiungskrieg im modernen humanitären Völkerrecht. By Christian Koenig. Frankfurt am Main, Bern, New York, Paris: Peter Lang, 1988. Pp. xxvii, 209. SF 55.

On June 8, 1977, the representatives of 102 states (from all five continents and including the big powers) adopted Additional Protocol I to the Geneva Conventions¹ by consensus. This Protocol, a complex package of measures to strengthen the protection of war victims, includes a provision that categorizes as *international* armed conflicts those

armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations [Article 1(4)].

Should this provision be seen as reverting to the outdated concept of *bellum justum* by one-sidedly favoring undeserving groups, or is it an appropriate and innovative response to new circumstances on the part of international humanitarian law?

Opinions differ considerably, as evidenced inter alia by President Reagan's not recommending Protocol I for ratification.² Christian Koenig investigates this question in his meticulous, intelligently written and well-documented doctoral thesis, reaching the conclusion that *for humanitarian purposes* a war of national liberation may justifiably be qualified as an international phenomenon. Indeed, the level of violence and the degree of suffering

¹ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, *opened for signature* Dec. 12, 1977, 1125 UNTS 3, 16 ILM 1391 (1977).

² See *Agora: The U.S. Decision Not to Ratify Protocol I to the Geneva Conventions on the Protection of War Victims*, 81 AJIL 910 (1987) (with the letter of transmittal of Jan. 29, 1987, by President Reagan to the Senate and a comment by the author of this review).

that characterize such wars make protection by the (more extensively elaborated) humanitarian law of international armed conflicts necessary.

Koenig begins with a reminder of the dialectical approach that governs the making of international humanitarian law. Its object is to guarantee a minimum of humanity and to maintain public order even in time of war, while respecting the dictates of military necessity. Only when new law fulfills such requirements can it be effective and merit approval. There is no doubt in the author's mind that the current rigid division of international humanitarian law into rules applicable to international armed conflict on the one hand, and provisions on noninternational armed conflicts on the other, has ruled out a satisfactory solution to the problem. The application of the law on international conflicts to combatants and civilians in a war of liberation can be made possible through recognition of belligerency, but this never happened during the decolonization period (as it did, at least *de facto*, in the American Civil War). The reason is well-known: governments were not willing to enhance the status of "rebels" under international law through recognition of their belligerency.

Continuing his introductory analysis, the author considers the extent to which the application of *jus in bello* has been affected by the contention, upheld in particular by Third World countries, that, in wars of liberation, the use of force by the "people" is legitimate. His research into both the officially stated positions of governments and the conduct of parties in selected conflicts led him to the conclusion that no party to such a conflict has ever refused to respect international humanitarian law on the grounds that it was fighting for a "just" cause. Thus, the debate has always been restricted to aspects of *jus in bello* and has not lent countenance to the *bellum justum* concept.

Koenig also discusses the relationship between terrorism and guerrilla warfare. To his mind, guerrilla tactics are a method of warfare adapted to an exceptional situation. Guerrilla warfare is definitely subject to the law of war. Terrorist acts thus violate the law of war and must be prosecuted as grave breaches (war crimes). Furthermore, they can occur in both conventional and guerrilla warfare; they always deserve condemnation. (In fact, however, terrorist acts occur regularly outside the scope of applicability of international humanitarian law.) Koenig reminds the reader of the policy of the United States in Vietnam; captured Vietcong were treated as prisoners of war unless they were engaged in terrorist activity or espionage. The new provisions of Protocol I were thus partly anticipated by the practices of the armed forces of a major power. However, Koenig concludes that no customary law rule can be invoked as grounds for conferring international status on wars of liberation. He closely scrutinizes the practice of various states that have been engaged in such wars, concluding that there is no such norm in customary law. His conclusions are in accordance with the prevailing view. Article 1(4) has created new international treaty law, binding only on the parties. These explanations clear the way for an analysis of the content of the controversial norm.

The key to understanding Article 1(4) is the peoples' right to self-determination. The existence of this right was universally acknowledged

long before Additional Protocol I came up for discussion. The Diplomatic Conference of 1974–1977 did not “invent” the problem, but merely reformulated the response of international humanitarian law to an existing challenge by stipulating that an armed conflict between a people entitled to self-determination and the opposing power is to be considered international. Thus, the new rule is justified by the right to self-determination. Despite frequent claims to the contrary, Article 1(4) makes no reference to the *jus ad bellum*. Its application does not require a value judgment regarding the right to use force. The legal classification of such conflicts is the result of a legal judgment as to the validity of the right to self-determination.

It is not always easy to identify those who have such a right. The author highlights the difficulties that arise from the potential contradiction between the right to self-determination on the one hand, and claims to territorial integrity and national unity on the other, giving practical examples. In his view, it is impossible to make this judgment without taking into account the type of oppression involved: “colonial domination,” “racist régimes” or “alien occupation” (in the words of Article 1(4)). When an armed conflict arises in one of these situations, the legal framework governing international conflicts comes into play. In this connection, the author convincingly shows that an armed conflict can be said to exist only if the liberation movement has the minimum of organization required to conduct hostilities in a coordinated manner and with respect for international humanitarian law.

It remains for the author to define “colonial domination,” “racist régimes” and “alien occupation.” Whereas the first two concepts are largely used to denote particular situations and hence are linked to a specific period in history, Koenig believes that the rule assumes its true significance with its reference to “alien occupation.” He contends that, so interpreted, Article 1(4) provides a satisfactory solution for situations that have all the elements of foreign occupation but are not covered by the classic concept of *occupatio bellica*. Such cases, he suggests, include the occupation of areas of disputed legal status and, above all, foreign armed intervention requested by the (illegitimately) established government. From the point of view of international humanitarian law, no generally accepted solution has hitherto been found in practice to the problem of “intervention on request” in a civil war, although such intervention *de facto* internationalizes the internal dispute. Koenig’s line of interpretation is an interesting one, and the proposal should be given close scrutiny both in theory and in practice. However, it must also be considered whether, contrary to the currently prevailing view, such situations could not be covered by the conventional international law on occupation. The question also arises whether the interpretation proposed by the author has a chance of being accepted in practice.

Koenig’s thesis considerably elucidates a controversial rule in modern international humanitarian law. He succeeds in giving a clear, sober analysis of a subject on which feelings often run high, and in following through the difficulties that emerge to an enlightening conclusion. The work is well documented and enriched by many references to actual practice in conflict situations. Reading this thesis, one reaches the conclusion that bringing wars

of national liberation within the scope of humanitarian law governing international armed conflicts should be considered a positive step toward overcoming a present-day humanitarian problem. The author makes a useful contribution to our understanding of the parameters that will determine the fate of this rule.

HANS-PETER GASSER
Geneva

Transnational Corporations in World Development: Trends and Prospects. United Nations Centre on Transnational Corporations. New York: United Nations, 1988. Pp. xxi, 623. Index. \$56.

This volume is peculiarly difficult to review in that it constitutes an impressive compendium of statistics, theory and conjecture. For the international business practitioner, academician, public policy maker or lawyer concerned with the internationalization of markets and of firms and with the public policy and legal issues flowing therefrom, it is a very valuable publication. The 100-page statistical appendix and 20-page index are useful adjuncts.

The volume's utility is reduced somewhat by the cutoff dates of a large proportion of the data, generally 1985, but frequently earlier. Of course, that is a problem of all published articles and books. A second problem lies in what I feel to be inadequate warnings relative to the accuracy of much of the statistical information. Finally, there remain definitional problems and, on occasion, some curious omissions. But for all that, the value of the book is not greatly reduced.

Divided into 15 chapters and 5 sections, the text begins with a short overview and then moves into part one, which deals with transnational corporations (TNCs) in the world economy—how private business has promoted the internationalization of markets. The differing sizes and nationalities of TNCs, their organizational dynamics, their strategic responses, trends in direct foreign investment (FDI), TNC impact on international trade and TNC involvement in international finance and capital markets are subjects of subsequent chapters. Part two examines the role of TNCs in development, with separate chapters on the relative importance of TNCs in the development process and their significance as a source of financial resources for development, as agents affecting trade, as international transmitters of technology and as redistributors of employment and income internationally. Part three dwells specifically on the employment, sociocultural and environmental aspects of TNCs. Separate chapters analyze their employment effects, sociocultural impacts (i.e., production, employment practices, consumption patterns and politics) and environmental impacts. Part four moves to public policy responses to the TNCs and market internationalization at both the national and the international levels. The final two chapters in this section, which deal with relations between host countries and TNCs and the development of international cooperation in regulating the activities of

TNCs, are of particular value. Part five deals with services, with specific chapters on FDI in services, TNCs in services, a theoretical explanation of the growth of FDI and TNCs in services, FDI in services and development, and public issues and policies relative to the internationalization of services. An epilogue speculates on the reach and nature of TNCs in the early 1990s.

In general, the book emphasizes the value of the TNCs to world development and welfare and is optimistic about the outcome of present efforts to develop international codes and guidelines that would regulate TNCs so as to avoid serious confrontation between TNCs and host countries. The very title of the volume is somewhat bothersome, for surely what the various authors had in mind was "*International Business in Sustainable World Development*." There is considerable discussion of international trade, but much trade is initiated by entities other than TNCs, although the latter concept is really never defined. The concept of "transnationalization" (however defined) seems to be equated with "internationalization of markets." The confusion arises, one suspects, because the idea of a TNC seems to include *any* organization operating in more than one national market for commercial gain by whatever organizational/legal mode. Such a definition includes everything from manufacturing enterprises with multiple plants abroad to international banks, trading companies and other service-producing firms—from the very largest to the smallest in both scale and geographical scope. But if this be the case, why are not construction companies, shipping firms, educational institutions with foreign students, etc., included?

The study could have been made more rigorous and informative by offering a tighter definition of a TNC. Personally, I would have preferred a more descriptive *group* of definitions, such as the *multinational* (a firm operating an internationally integrated system out of a single parent company largely owned and managed by nationals of the country in which it is headquartered), the *transnational* (a multinational in which the parent firm is owned and managed to a significant degree by nationals of more than one country), and the *supranational* (a multinational or transnational with the seat of control lodged outside the jurisdiction of any single nation, for example, one operating under special international convention or authority). Each type might be further defined as either predominantly manufacturing or service producing (i.e., trading, sales and marketing, financial and insurance, real estate, architectural and engineering, construction, education and training, communications, transport, shipping, tourist-related, etc.). Curiously, although 70-odd pages are devoted to the "transnational service corporation," no specific definition is provided differentiating such a firm from all other TNCs. Hence, what do the statistical tables relating to transnational service corporations really mean? Incidentally, there is no mention of those for-profit organizations promoting and serving international flows of labor.

Additionally, many of the statistics are seriously flawed as to both FDI and international trade. All such data are only approximations, which may vary from reality by a substantial margin. How much international trade is unreported because it is illegal (contraband, drugs) or because public policy re-

quires that it not be revealed (arms)? Also, many trade flows, such as transfers between related firms, traffic in arms, the flow of intangibles and those in the form of countertrade, are not reported at market prices. FDI statistics are notorious for a variety of reasons: (1) much FDI is made in kind between related firms at other than true market prices; (2) countries have different notions of what constitutes FDI; (3) much FDI is in the form of intangibles, the pricing of which is almost always open to question; (4) the impact of foreign exchange-rate movements and differential inflation rates alters the real value of FDI of both stocks and flows; and (5) there is always inconsistency between book value and depreciated value—practice differs between countries and companies.

Nonetheless, if the reader is forewarned, the volume is a very valuable reference, and its conclusions are of interest. It is impossible even to summarize its major conclusions, given its length, detail and diversity of subject matter. One can only report a few.

It is pointed out that while the flows of FDI have continued, they moved at a slower pace in the 1980s than in the previous two decades, particularly in respect to flows toward those LDCs with the most serious economic problems. Hence, the gap between FDI among the more developed market economies and that moving from those economies to LDCs grew wider in the 1980s. Meanwhile, the source of FDI—for many years after World War II predominantly the United States—has become diversified. Outflows from Japan, West Germany and the United Kingdom currently challenge those from the United States. What is not really pointed out is that the widening disparity in these FDI flows (i.e., those into the more-developed as compared with the less-developed countries) undoubtedly adds to income and wealth disparity between the two categories of countries, hardly a positive contribution to world welfare.

The point is made that many services are not tradable, which means that “FDI is far more important to the international service industries than is the case for manufactures” (p. 5). The logic of this conclusion is not obvious. And, given the admittedly fragmentary statistics relative to the international flow of services and the many omissions (as noted), it is really unprovable.

A basic premise of the book is that “FDI is undoubtedly the most important manifestation of transnationalization” (p. 16). One could well argue that the internationalization of markets (for goods, finance, information, skills and labor) is the most important manifestation of “transnationalization.” The writers of the various chapters waver between using “transnationalization” in a limited organizational sense and using it as a substitute for the internationalization of markets. One is left confused.

It is pointed out, for example, that the flows of FDI have shifted in direction from the production of goods to the production of services, the leading areas being related to finance and trade (p. 393). “At the aggregate level, FDI is at least as important as trade as a means of delivering services to foreign markets” (p. 394). This conclusion, however, overlooks the enormous investment made *nationally* to provide services in trade—such as in

research and development, educational and training organizations, communications systems, medical facilities and domestic transport.

It is admitted that

it is difficult, and in most cases impossible, to capture in a systematic manner the extent to which non-equity forms of foreign involvement are used by service TNCs. These forms still largely escape the attention of national FDI data collection systems which focus on forms with participation in a foreign economy or enterprise [p. 419].

The authors go on to point out a very important development—the apparent “growing realization of the fact that the control of an enterprise can be ensured by non-equity arrangements as well as by equity arrangements” (*id.*). What we are not told is that control is a multifaceted concept. Increasingly, firms are specifically looking at what needs to be controlled to assure themselves of a stream of returns. It would appear that if FDI is perceived as being of decreasing significance in this regard, FDI would be of declining overall significance. Hence, the very nature of the TNC is changing. A firm operating internationally via an integrated system based on equity control is very different from one operating via a web of contractual arrangements. In truth, many firms are reanalyzing their value-added chains and externalizing—either domestically or internationally—those links they believe other firms can perform better. The result is a close contractual bonding between supplier and user. The international service sector thus grows with very little FDI. Many firms would seem to be losing their transnational characteristics as they produce goods and services for international markets. In any event, the dichotomy between goods- (manufacturing) and service-producing firms is a very slippery one. In the final analysis, any “good” is simply a bundle of services.

There are a number of weaknesses in the more theoretical discussion in chapters XXIII and XXIV. One would have thought that in discussing FDI theory, mention might have been made of the market imperfection theory, under which Dunning’s “eclectic paradigm” could well be subsumed. Ownership-specific advantages of firms, location-specific advantages of countries, and market-internalizing advantages all give rise to imperfections in the market, which is the force that drives FDI. In chapter XXIV, labor and capital intensity are defined incorrectly, leading to misleading conclusions. Capital intensity does not equal net property, plant and equipment per worker (p. 450). Rather, it should be defined in terms of capital utilized per unit of output over a given period of time (depreciation, obsolescence, interest, maintenance cost of plant and equipment/annual output). Furthermore, the capital or labor intensity of a good or service cannot be measured from the accounts of a given company. How much has *society* invested, quite apart from the firm? This question is particularly relevant when considering the service industries, which tend to employ relatively large numbers of highly skilled persons in which society’s investment can be very large. This chapter should be read with these points in mind.

One should mention certain sections and compilations that the reader may find particularly useful. The most valuable chapters include VIII, "The banks and international capital markets"; XVII, "National policies of developing countries"; XVIII, "Joint venture policies of the socialist countries of Eastern Europe"; XX, "Development of international cooperation"; and XXV, "The policy and regulatory framework." Among the unique and more valuable compilations are those found in boxes II.1 (p. 35), "Which firms invest abroad"; IV.3 (p. 60), "Non-equity arrangements in selected sectors"; VII.1 (p. 108), "Measures to liberalize financial markets in the 1980s"; VII.2 (pp. 108–11), "Major cross-border acquisitions in financial markets in the 1980s"; IX.1 (p. 48), "Selected recent proposals for debt relief"; XVI.2 (p. 248), "Transnational Corporations in South Africa and Namibia"; XVI.3 (p. 256), "Main privatization actions by developed market economies in the 1980s"; XVII.1 (p. 264), "Privatization in developing countries"; and XVII.2 (p. 274), "Institutional and legal framework of export processing zones." The annex table (pp. 281–98), "Recent changes in regulations relating to transnational corporations," and table XX.2 (p. 338), "Main international arrangements relating to transnational corporations," are also of special interest.

In the final analysis, we are left with a question: "Relations between TNCs and host developing countries have become less conflictual over the past decade, compared to the 1960s and 1970s. Has peace broken out, or are we experiencing a temporary truce?" (p. 495). The authors seem to adopt the first option, given what they perceive to be new initiatives in the area of corporate responsibility and more effective international governance.

RICHARD D. ROBINSON
University of Puget Sound

MIGA and Foreign Investment: Origins, Operations, Policies and Basic Documents of the Multilateral Investment Guarantee Agency. By Ibrahim F. I. Shihata. Dordrecht, Boston, Lancaster: Martinus Nijhoff Publishers, 1988. Pp. xvi, 540. Index. Dfl.295; \$152; £89.50.

The Multilateral Investment Guarantee Agency (MIGA), established in 1988, is the fourth international institution sponsored by the World Bank. It was preceded by the International Finance Corporation (IFC) in 1956, the International Development Association (IDA) in 1960 and the International Centre for Settlement of Investment Disputes (ICSID) in 1966. Its objective is "to encourage the flow of investments for productive purposes among member countries, thus supplementing the activities of the [World Bank], the [IFC] and other international development finance institutions" (MIGA Convention, Article 2). In *MIGA and Foreign Investment*, which was written prior to the entry into force of the MIGA Convention, and was "meant to generate wider awareness and greater acceptability of the MIGA initiative" (foreword, p. x), Mr. Shihata, the vice-president and general counsel of the

World Bank, writes that this broad objective sets MIGA apart from national investment insurance programs and "clearly distinguishes [it] as an instrument of international public policy which transcends the parochial interests of any specific state or its nationals" (p. 191).¹

To serve its objective, MIGA will not only issue guarantees against non-commercial (political) risks; the Convention also mandates "appropriate complementary activities to promote the flow of investments to and among developing member countries" (Article 2), including the dissemination of information, technical advice and assistance, consultation among members on investment policies and facilitation of investment promotion and protection agreements among its members (Article 23). These complementary functions "may prove over time to be as important, if not more important, in the pursuit of MIGA's overall objectives" (p. 192). Activities of existing organizations in the field of investment policy and promotion "are fragmented" (p. 192). MIGA "obviously will have clear advantages over them," since "it will be in constant contact with both the host countries and the corporate investment world as the global instrument for the promotion of their mutual interest" (p. 195). Such ambitious predictions, also found in other parts of the book, are unfortunate. They are in particular unfair to the author himself.

Proposals for multilateral investment insurance had been considered at various times in the World Bank and elsewhere but had not come to fruition. Under the presidency of A. W. Clausen (1981-1986), a firm and articulate believer in the role of the private sector, a renewed attempt was made. Mr. Shihata took charge of the staff work in 1983; his legal acumen, negotiating skill and persistence overcame the initial opposition of a number of member countries and the indifference of many others, and resulted in the approval in 1985 by the Bank's Board of Governors of the MIGA Convention for submission to member countries.²

Unfortunately, the expectations of its early entry into force were not realized. The failure of the U.S. administration to obtain congressional action was the principal cause of a 2½-year delay until April 1988. This loss of momentum has carried over to the start-up of operations: at the time of this writing (December 1989), MIGA had not yet concluded a single guarantee contract. The delay is ominous since it suggests policy differences among members. As regards MIGA's nonguarantee activities, in the interval between 1985 and 1988 IFC established a Foreign Investment Advisory Services unit (FIAS), which after the establishment of MIGA became an IFC/MIGA joint venture administered within MIGA.

¹ This common understanding was wholly ignored by the U.S. implementing legislation, which recognized "that United States participation in the Agency represents an effort to enhance United States trade prospects and strengthen the role of the United States private sector in the development process," and called for "regular and continuing consultations" with private-sector and labor representatives "on policy directions and operations of the Agency" (22 U.S.C. §290k-4 (Supp. V 1987)).

² The author's description and evaluation of earlier attempts and of his own role are found in part I, "The Making of MIGA: A Case Study of the Preparation and Acceptance of a Multilateral Financial Convention" (pp. 29-106).

MIGA and Foreign Investment consists, in addition to the already-mentioned part 1, of three chapters (part 2) dealing with legal and policy aspects of MIGA's guarantee services and other operations (pp. 107–214), and of three further chapters (part 3) under the headings of policy and institutional issues dealing with standards applicable to foreign investments, settlement of disputes and MIGA's organization and voting structure (pp. 215–328), together with 200 pages of appendixes. The book is well organized and clear and precise throughout. While some of its content will be of interest principally to potential users of MIGA's guarantees, its scope is wider and it contains much material and analysis that should be of interest to scholars and practitioners in the field of international affairs, as well as to international lawyers.

The eligibility requirements for MIGA's guarantee are laid down in Articles 11–14 of the Convention and elaborated in paragraphs 1.01–1.57 of the Operational Regulations. One notes interesting provisions giving MIGA a desirable amount of flexibility: in addition to the customary noncommercial risks of expropriation, currency transfer and war and civil disturbance, MIGA may also cover breach of contract in circumstances that amount, broadly speaking, to denial of justice (pp. 131–34); MIGA's board, acting by a special majority, may approve coverage of other specific noncommercial risks (p. 138) and extend eligibility to an investor who is a national of the host country, provided the assets to be invested are transferred from outside to the host country (p. 119). In deciding whether to issue a guarantee, MIGA not only must determine that the formal eligibility requirements have been met but also must satisfy itself, on the one hand, as to the consistency of the investment with the interests of the host country and, on the other, as to “the investment conditions in the host country, including the availability of fair and equitable treatment and legal protection for the investment” (Article 12(d)(iv)). The author comments that this reference to standards applicable to foreign investment relates to protection for the investments to be guaranteed rather than to general obligations of members regarding treatment of foreign investment and that it “uses familiar terms in such a broad manner as to allow MIGA enough discretion to judge the investment conditions on a case by case basis” (p. 222).

He then describes the linkage established in the course of negotiation between the “standards” provision of the Convention and another provision that envisages, as one of MIGA's nonguarantee functions, the conclusion by MIGA of agreements with host countries that would assure it, with respect to guarantees issued by it, treatment “at least as favorable as that agreed by the member concerned for the most favored guarantee agency or State in an agreement relating to investment” (Article 23(b)(ii)). Thus, if MIGA were not satisfied with the adequacy of the standards prevailing under the host country's domestic law and that country had concluded one or more investment protection treaties, MIGA could require the conclusion of an Article 23(b)(ii) agreement as a condition for the issuance of its guarantee (p. 226). Host countries would have preferred that the Convention omit any “standards” provision, while some capital-exporting countries had wished to define

the standards in substantive terms. The already-delicate problem of judging investment conditions was made more difficult by its treatment in the Operational Regulations. "[I]n part to accommodate the German delegation which proposed again that some broad substantive standards be incorporated in the Regulations" (p. 232), their paragraph 3.16 provides that in the absence of bilateral treaty protection, "adequate legal protection should be ascertained by the Agency in the light of the consistency of the law and practice of the host country with international law." This places "a formidable burden on MIGA" since, absent well-defined customary international law, the text "gives the Agency a mandate to develop the standards of this law for the purpose of its operations" (p. 233).

According to the author, the "law" identified by MIGA is likely "to have a strong impact on the behavior of its member countries and more generally on future decisions of international tribunals" (p. 235). It should therefore be specified with the greatest caution and impartiality. Shihata cautions MIGA in particular against being influenced by its interest in securing maximum protection for the investment to be guaranteed (*id.*). "In addition to the immense difficulty of formulating substantive standards in an objective manner, the exercise is likely to be so divisive in MIGA's councils as to obstruct rather than facilitate its operations" (p. 245). The author believes, therefore, that given the controversy regarding the state of customary international law in the field, of which he gives a number of examples (pp. 234-44), "MIGA is best advised in its formative years to apply broad guidelines which are likely to be generally acceptable to its members" (p. 247).

Another sensitive subject concerns claims by MIGA against a host country where MIGA acts as subrogee of a compensated investor (pp. 260-71). Annex II to the Convention prescribes that the parties shall attempt to resolve their dispute by negotiation. Failing such resolution within 120 days, either party may submit the dispute to arbitration, unless both parties consent to resort first to conciliation. MIGA, however, "as a business decision" (p. 260), may not press its claim against the host country, and the Regulations reflect a desire to avoid the confrontation inherent in arbitration. Disagreement among delegates as to the substantive law to be applied by an arbitral tribunal was ultimately resolved by a formula that mentions "the applicable rules of international law" and "the domestic law of the member concerned," in that order. Shihata states that the consensus on that text "was based on the assurance that principles of international law, whatever their content on this matter may be, would normally prevail over conflicting rules of the host country *in an arbitration proceeding between the Agency and that country*" (pp. 269-70, emphasis in original). To pacify countries that had strong objections to Annex II, the Convention authorizes, as an alternative, settlement in accordance with an agreement to be entered into, before issuance of the guarantee, between MIGA and the host country concerned. The agreement must be approved by a special majority and the Annex "shall serve as a basis for such agreement" (Article 57(b)). Attempts to apply the provision are likely to generate such controversies that it is not unreasonable to expect that it will remain a dead letter.

Issues involved in MIGA's financing system are discussed rather briefly. MIGA has an authorized share capital of \$1,082,000,000,³ of which 60 percent is allocated to developed and 40 percent to developing countries. Subscribed capital as of June 30, 1989, was \$702,543,000. The Convention limits MIGA's initial guarantee capacity to a 1.5:1 risk-to-asset ratio. This ratio may be increased in the light of experience, subject to an absolute maximum of 5:1. These provisions impose severe constraints on MIGA, especially in its early years (pp. 148-49). In the allocation of its guarantee capacity, MIGA will not only observe the requirement of risk diversification but also seek the broadest possible distribution of the benefits of its guarantees among members. To that end, it may prescribe maximum amounts of guarantees to be issued to investors of individual member countries, giving due consideration, among other things, to the share of these countries in MIGA's capital (p. 151). These difficult issues either do not arise or can be solved more easily in a sponsorship system in which the guaranteeing institution, acting as administrator of a joint operation, guarantees investments sponsored by member countries with each of them having a proportionate loss-sharing contingent obligation, while the institution's own funds would not be at risk (pp. 149-50).

The pre-MIGA proposals were based entirely on the sponsorship system. On the other hand, the advantages of a share-capital-based institution were said to be that participation by all members in MIGA's capital, and thus in loss sharing, would create a common interest in avoiding losses; that to be considered for a MIGA guarantee, investments would not need to be supported by a government; and that with share capital of its own, the institution would be more readily accepted by investors as a credible insurer (p. 68).⁴ MIGA ended up with a dual system, combining share capital and sponsorship, in which the latter was seen as a useful addition to MIGA's guarantee operations for its own account, to which MIGA might resort when it reached the limit of its guarantee capacity.

The last chapter, "MIGA's Organization and Voting Structure" (pp. 293-327), is an often-fascinating account of the drafters' attempts to balance the interests of developed and developing countries and, in particular, to enhance the influence of the latter and to make possible eventual voting parity between the two groups. The extremely complex solutions adopted will be of special interest to students of international affairs.

The materials included in *MIGA and Foreign Investment* and Shihata's comments constitute an invaluable guide to interpreting the MIGA Convention.

³ The Convention expresses capital in terms of Special Drawing Rights (SDR), but this is misleading since contrary to the very object and purpose of the SDR, its value is pegged permanently at \$1,082 (Article 5(a)).

⁴ Recognizing that 80% of subscriptions is not paid in but is only subject to call, the author envisages that MIGA may have to resort to "bridge financing until payments by members are made on calls related to obligations resulting from guarantee operations" (p. 210). For such financing to be available, the lenders must presumably be satisfied that the reasons for the delay do not raise doubts concerning the performance of the members' obligations to respond to calls.

One regrets, nevertheless, the paucity of references to *travaux préparatoires* other than those generated by Shihata and his staff. Publication of the complete *travaux préparatoires* or, in the alternative, making them accessible, would be an appropriate supplement to the book.

ARON BROCHES*
Of the New York Bar

International Law and Development. Edited by Paul de Waart, Paul Peters and Erik Denters. Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1988. Pp. xxx, 457. Index. Dfl.195; \$106; £58.

This volume reproduces the papers submitted to a seminar on international law and development organized by the Free University of Amsterdam for April 9–11, 1987. A very brief summary of the discussions and conclusions of the working groups is also included (pp. 371–99). Besides an introduction by Paul de Waart, there are 30 contributions of diverse length and quality, grouped under the following headings: (1) General, (2) Economic Sovereignty, (3) Investment, (4) Trade, (5) Finance and Taxation, (6) Economic, Social and Cultural Rights, and (7) Right to Development.

The essays this reviewer found of most interest include: *Sustainable Development as a Principle of International Law*, by Nagendra Singh (pp. 1–12); *Permanent Sovereignty over Natural Resources Versus Common Heritage of Mankind: Complementary or Contradictory Principles of International Law?*, by Nico J. Schrijver (pp. 87–101); *Transnational Corporations and Emerging International Legal Standards*, by Sylvanus Tiewul (pp. 105–17); *Science and Technology for Development: Individual Property and Public Interest*, by D. Kokkini Iatridou and P. de Waart (pp. 119–30); *Investment Risk and Trust: The Role of International Law*, by Paul Peters (pp. 131–62); *Counter-Trade and the Third World*, by Roeland F. Bertrams (pp. 213–25); and *Taxation and Economic Development*, by M. P. van Overbeeke and J. C. Prast-Ragetli (pp. 261–71).

The contributors mainly used as terms of reference the Declaration on the Progressive Development of Principles of Public International Law Relating to a New International Economic Order, adopted by the International Law Association in August 1986 (Seoul Declaration); the United Nations General Assembly Resolution 41/128 of December 4, 1986, embodying the Declaration on the Right to Development; and the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, adopted under the auspices of the International Commission of Jurists in June 1986.

The main areas of concern considered by the papers are the following: the relationships among development, human rights, ecology and the search for peace; sovereignty over natural resources and the need to exploit those resources through the use of foreign capital, managerial know-how and technology, as well as sovereignty's relationship with the seemingly incompatible concept of the common heritage of mankind; economic self-determination, economic, social and cultural rights, and conditionality of economic assist-

* Retired in 1979 as Vice-President and General Counsel of the World Bank.

ance, in particular from the International Monetary Fund; transfer of technology and the protection of the intellectual property, as well as the economic interests, of the transferring entities; the place of the right to development within the overall framework of human rights and, more specifically, of economic, social and cultural rights; and the place and role of international and municipal law in the promotion and regulation of international economic relations in general, and as regards development in particular. Several contributions also deal with research problems in these various fields.

Inevitably, the great number of contributions leads to some overlapping, as well as contradictions. These latter mainly stem from the fact that a wide spectrum of attitudes is represented by the authors, who range from unconditional supporters of the most extreme concepts of a "New International Economic Order" to skeptics preferring to discuss development issues within the framework of current international economic law. As a result, the reader can either choose presentations according to his or her own preferences or enjoy the possibility of comparing and gauging widely different approaches. This is certainly the chief merit of compendiums of this kind.

On the whole, however, a laudable spirit of reasonableness and realism prevails. This may be seen, for instance, in the manner in which the thorny issue of investments is handled in the many contributions dealing with it principally or incidentally. The fact that one cannot force an investor to invest but must persuade him to do so by providing suitable attractions is generally recognized, as is the no less important truth that an investor invests to earn money and not to make gifts—he will inevitably wish to withdraw more money from a venture than he put into it. Thus, if the investment is to benefit the host country, it has to produce sufficient added value to satisfy the investor and still provide gains for the host country's economy. The same spirit also usually prevails in the more clearly legal issue of the nature of such rights as self-determination and the right to development. The reader is shown how these evolved from political or ideological postulates into legal principles through the formation of a corresponding *opinio juris* (which may not yet exist in the case of the right to development), and how neither may pretend to the status of *jus cogens* as defined by the 1969 Vienna Convention on the Law of Treaties.

The contributions dealing with economic, social and cultural rights and international economic relations are more ambiguous. In particular, the affirmation that the International Monetary Fund as a UN agency is obliged to promote these rights and thus should not impose economic programs that hurt the ordinary people is certainly well-meant but totally ignores the constraints under which the IMF must operate if it is to remain at all able to provide its much-needed short-term assistance.

It is obviously difficult for organizers of a seminar to ensure that all the contributions will be of high quality, as it is for the editors of reports to exclude papers that hardly merit publication. But one sometimes wonders whether four-page statements consisting of an introduction of one page and a few unsupported affirmations should not be eliminated, even if at the actual seminar they may have served as catalysts for interesting debates.

Similarly, in a volume dealing with international law and development, contributions that deal only with economic matters, even if written by lawyers, may be seen by some readers as slightly out of place.

DIETRICH KAPPELER
University of Nairobi

BRIEFER NOTICES

Dutch Business Law. Legal, Accounting and Tax Aspects of Doing Business in the Netherlands (3d rev. ed.). Edited by Steven R. Schuit, Jan M. van der Beek, Gerrit H. Zevenboom and Bette E. Shifman. (Dordrecht: Kluwer Law and Taxation Publishers, 1989. Loose-leaf. Dfl.265; \$132; £76.) As international commerce multiplies at an ever-increasing tempo, the need for information on foreign legal systems grows in corresponding measure. On the international level, the Dutch have historically played a disproportionately large role. Dutch scholars such as Hugo Grotius and Johannes Voet, in the 17th and 18th centuries, laid the foundations for the modern law of nations and conflict of laws. The first modern corporation, the East India Company, was organized by the Dutch. Dutch involvement in international intercourse continues apace. Surprisingly to some, the Dutch are currently the second largest foreign investor in the United States, ahead of Japan, France, West Germany and Italy. Uniquely, the Dutch have given treaties a status higher than that of any domestic law, including their constitution.

Dutch involvement in international intercourse has also enhanced the need for information on the Dutch legal system. The fact that the Netherlands Antilles, a prominent haven for offshore investment, has essentially kept the Dutch legal system has only added to this need. The Netherlands has long provided a most attractive investment climate for foreign, and in particular American, investors. Its stable political system and labor conditions, internationally minded population (English is virtually any Dutchman's second language) and sophisticated legal and financial infrastructure attracted many foreign investors after World War II. As 1992 approaches, many will regard the Netherlands as an ideal base for EC-wide operations.

Comparatists are familiar with the great difficulties of acquainting outsiders with the general thrust and ambiance of a legal system. The authors and editors of this book did not set themselves an easy task. They sought to provide in brief compass information on the elements of the Dutch legal system likely to be of interest to foreign lawyers and businessmen. They have succeeded well in carrying this off.

The English text of the book is clear, succinct and to the point. The subjects covered are of an impressive breadth. The information provided is readily understandable and apt to provide answers to the questions readers are most likely to pose. Most helpful are the many references to statutes, court decisions, legal commentators and other sources. The reader is not asked to trust the authors; he or she is given the means for checking the sources relied upon.

It can fairly be said that no foreign lawyer or businessman who confronts a Dutch legal problem can responsibly forgo consulting this book. Where it does not provide the answer, this book is most likely to set him or her on the way to finding the information. As might be expected, there are chapters on

the judicial structure and litigation, the professions, conflict of laws, contracts, negotiable instruments, secured transactions, business organizations, agency and distribution agreements, antitrust law, labor, taxation and exchange controls. However, there are also in contemplation chapters on securities and capital markets, financing, business incentives, business regulation, industrial and intellectual property, real property, insurance, foreign trade, oil and gas, and bankruptcy. The loose-leaf format of the third edition allows the addition of both new material and changes in text whenever appropriate.

I know of no work on any legal system that does as well what this book sets out to do. It belongs in the library of any lawyer dealing with transactions involving the Netherlands.

HANS SMIT
Columbia Law School

Documents on International Administrative Tribunals. Edited by C. F. Amerasinghe. (Oxford: Clarendon Press, 1989. Pp. ix, 214. Index. \$59.) The two-volume treatise, *The Law of the International Civil Service*, by Dr. Amerasinghe was reviewed at 83 AJIL 674 (1989). The present volume complements the earlier volumes by setting forth the texts of the statutes and rules of procedure of the administrative tribunals discussed in the treatise.

European Inter-State Co-operation in Criminal Matters: The Council of Europe's Legal Instruments. Compiled and edited by Ekkehart Müller-Rappard and M. Cherif Bassiouni. (Dordrecht, Boston, Lancaster: Martinus Nijhoff Publishers, 1987. Loose-leaf.) This loose-leaf volume assembles the conventions sponsored by the Council of Europe on criminal matters. First, there are a series of conventions on mutual assistance in criminal matters, including extradition, the enforcement of foreign criminal judgments and the transfer of sentenced persons. Second, there are conventions on particular offenses such as road traffic offenses, crimes against humanity, terrorism and offenses against cultural property. The third part deals with agreements as to firearms and compensation for victims of violent crime.

Répertoire de la jurisprudence arbitrale internationale / Repertory of International Arbitral Jurisprudence. 2 vols. Edited by Vincent Coussirat-Coustère and Pierre Michel Eisemann. (Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1989. Vol. I: pp. xxxiii, 546; vol. II: xxvi, 872. Indexes. Vol. I: \$205; vol. II: Dfl.395; \$215; £125.) These two volumes, covering awards from 1794 to 1918 and from 1919 to 1945, respectively, provide a research guide to awards of international tribunals that state rules of international law. Arranged in 11 chapters, each covering a different substantive topic, the extracts set forth the relevant parts of the awards, both in French and in English. The researcher can proceed from the quotation to the table of awards to find the source, typically the UN Reports.

COLLECTED ESSAYS

Studies on International Law. Vol. 4. (Sofia: Bulgarian Association of International Law, Publishing House of the Bulgarian Academy of Sciences, 1989. Pp. 129.)

Vassil Mrachkov, *International Legal Regulations in the Field of Social Security and the Bulgarian Insurance Legislation*; Nikola Vachev, *International (Collec-*

tive) *Currency—Legal Aspects*; Ivan Ivanov, *Liability of the Member-States of CMEA on Agreements for Economic and Scientific-Technical Cooperation*; Emil Konstantinov, *International Legal Regulation of the Remote Sensing of the Earth from Outer Space*; Dencho Georgiev, *The Establishment of Treaty Relations between the CMEA and the EEC*; Alexander Dichev, *Jurisdiction of the International Civil Process*; Georgi Sarakinov, *Recognition and Legal Protection of Foreign Trademarks in the People's Republic of Bulgaria*; Stoyan Stalev, *Applicable Law for Rights in rem over a Ship*; Petko Radoynov, *Prof. Yanko D. Vekhilov*.

Chinese Yearbook of International Law and Affairs 1987–88. Vol. 7. Edited by Hungdah Chiu. (Taipei: Chinese Society of International Law, 1989. Pp. viii, 548. Index. \$20. Distributed by the Occasional Papers/Reprints Series in Contemporary Asian Studies, Baltimore, Md.)

Hungdah Chiu, *The Status of Customary International Law, Treaties, Agreements and Semi-Official or Unofficial Agreements in Chinese Law*; Ta-tung Jacob Chang, *Legal and Policy Aspects of Procurement of Goods Financed by the World Bank*; Peter Singleton, *The Legal Basis of British Piracy Suppression in Chinese Waters, 1927–1937*; Kuen-chen Fu, *Note on the Guinea/Guinea-Bissau Maritime Boundary Delimitation Arbitration*; David Simon and C. Y. Wang, *Critique of "Taiwan" Section from Steel and the State*; Lawrence Shao-Liang Liu, *Survey of Major Commercial Law Developments in the Republic of China: 1987–1988*; David Simon, *Legal Developments in United States–Republic of China Trade from January 1, 1986 through June 30, 1988*; Hungdah Chiu, *American Cases/Legal Opinions Concerning Taiwan/Republic of China*.

Polish Yearbook of International Law 1987. Vol. 16. (Wrocław, Warszawa, Kraków, Gdańsk, Łódź: Polish Academy of Sciences, Institute of State and Law, 1989. Pp. 248.)

Wojciech Forysiński, *CMEA's Cooperation with Third States in the Light of International Law*; Andrzej Jacewicz, *L'initiative de défense stratégique et les engagements conventionnels des Etats-Unis*; Leonard Łukaszuk, *Settlement of International Disputes concerning Marine Scientific Research*; Kazimierz Równy, *The Right of Passage Through Straits Used for International Navigation and the United Nations Convention on the Law of the Sea*; Jerzy Rzymanek, *Some Legal Problems of United Nations Peacekeeping: UNEF–2 and UNDOF Experiences*; Stefan Sawicki, *Consular Immunity of Personal Inviolability*; Janusz Stańczyk, *Permissibility of Intervention under Article 62 of the Statute before the International Court*; Janusz Symonides, *Contiguous Zone*; Jan Ciszewski, *Norms of Competence Concerning Competence of Law and Organs in Civil and Family Matters and the Principles of Recognition of Judicial Decisions in Agreements Concluded between Poland and Capitalist States*.

The Canadian Yearbook of International Law 1988. Vol. 26. (Vancouver, B.C.: The Canadian Branch, International Law Association; University of British Columbia Press, 1989. Pp. 499. Index. \$60.)

Douglas M. Johnston, *Functionalism in the Theory of International Law*; R. St. J. Macdonald, *Maximilien Bibaud, 1823–1887: Pionnier de l'enseignement du droit international au Canada*; Sharon A. Williams, *International Law and Terrorism: Age-Old Problems, Different Targets*; Philippe Kirsch & Douglas Fraser, *The Law of the Sea Preparatory Commission after Six Years: Review and Prospects*; Elaine L. Hughes, *Ocean Dumping and Its Regulation in Canada*; Howard Mann, *Arms Control Verification and the United Nations: The Chemical Weapons Experience of the 1980s*; Marie-France Major, *L'Entente du Lac Meech, le partage des pouvoirs en matière de pêcheries et le droit international*.

Canadian Human Rights Yearbook / Annuaire canadien des droits de la personne 1988. (Ottawa, Paris, London: Les Presses de l'Université d'Ottawa. Pp. 297. \$45, cloth; \$25, paper.)

Pierre Foucher, *L'Accord du lac Meech et les francophones hors Québec*; Louis Bruyere, *Aboriginal Peoples and the Meech Lake Accord*; Bruce Feldthusen, *Urinalysis Drug Testing: Just Say No*; Michel Le Bel, *Liberté d'expression, pornographie et "danse nue" dans les bars*; John A. Detzner, *De l'efficacité des mécanismes internationaux de protection des droits de la personne: le cas du Chili*; Margrit Eichler, *The Elusive Ideal—Defining Equality*.

Italian Yearbook of International Law 1986–87. Vol. 7. (Milan: Dott. A. Guiffè Editore, 1988. Pp. xii, 695. Index. \$80. Distributed by Oceana Publications, Inc.)

Andrea Giardina, *Compensating Nationals for Damage Suffered Abroad: Italian Practice*; Giorgio Sacerdoti, *State Contracts and International Law: A Reappraisal*; John J. Barcelò III, *The Conceptual Framework for EEC Regulation of State Aids*; Aurelio Pappalardo, *Aids to Restructuring and Government Equity Participation in the EEC and in International Trade. Recent Developments*; Gabriella Venturini, *GATT, Domestic Adjudication and International Conciliation*; Sergio Marchisio, *Legal Features of Multilateral Aid*; Bruno Zanghirati, *Sovereign Indebtedness: The Complex Relations between Banks and States*; Salvatore Vitale, *New Cooperation Treaty between Italy and Argentina*; Andrea de Guttry, *Some Recent Cases of Unilateral Countermeasures and the Problem of their Lawfulness in International Law*; Claudio Cocuzza, *State Involvement in Terrorist Activities and Economic Sanctions: The Libyan Case*; Paolo Cesarini, *The Constitutional Reform of the International Labour Organization*; Louise Doswald-Beck, *The International Law of Naval Armed Conflicts: The Need for Reform*.

Annuaire Européen / European Yearbook 1987. Vol. 35. Published under the auspices of the Council of Europe. (Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1989. Dfl.395; \$195; £129.)

Paul Luif, *The European Neutrals and Economic Integration in Western Europe*; Claude Dejardin, *Migration: The European Melting Pot*; Michèle Barzach, *Organs Transplants*; Nicolas Valticos, *Democracy and Human Rights*.

International Geneva Yearbook 1989. Organization and Activities of International Institutions in Geneva. Edited by Ludwik Dembinski and Richard O'Regan. (Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1989. Pp. xii, 359. Index. Dfl.100; \$54; £32.)

Antonio Donini, *Resilience and Reform: Some Thoughts on the Process of Change in the United Nations*; Victor-Yves Ghebali, *L'URSS de Gorbatchev et les Nations Unies*; Maxime Tardu, *Implementation of Human Rights through the United Nations' Complaint Procedures*; Fred Tanner, *Arms Control Today: From Negotiations to the Management of Agreements*; Jean-Marie Serre, *Gérer l'indépendance: le diagnostic et les propositions de la VIIe session de la CNUED*; Marni J. Pigott, *International Labour Standards and ILO Activities: The Case of Plantations*; Michel Veuthey, *Le Comité International de la Croix Rouge et la coopération humanitaire internationale*; Pierre Bringuier, *Le Comité Intergouvernemental pour les Migrations et son oeuvre*; Julian Burger, *The Ethics of Human Survival*; P. H. Dembinski and Y. Flückiger, *Public International Activities in Geneva: An Attempt at a Cost-Benefit Analysis*.

Cursos de derecho internacional de Vitoria-Gasteiz, 1987. Organized by the Faculty of Law of the University of the Basque Country. (San Sebastián: Servicio Editorial Universidad del País Vasco, 1989. Pp. 236.)

Alejandro J. Rodríguez, *El Derecho internacional en la sentencia de la Corte Internacional de Justicia en el asunto Nicaragua-Estados Unidos*; Carlos Jiménez, *El Particular ante el derecho de la responsabilidad internacional: los problemas previos del "Standard" mínimo y la protección diplomática*; Alberto A. Herrero, *Neutralidades, Neutralizaciones y Neutralismos*; Héctor Gros, *Reflexiones en Torno a la protección internacional de los derechos humanos en el ámbito regional americano*; José Puente, *El Derecho internacional en el sistema constitucional español vigente*.

BOOKS RECEIVED*

International Law—General

Recueil des Cours de l'Académie de droit international de La Haye, 1989. Vol. I. (Vol. 213 of the collection.) Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1989.

Dinstein, Yoram (ed.). *International Law at a Time of Perplexity. Essays in Honour of Shabtai Rosenne.* Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1989. Pp. xxxiii, 1056. Index. Dfl.450; \$250; £142.50.

Doehring, Karl, Matthias Herdegen, Werner Meng, Werner Morvay, and Torsten Stein (eds.). *Deutsche Rechtsprechung in völkerrechtlichen Fragen / Decisions of German Courts Relating to Public International Law / Décisions des cours allemandes en matière de droit international public 1981–1985.* Berlin, Heidelberg, New York, London, Paris, Tokyo: Springer-Verlag, 1989. Pp. xxv, 921. Index.

Fiedler, Wilfried, and Georg Ress (eds.). *Verfassungsrecht und Völkerrecht. Gedächtnisschrift für Wilhelm Karl Geck.* Cologne, Berlin, Bonn, Munich: Carl Heymanns Verlag KG, 1989. Pp. viii, 1038. DM 270.

German Yearbook of International Law 1988. Vol. 31. Berlin: Duncker & Humblot, 1989. Pp. 741. DM 248.

Mariño Menéndez, Fernando M. *Nociones de derecho internacional público* (2d ed.). Zaragoza: Universidad de Zaragoza, 1989. Pp. 389. Author index.

International Economic Law & Relations

Forsythe, David P. (ed.). *The United Nations in the World Political Economy: Essays in Honour of Leon Gordenker.* New York: St. Martin's Press, 1989. Pp. xii, 239. Index. \$45.

Gruson, Michael, Stephan Hutter, and Michael Kutshera. *Legal Opinions in International Transactions. Foreign Lawyers' Response to US Opinion Requests* (2d ed.). London, Dordrecht, Boston: Graham & Trotman, 1989. Pp. 130. £45; \$76.

Guía de servicios de información relacionados con el comercio exterior. Buenos Aires: Banco Interamericano de Desarrollo/Instituto para la Integración de América Latina (BID-INTAL), 1989. Pp. viii, 130. \$5.

Husain, Ishrat, and Ishac Diwan (eds.). *Dealing with the Debt Crisis.* Washington: The World Bank, 1989. Pp. xiv, 308. \$24.95.

Kenworthy, James L. *A Guide to the Laws, Regulations and Policies of The People's Republic of China on Foreign Trade and Investment.* Buffalo, N.Y.: William S. Hein and Co., 1989. Pp. xvi, 189. \$85.

Martha, Rutsel Silvestre J. *The Jurisdiction to Tax in International Law. Theory and Practice of Legislative Fiscal Jurisdiction.* Deventer, Boston: Kluwer Law and Taxation Publishers, 1989. Pp. xxxii, 202, Dfl.164; \$87.

* Mention here neither assures nor precludes later review.

- McIntyre, Michael J. *The International Income Tax Rules of the United States*. Stoneham, Mass.: Butterworth Legal Publishers, 1989. Index.
- Petermann, Dirk. *Beschränkungen zur Abwehr von Beschränkungen. Sec. 301 des US-amerikanischen Trade Act von 1974 und das neue handelspolitische Instrument der EG*. Heidelberg: Verlag Recht und Wirtschaft GmbH, 1989. Pp. 166. Index. DM 68.
- Salgado P., Germánico (comp.). *Economía de la integración latinoamericana. Lecturas seleccionadas*. 2 vols. Buenos Aires: Banco Interamericano de Desarrollo/Instituto para la Integración de América Latina (BID-INTAL), 1989. Vol. I: pp. 555; vol. II: pp. 339. \$15 combined.
- Šarčević, Petar (ed.). *Essays on International Commercial Arbitration*. London, Dordrecht, Boston: Graham & Trotman/Martinus Nijhoff, 1989. Pp. x, 247. Index. Dfl.145; \$78; £46.50.
- Sukijasović, Miodrag. *Pravo regulisanje međunarodne trgovine kafom*. Beograd, 1989. Pp. 303. Index. English Summary.
- Zelada Castedo, Alberto. *Derecho de la integración económica regional*. Buenos Aires: Banco Interamericano de Desarrollo/Instituto para la Integración de América Latina (BID-INTAL), 1989. Pp. xxiii, 214. \$7.
- Zelada Castedo, Alberto (comp.). *Derecho de la integración económica regional. Lecturas seleccionadas*. 2 vols. Buenos Aires: Banco Interamericano de Desarrollo/Instituto para la Integración de América Latina (BID-INTAL), 1989. Vol. I: pp. 399; vol. II: pp. 306. \$14 combined.

Law of the Sea & Maritime Law

- Hey, Ellen. *The Regime for the Exploitation of Transboundary Marine Fisheries Resources. The United Nations Law of the Sea Convention. Cooperation between States*. Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1989. Pp. xii, 306. Index. Dfl.165; \$85; £56.
- Orihuela Calatayud, Esperanza. *España y la delimitación de sus espacios marinos*. Murcia: Universidad de Murcia, 1989. Pp. 258.
- Orrego Vicuña, Francisco. *The Exclusive Economic Zone. Regime and legal nature under international law*. Cambridge, New York, Port Chester, Melbourne, Sydney: Cambridge University Press, 1989. \$49.50.

Use of Force & Law of War

- Boiton-Malherbe, Sylvie. *La protection des journalistes en mission périlleuse dans les zones de conflit armé*. Brussels: Editions Bruylant, 1989. Pp. xxv, 404. F 400.
- Butler, W. E. (ed.). *The Non-Use of Force in International Law*. Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1989. Pp. 250. Dfl.135; \$67.50; £43.50.
- Paenson, Isaac. *English-French-Spanish-Russian Manual of the Terminology of the Law of Armed Conflicts and of International Humanitarian Organizations*. Brussels: Bruylant; London, Dordrecht, Boston: Martinus Nijhoff, 1989. Pp. xxxviii, 844. Index. Dfl.475; \$235; £155.

Arms Control & Disarmament

- Menon, P. K. *The United Nations' Efforts to Outlaw the Arms Race in Outer Space. A Brief History with Key Documents*. Lewiston, Queenston: The Edwin Mellen Press, 1988. Pp. 209. Index. \$59.95.
- Seidelmann, Reimund. *Auf dem Weg zu einer westeuropäischen Sicherheitspolitik*. Baden-Baden: Nomos Verlagsgesellschaft, 1989. Pp. 384. DM 49.

Terrorism

- Erickson, Richard J. *Legitimate Use of Military Force Against State-Sponsored International Terrorism*. Alabama: Air University Press, 1989. Pp. xi, 267.

Human Rights

- Delmas-Marty, Mireille (ed.). *Raisonnement la raison d'Etat. Vers une Europe des droits de l'homme*. Paris: Presses Universitaires de France, 1989. Pp. 512. F 240.
- Forsythe, David P. (ed.). *Human Rights and Development: International Views*. New York: St. Martin's Press, 1989. Pp. xvi, 369.
- Frankel, Marvin E., and Ellen Saideman. *Out of the Shadows of Night. The Struggle for International Human Rights*. New York: Delacorte Press, 1989. Pp. 257. Index. \$8.95.

Maran, Rita. *Torture: The Role of Ideology in the French-Algerian War*. New York, Westport, Conn., London: Praeger, 1989. Pp. x, 214. Index. \$42.95.

Medina Quiroga, Cecilia. *The Battle of Human Rights. Gross, Systematic Violations and the Inter-American System*. Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1988. Pp. xvii, 363. Index.

Meron, Theodor. *Human Rights and Humanitarian Norms as Customary Law*. Oxford: Clarendon Press, 1989. Pp. x, 263. Index. \$55.

Toscano, Roberto. *Soviet Human Rights Policy and Perestroika*. Center for International Affairs, Harvard University. Lanham, Md.: University Press of America, 1989. Pp. x, 38. \$8.50.

Immigration & Refugee Law

Bean, Frank D., Georges Vernez, and Charles B. Keely. *Opening and Closing Doors. Evaluating Immigration Reform and Control*. Santa Monica, Cal.: Rand Corporation; Washington: The Urban Institute, 1989. Pp. xvi, 138. \$9.25.

Nanda, Ved P. (ed.). *Refugee Law and Policy. International and U.S. Responses*. New York, Westport, Conn., London: Greenwood Press, 1989. Pp. x, 225. Index. \$45.

Ricca, Sergio. *International Migration in Africa: Legal and administrative aspects*. Geneva: International Labour Office, 1989. Pp. xii, 190. Index. SF 27.50.

State Responsibility

Mazzeschi, Riccardo Pisillo. "*Due diligence*" e responsabilità internazionale degli stati. Milan: Dott. A. Giuffrè Editore, 1989. Pp. xiv, 418. Indexes.

Air & Space Law

Naveau, Jacques. *International air transport in a changing world*. Brussels: Bruylant; London, Dordrecht, Boston: Martinus Nijhoff, 1989. Pp. 250. Dfl.135; \$67; £45.

Okolie, Charles C. *International Law of Satellite Remote Sensing and Outer Space*. Dubuque, Iowa: Kendall/Hunt Publishing Co., 1989. Pp. vii, 205. \$37.95.

International Organizations

Barros, James. *Trygve Lie and the Cold War. The UN Secretary-General Pursues Peace, 1946-1953*. DeKalb, Ill.: Northern Illinois University Press, 1989. Pp. x, 445. Index. \$37.

Haggenmacher, Peter, Richard Perruchoud, and Haritini Dipla. *Cour Permanente de Justice Internationale 1922-1945. Volume 5-I: La responsabilité internationale. Volume 5-II: La guerre et la neutralité*. Geneva: Publications de l'Institute Universitaire de Hautes Etudes Internationales, 1989. Pp. 1636. Indexes.

European Community Law

Fine, Frank L. *Mergers and Joint Ventures in Europe: The Law and Policy of the EEC*. London, Dordrecht, Boston: Graham & Trotman, 1989. Pp. x, 181. Index. £50; \$85.

Peláez Marón, José M. *La capacidad de compromiso de la Comunidad Europea en el medio económico internacional*. Valladolid: Universidad de Valladolid, 1989. Pp. 66.

Treaty Law

Kavass, Igor I., and Adolf Sprudz (comps.). *Unpublished and Unnumbered Treaties Index 1988* (3d ed.). Buffalo, N.Y.: William S. Hein and Co., 1989. Pp. xx, 584. \$89.50.

Telecommunications

Savage, James G. *The Politics of International Telecommunications Regulation*. Boulder, San Francisco and London: Westview Press, 1989. Pp. vii, 240. Index. \$36.50.

Wallenstein, Gerd. *Setting Global Telecommunication Standards*. Norwood, Mass.: Artech House, 1990. Pp. xv, 256. Index.

U.S. Law & Foreign Relations

- Boyle, Francis R. *Searching the Law: The States. A Selective Bibliography of State Practice Materials in the 50 States*. Dobbs Ferry, N.Y.: Transnational Publishers, Inc., 1989. Pp. ix, 525. \$65.
- Mabry, Donald J. (ed.). *The Latin American Narcotics Trade and U.S. National Security*. New York, Westport, Conn., London: Greenwood Press, 1989. Pp. x, 206. Index. \$37.95.
- Foreign Relations of the United States, 1955-1957. Volume XXII: Southeast Asia*. (Dept. of State Pub. 9715.) Washington: U.S. Govt. Printing Office, 1989. Pp. xxiii, 973. Index.
- Foreign Relations of the United States, 1955-1957. Volume X: Foreign Aid and Economic Defense Policy*. (Dept. of State Pub. 9719.) Washington: U.S. Govt. Printing Office, 1989. Pp. xxvii, 775. Index.

Regional, Foreign & Comparative Law & Politics

- Brode, Patrick. *The Odyssey of John Anderson*. Toronto, Buffalo, London: University of Toronto Press, 1989. Pp. xiii, 151. Index. \$35, cloth; \$14.95, paper.
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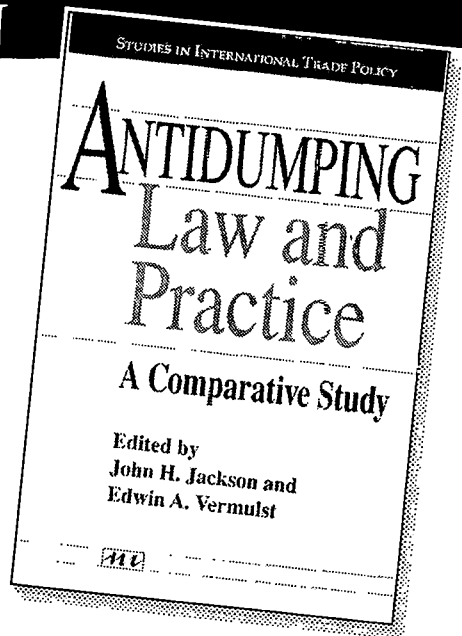
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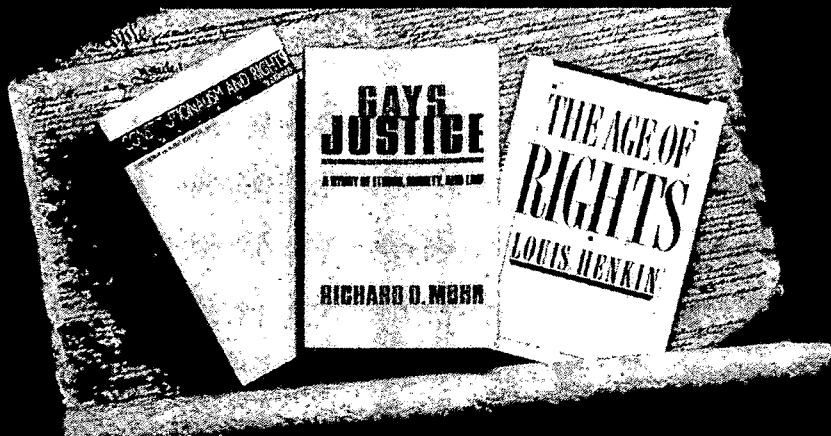
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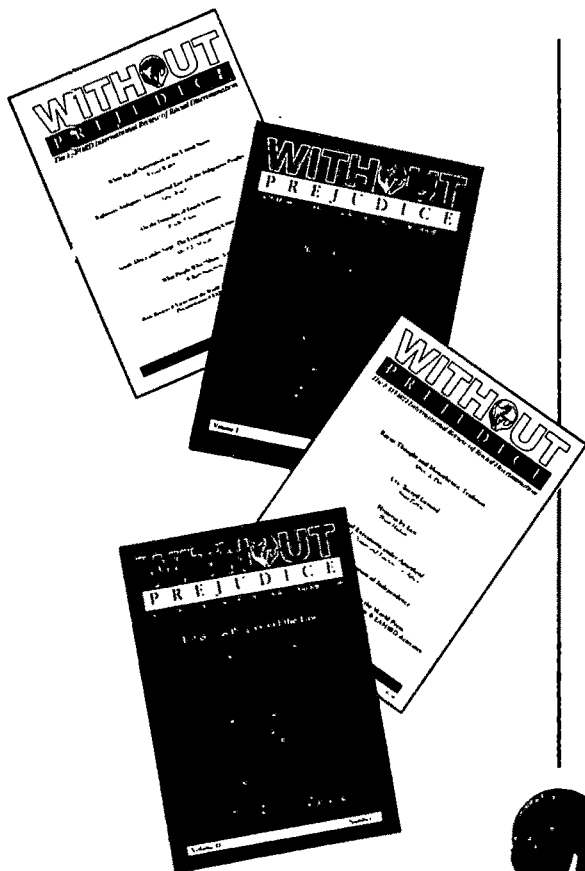
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VOL. 84

July 1990

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INTERNATIONAL LAW IN THE THIRD REICH

By Detlev F. Vagts*

What justifies asking American readers to take time in 1990 to review German international law during the Third Reich, which ended in 1945? First, it is a dramatic story. People who hold certain views on international law are dismissed, exiled, imprisoned and even hanged. The penalties for disagreement are far more severe than tenured faculty members of the 1990s would even dream. Second, the peculiarities of the period enable one to develop some hypotheses about the interactions in the law among people, institutions, ideas and policies in a way that is starker and clearer than the path one must try to trace in calmer times when movements are more gradual and subtle. It is in a sense a not-to-be-repeated laboratory test of how far a ruthless regime can impose a radical change in thinking on a community of legal scholars. The very repulsiveness of some of the concepts enables one to distance oneself from them and regard them as objects of disinterested scrutiny. Finally, the period is widely ignored, even in Germany, in the literature on the history of international law and in many other subsequent studies that seem to demand some reference to events and writings of that time. Although a few highly useful works have appeared, mostly on limited aspects of the scene, the field is clearly understudied.¹ It is perhaps most strikingly so in

* Of the Board of Editors.

Since this article is aimed at an English-speaking audience, I have cited works in English whenever they were comparable to sources in German and have referred to translations whenever available. Where no translator is named, the translation is my own. Very helpful research work was done for me by students: Brian Ganson, Greta Husemoller and Carlo Kostka. Important comments on earlier versions were made by Jost Delbrück, Karl Doehring, Jochen Frowein, Bardo Fassbender, Leo Gross, John Herz, Norbert Horn, Theodor Meron and Christian Tomuschat. Bardo Fassbender furnished both comments and quantities of materials not available here. The Harvard Law School library staff performed heroically in finding difficult sources.

¹ After a half century, the most valuable work is still E. BRISTLER, *DIE VÖLKERRECHTSLEHRE DES NATIONALSOZIALISMUS* (1938) (written in fact by John Herz, and in Geneva, not, as stated in the book, in Paris). This was done to protect the author's family, then still in Germany. See J. HERZ, *VOM ÜBERLEBEN: WIE EIN WELTBILD ENTSTAND* 111 (1984). Portions of the 1938 book were published as Herz, *The National Socialist Doctrine of International Law and the Problems of International Organization*, 54 *POL. SCI. Q.* 536 (1939); and *Bolshevist and National Socialist Doctrines of International Law*, 7 *SOC. RES.* 1 (1940) (with J. Florin). Just as this article was being completed, I was sent a copy of an anonymous piece, *Nationalsozialismus und Völkerrecht*, in 6 *DEUTSCHLAND-BERICHTE DER SOZIALDEMOKRATISCHEN PARTEI DEUTSCHLANDS (SOPADE)* (1939); this was the voice of the Social Democratic Party in exile. A more recent discussion of German international law in this period, D. FISCHER, *NATIONAL SOCIALIST GERMANY AND INTERNATIONAL LAW* (1974), seeks to normalize Nazi treatment of international law, criticizing Bristler's "all to [sic] frequent degeneration into anti-National Socialist polemics" (p. 3), and retains some coherence only by firmly excluding from consideration everything published after 1939. A contemporary work in French was J. FOURNIER, *LA CONCEPTION NATIONALE-SOCIALISTE DU DROIT DES GENS* (1939). See also Preuss, *La Conception raciale nationale socialiste du*

the work of those authors who since 1945 have not mentioned what they themselves wrote in the period 1933–1945. In general, the German legal community has only recently started to investigate what happened to law in that period.²

It is my intention, then, to begin by sketching the general historical background, the foreign affairs of Germany during those 12 years, together with some reminder of the preceding Weimar times. I will then describe the academic institutions and government agencies within which international law was practiced as of 1933. Next, I analyze the means through which Hitler's regime sought to change German international law. The following section attempts to account for the population of individuals who did the writing and thinking during those years, tracing the very divergent ways in which they reacted to these pressures. Finally, I analyze the rhetoric and argumentation deployed by academicians and government representatives in dealing with international law issues as they arose in those years.

I. GERMANY'S INTERNATIONAL RELATIONS FROM 1933 TO 1945

Some Generalities

Many people remember, think they remember, or have studied the events of the Nazi period. Yet it seems necessary to give a brief résumé of those events which form the background to international law thinking during those years.³ Before plunging into chronology, I will make a few useful general points, basically corrections of widely held misconceptions.

droit international, 42 REVUE GÉNÉRALE DU DROIT INTERNATIONAL PUBLIC [RGDIP] 688 (1935); Gott, *The National Socialist Theory of International Law*, 32 AJIL 704 (1938).

Three postwar German articles have looked at Nazi international law theory: Messerschmidt, *Revision, Neue Ordnung, Krieg; Akzente der Völkerrechtswissenschaft in Deutschland 1933–1945*, MILITÄRGESCHICHTLICHE MITTEILUNGEN, No. 1, 1971, at 61; Paussmeyer, *Die Grundlagen nationalsozialistischer Völkerrechtstheorie als ideologischer Rahmen für die Geschichte des Instituts für Auswärtige Politik 1933–1945*, in KOLONIALRECHTSWISSENSCHAFT, KRIEGSURSACHENFORSCHUNG INTERNATIONALE ANGELEGENHEITEN 115 (K. J. Gantzel ed. 1983) [hereinafter 1 Gantzel]; Diner, *Rassistisches Völkerrecht: Elemente einer Nationalsozialistische Weltordnung*, 37 VIERTELJAHRSCHEFTE FÜR ZEITGESCHICHTE 23 (1989).

² The only recent sources on National Socialist law available in English are J. BENDERSKY, CARL SCHMITT, THEORIST FOR THE REICH (1983); Kaufmann, *National Socialism and German Jurisprudence from 1933 to 1945*, 9 CARDOZO L. REV. 1629 (1988); and Reimann, *National Socialist Jurisprudence and Academic Continuity: A Comment on Professor Kaufmann's Article*, *id.* at 1651. In 1990 a translation of I. MÜLLER, FURCHTBARE JURISTEN (1987) is due to appear. Some of the contemporary American work on Nazi law is still of value. See Loewenstein, *Law in the Third Reich*, 45 YALE L.J. 779 (1936), and the other sources cited in his *The Law and the Legislative Process in Occupied Germany*, 57 YALE L.J. 724, 733 n.40 (1948).

A striking example of omission of one's own works comes from FESTSCHRIFT FÜR HERMANN JAHREISS 503–08 (K. Carstens & H. Peters eds. 1964), which lists only one work during the Third Reich, omitting the author's most imperialistic studies, *Wandel der Weltordnung*, 21 ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT [ZÖR] 513 (1941), and *Völkerrechtliche Grossraumordnung*, 6 ZEITSCHRIFT DER AKADEMIE FÜR DEUTSCHES RECHT 608 (1939).

³ For a chronicle of German foreign relations in this period, see G. WEINBERG, THE FOREIGN POLICY OF HITLER'S GERMANY: DIPLOMATIC REVOLUTION IN EUROPE, 1933–1936 (1970) [hereinafter 1 G. WEINBERG]; THE FOREIGN POLICY OF HITLER'S GERMANY: STARTING WORLD WAR II, 1937–1939 (1980) [hereinafter 2 G. WEINBERG].

First, what happened between 1933 and 1945 was not inevitable. Inevitability is a construct forced upon actual happenings by retrospection. However much one may see deep forces pushing the current of events, those we here take account of were in fact peculiarly contingent. Had the Bavarian policeman who killed the man arm in arm with Hitler in the 1923 putsch aimed slightly to one side, these actions of the thirties would have been very different.

Second, what happened was not predictable in any detail. Intelligent observers of the scene in, say, 1933 could, and did, anticipate that the Nazi program would be tempered, co-opted, by established conservative forces, though they should also have been apprehensive about the high level of risk introduced by Hitler's seizure of power. The actions and statements of our cast of characters must be understood in the light of this uncertainty.

Third, the "system" of the Third Reich was in fact rather confused and unsystematic. The aura of German orderliness obscures this reality for many people.⁴ While Hitler made the major decisions and was able to fuss with the placement of regiments on the map of Normandy, he was not in touch with the details of much that was happening.⁵ This disorder permeated the Reich's international relations, where the traditional bureaucracy of the Foreign Office was supplemented and duplicated by a National Socialist Party apparatus; other adventurers, ranging from personal friends of Adolf Hitler to the heads of such organizations as the Abwehr (Germany's Central Intelligence Agency), conducted foreign policy initiatives on their own. In the early stages, this overlapping was largely due to Hitler's need to proceed circumspectly in displacing the establishment; in later stages, it was due in part to his temperament, which favored rivalries among his subordinates, and to his inability to focus on all of the happenings in a high-paced period. Near the end, it had to do with his deteriorating mental and physical condition. These factors imply that there was some room for individuals to make moral decisions, to attempt to influence action for good or evil, at a level that was significant for human lives.

Fourth, political relations with foreign states were important for the achievement of Hitler's goals, a consideration that is obscured by our recollections of Panzers rolling through the Ukraine or Stukas plunging from the skies over Dunkirk. Much of Hitler's success was achieved by diplomacy, by such classic techniques as dividing potential adversaries and establishing temporary alliances or commonalities of interest. Indeed, the military-power

⁴ K. BRACHER, *THE GERMAN DICTATORSHIP: THE ORIGINS, STRUCTURE AND EFFECTS OF NATIONAL SOCIALISM* 319-29 (J. Steinberg trans. 1970). There is a lively dispute about the degree to which Hitler was able to impose a consistent and systematic order on German affairs, as opposed to a rivalry of systems or, in the term the specialists use, "polycracy." See K. HILDEBRAND, *THE THIRD REICH*, ch. 4 (P. S. Falla trans. 1987); I. KERSHAW, *THE NAZI DICTATORSHIP: PROBLEMS AND PERSPECTIVES OF INTERPRETATION*, ch. 4 (2d ed. 1989).

⁵ As to overlapping functions in the foreign affairs field, see H. A. JACOBSEN, *NATIONALSOZIALISTISCHE AUSSENPOLITIK 1933-1938* (1968); I. KERSHAW, *supra* note 4, ch. 6. Of course, none of this puts into question Hitler's moral and legal responsibility for what happened in the Third Reich. Hitler occasionally involved himself in the details of controversies when international law issues were at stake, as in the *Jacob* case with Switzerland. See sources cited in note 144 *infra*.

relations between France and Germany alone were such that an armed confrontation before 1937 or 1938 would have ended disastrously for the Reich.⁶ During the early years, Hitler spoke repeatedly of his desire for peace, of his determination to observe Germany's treaty commitments.⁷ The German people, as reported by both the secret police and the exiled Social Democratic Party, dreaded war and went through great emotional crises every time Hitler took them to the brink—although they were tumultuously glad and proud when he brought them a whole series of triumphs in foreign policy.⁸ Even when Germany entered the war in 1939, it needed allies and had an interest in keeping neutrals favorably disposed.

These considerations do not negate the fact that it was often impossible to pursue German diplomatic goals consistently and intelligibly in the presence of the regime's perceived military and racial necessities. They do indicate, however, that there was a role for international law and, subsidiarily, one for international legal rhetoric. In particular, international law was regarded by the Reich as instrumental in neutralizing foreign public opinion, especially in Great Britain, so as to forestall drastic reactions.

A Brief Chronology

We turn now to a more specific description of Germany's international affairs, starting with the major external issues that cast their shadow over the Reich in 1933. In a fundamental sense, they all derived from one set of documents, the Treaty of Versailles and the arrangements that accompanied and followed it.⁹ Seldom has a nation been as obsessed by a treaty as was the Germany of the 1920s and 1930s—and, of course, the German international law community was particularly wrapped up in it. At the base of this furor was the question of war guilt, of Germany's responsibility for having started World War I.¹⁰ Germany's forced concession of sole responsibility in Article 231 of the Treaty had in no way settled the question in the hearts and minds of the German people. Enormous quantities of scholarship were lavished on this issue by parliamentary commissions, publicists and academicians. Political parties took strong positions on the Treaty as a whole and the war guilt clause in particular; as a result, the Treaty became a grievous burden for all those who could be saddled with the onus of having accepted it

⁶ 2 G. WEINBERG, *supra* note 3, at 151, analyzes the reality and perceptions of German military power in relation to other European states.

⁷ Hitler's speeches asserting Germany's peaceful intentions are collected in A. HITLER, *DES FÜHRERS KAMPF UM DEN WELTFRIEDEN* (1936).

⁸ I. KERSHAW, *THE "HITLER MYTH": IMAGE AND REALITY IN THE THIRD REICH* 121–47 (1987); D. PEUKERT, *INSIDE NAZI GERMANY: CONFORMITY, OPPOSITION AND RACISM IN EVERYDAY LIFE* 61–68 (R. Daveson trans. 1987).

⁹ For thorough treatment of Versailles from a German point of view, see the articles under the caption "Versailler Frieden," in 3 *WÖRTERBUCH DES VÖLKERRECHTS UND DER DIPLOMATIE* 36 (K. Strupp ed. 1929).

¹⁰ For a review of war guilt scholarship in the interwar period, see Wendt, *Über den geschichtswissenschaftlichen Umgang mit der Kriegsschuldfrage*, in *WISSENSCHAFTLICHE VERANTWORTUNG UND POLITISCHE MACHT I* (K. J. Gantzel ed. 1986) [hereinafter 2 Gantzel]. A typical nationalist polemic of the time was A. VON WEGERER, *REFUTATION OF THE VERSAILLES WAR GUILT THESIS* (E. Zeydel trans. 1930).

on Germany's behalf. The disarmament provisions were the next most specific and passionate focus, particularly in conjunction with the demilitarization of the Rhineland zone along the western frontier, a provision accepted by Germany in the Locarno pact of 1926 as the price for Allied evacuation of that region.¹¹

The rearrangement of Germany's frontiers in 1919 had caused a substantial number of persons whom Germans regarded as fellows to be placed under the sovereignty of other states; efforts to obtain guarantees for the minorities under foreign rule and to enforce the agreements so obtained were a major preoccupation of German international lawyers.¹² International lawyers of the 1990s still refer to the *Chorzów Factory* case,¹³ which was in fact but one of many cases dealing with the rights of Germans to person and property vis-à-vis Poland. Payment of the reparations obligations forced upon Germany focused various issues, not all of them belonging to public international law.¹⁴ Finally, the new flowering of international institutions created to administer the Versailles settlement, including the Permanent Court of International Justice, furnished challenges for the Weimar generation of international lawyers—to which they responded in different ways.¹⁵

The Third Reich, then, inherited a complex of international law issues from its predecessor. It proceeded to undertake a series of further actions that drastically shifted the context of those questions, putting some to rest while creating new ones. In the early years, the National Socialist program in its external aspects centered on undoing the Versailles settlement.¹⁶ Mounting a legalistic attack on the validity of that Treaty as a coerced, dictated and unlawful imposition, the new Government began to dismantle it. In installments, the Hitler regime proceeded to defy the disarmament provisions of Versailles and the subsequent treaty modifications of them, each of which was intended to give Germany some concessions in return for acceptance of the new arms limitations.¹⁷ By plebiscite in 1935, it reintegrated the Saar into the fatherland.¹⁸ In 1936 Germany remilitarized the Rhineland despite

¹¹ For contrasting views of Locarno, see K. STRUPP, *DAS WERK VON LOCARNO: EINE VÖLKERRECHTLICHE-POLITISCHE STUDIE* (1926); LOCARNO, *A COLLECTION OF DOCUMENTS* (F. Berber ed. 1936) (with preface by Ribbentrop).

¹² J. ROBINSON, *DAS MINORITÄTENPROBLEM UND SEINE LITERATUR* (1928), sums up the German learning on minorities during Weimar.

¹³ *Factory at Chorzów* (Ger. v. Pol.), 1926–1929 PCIJ (ser. A) Nos. 7, 8, 9, 13, 17, 19.

¹⁴ Krüger, *Das Reparationsproblem der Weimarer Republik in fragwürdiger Sicht*, 29 *VIERTEL-JAHRSHEFTE FÜR ZEITGESCHICHTE* 21 (1981).

¹⁵ W. SCHÜCKING & H. WEHBERG, *DIE SATZUNG DES VÖLKERBUNDES* (3d ed. 1931); compare C. SCHMITT, *DIE KERNFRAGE DES VÖLKERBUNDES* (1926).

¹⁶ Point 2 of the Nazi party program called for "equality of rights and the abolition of the Treaty of Versailles." For a thorough Nazi coverage, see Woermann, *Das Diktat von Versailles*, in *NATIONALSOZIALISTISCHES HANDBUCH FÜR RECHT UND GESETZGEBUNG* 143, 176 (H. Frank 2d ed. 1935) [hereinafter *HANDBUCH*].

¹⁷ Freyberg Eisenberg, *Das deutsch-englische Flottenabkommen vom 18 Juni 1935*, 6 *ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT* [ZAÖRV] 1 (1937).

¹⁸ V. BRUNS, *DIE VOLKSABSTIMMUNG IM SAARGEBIET* (1934); S. WAMBAUGH, *THE SAAR PLEBISCITE* (1940).

the Versailles and Locarno pledges.¹⁹ In 1938 Austria was incorporated into the Reich, a step that defied a Versailles/Trianon commitment explicated by a ruling of the Permanent Court.²⁰

The program of the Führer to establish primacy in Europe, and perhaps in the rest of the world, was advanced by the assistance given to the Franco regime of Spain, in the face of charges of violation of the understandings about neutrality (1936–1939).²¹ It was further extended by the neutralization of Czechoslovakia and the annexation of Sudeten-German regions (1938),²² followed in 1939 by the coerced restructuring of Czechoslovakia, which created a state of Slovakia and a Protectorate of Bohemia and Moravia.²³ After achieving collaboration with the Soviet Union through a nonaggression pact in 1939,²⁴ the Reich attacked Danzig and Poland, triggering the British and French commitments to defend that country and, therefore, World War II. For six years the war ravaged Europe, producing numerous international law issues. These ranged from the rights and obligations of neutral states, both on land and on sea, to the status of the countries that fell under German domination. The treatment of prisoners of different categories, the use of various types of weapons, the resort to reprisals—all were grist for the mills of the German international law community. By the summer of 1943, Germans capable of rational analysis knew that the war could not be won. On July 20, 1944, a small group of the German elite, including several international lawyers, attempted to kill Hitler and end the war.²⁵ By late 1944, a few had looked far enough into the future to raise questions about the coming relationship of Germany to the United Nations—which was beginning to loom on the horizon and looked ominously like another League.²⁶ Thus, the period from 1933 to 1945 was full of changes on the international scene and provided a wide range of opportunities for lawyers to test their skills in justifying new initiatives.

¹⁹ Stauffenberg, *Die Vorgeschichte des Locarnovertages und das russisch-französische Bündnis*, 6 ZAÖRV 215 (1937).

²⁰ See Customs Regime between Germany and Austria, 1931 PCIJ (ser. A/B) No. 41 (Advisory Opinion of Sept. 5). The importance that Hitler gave to this move is shown by the fact that *Mein Kampf* starts by asserting that "[c]ommon blood belongs in a common Reich"; quoted in Wright, *The Legality of the Annexation of Austria by Germany*, 38 AJIL 621, 623 (1944).

²¹ N. PADEFORD, *INTERNATIONAL LAW AND DIPLOMACY IN THE SPANISH CIVIL STRIFE* (1939), reviewed by Scheuner, 9 ZAÖRV 948 (1940).

²² For a contemporary Nazi view of Munich, see Wolgast, *Über die Bedeutung des Werkes von München vom 29 und 30. September 1938*, 18 ZöR 415 (1939).

²³ See Markus, *Le Traité germano-tchécoslovaque du 15 mars 1939 à la lumière du droit international*, 46 RGDIP 653 (1939); for a German attempt to square this action with the Munich accord, see note 165 *infra*.

²⁴ A. READ & D. FISHER, *THE DEADLY EMBRACE: HITLER, STALIN AND THE NAZI-SOVIET PACT* (1988).

²⁵ A concise history of the July 20 attempt is P. HOFFMANN, *THE GERMAN RESISTANCE TO HITLER* (1988).

²⁶ Bilfinger, *Streit um das Völkerrecht*, 12 ZAÖRV 1 (1944).

II. THE INSTITUTIONS IN 1933

The Universities

In 1933 there were 23 German universities.²⁷ Each of them was a state institution subject to the ministry of education of the state in question. Still, they had traditionally operated with a substantial degree of autonomy and self-government. As state institutions they were more of a piece than American universities and colleges. Before 1914 those citadels of higher education enjoyed an enormous reputation outside the country; German doctorates were sought by students of both the natural and the social sciences throughout the world. The years of Weimar had not succeeded in doing much to change the universities. They were authoritarian in structure, controlled by their tenured professors, and rigid in their instructional approaches. They had become rather shabbier, funds for education being tight. The students were impoverished and politicized, the bulk tending toward the right of the spectrum.

German law faculties were more closely integrated into the universities than are American law schools. Their students did not necessarily obtain doctoral degrees before entering practice, but those who sought teaching positions had to. Thus, relations between senior and junior law faculty professors approximated the American arts and sciences model. Most of the general instruction was by lectures, although there were also exercises with problems drawn from practice. Seminars were reserved for advanced students on an academic track. Much of the instruction for practice was confided to lawyers outside the university who prepared students for the first state, i.e., bar, examination, who guided their mandatory clerkship experience, and who finally took them through the second state examination that led to admission to practice.

The Institutes and Societies

Alongside the universities stood the institutes. Organizational separation of such research activities from the teaching-oriented institutions was well established in Germany when the "think tank" was still unknown in the United States. Three institutes were of particular importance to our story. The first, an institute in Kiel, dated from just before the First World War.²⁸ The second belonged to the group of Kaiser Wilhelm Institutes, which had been founded as a shelter for the natural sciences that would free the cutting edge of useful research from the constrictions of academic personnel and

²⁷ The state of German universities before Hitler is reviewed in F. RINGER, *THE DECLINE OF THE GERMAN MANDARINS: THE GERMAN ACADEMIC COMMUNITY 1890-1933* (1969). On the seizure of power at the universities, see K. BRACHER, *supra* note 4, at 266-72; and for the experience at one university, B. VEZINA, *DIE "GLEICHSCHALTUNG" DER UNIVERSITÄT HEIDELBERG IM ZUGE DER NATIONALSOZIALISTISCHEN MACHTERGREIFUNG* (1982). On Cologne, see F. GOLCZEWSKI, *KÖLNER UNIVERSITÄTSLEHRER UND DER NATIONALSOZIALISMUS* (1988).

²⁸ E. DÖHRING, *GESCHICHTE DER JURISTISCHEN FAKULTÄT 190-92, 222-23* (3 Geschichte der Christian-Albrechts-Universität Kiel 1665-1965, 1965).

other policies. In 1924 the Kaiser Wilhelm Institute for Public International Law was founded in Berlin;²⁹ a major purpose of its founding was to equip Germany to struggle with the victors of Versailles in various international forums. Some of its leaders were also professors at the university in Berlin; they were backed by scientific assistants who did much of the research and writing. There was also a Kaiser Wilhelm Institute for Private International Law, with distinguished leaders.³⁰ Both institutes published journals and issued legal opinions to outside parties. Third, beginning in 1923, the Institute for Foreign Policy at the University of Hamburg united international lawyers with historians and other social scientists.³¹ Its publications covered a wider range of subjects than those of the other two institutes, and being a new foundation and the creature of a leftish government, it attracted personnel who were politically leftist or liberal and less establishment oriented. In addition to the institutes, there was a German Society for International Law, which held annual meetings and published regular reports of its transactions from 1918 to 1933.

The Government Lawyers

The German Government also employed international lawyers in connection with its work. As of 1933, there was only one department that holds our interest—the Foreign Ministry. The legal division of the Foreign Ministry was headed by Friedrich Gaus, a career civil servant who had entered the Foreign Service in 1907.³² His listing for the Nuremberg Tribunal of the treaties he had helped to draft is a roll call of the major landmarks of the diplomatic life of Weimar and the Reich.³³ International law functions were also assigned to lawyers within the Ministry of Justice, who dealt with such questions as extradition and treaties on private international law.³⁴ And there were already lawyers in the army, whose function would grow in importance.³⁵

International Institutions

During the Weimar period, German international lawyers became increasingly active in the international institutions that had developed as part of the

²⁹ For the founder's own statement of the purposes of the institute and its journal, see Bruns, 1 ZAÖRV, at iii (1929). See also Borchard, *Death of Dr. Viktor Bruns*, 37 AJIL 658 (1943).

³⁰ Rabel, *Zur Einführung*, 1 ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 1 (1927); Dölle, *Funfundzwanzig Jahre Institut für ausländisches und internationales Privatrecht*, 16 *id.* at 337 (1951).

³¹ The history of the Hamburg institute is detailed in 1 and 2 Gantzel, *supra* notes 1 and 10. The reader should know that my father, Alfred Vagts, was a member of that institute until 1933.

³² *United States v. von Weizsaecker*, 12 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 1184 (1949) [hereinafter TRIALS OF WAR CRIMINALS].

³³ *Id.* at 1184–85.

³⁴ L. GRUCHMANN, JUSTIZ IM DRITTEN REICH 1933–1940, at 1149, 1151, 1165, 1170 (1988).

³⁵ See part VII *infra*.

Versailles settlement. In 1930 Walther Schücking was elected a judge of the Permanent Court of International Justice.³⁶ Viktor Bruns sat as an ad hoc judge for Germany or Danzig on several occasions.³⁷ German advocates argued for their fatherland on several occasions when Germany was a party to contentious matters before the Court. Germany participated in arbitrations to settle matters arising from World War I, for example with the United States.³⁸ A series of commissions were set up to deal with the minorities in the eastern neighbors of Germany, international waterways, the execution of the Dawes Plan, and other questions.³⁹ After Germany became a member of the League of Nations in 1926, its diplomats and lawyers took part in the League's activities.⁴⁰

Private international institutions also carried on the work of cultivating international law on a multinational basis. One of these was the Hague Academy of International Law, founded in conjunction with the Court.⁴¹ From the start, German professors of international law were invited to give series of lectures—in French.⁴² On the whole, those chosen from the German ranks were the older and more cosmopolitan scholars. Germans also participated in the Institut de Droit International and the International Law Association, again through establishment personalities.⁴³

Individuals

In 1933 the heart of the German international law community was made up of 35 full professors or *Ordinarien*, possessing tenure and full rights of participation in faculty self-government (see Appendix A). One would count together with them assistant professors (*Privatdozenten*), who were aspiring to their chairs. When one adds the lawyers in the Foreign Ministry and the scholarly assistants in the institutes, one might come to a total of about 150 international lawyers. The standard German directory of scholars and writers listed 80 international law experts.⁴⁴

³⁶ D. ACKER, WALTHER SCHÜCKING 1875–1935 (1970).

³⁷ The activities of Bruns are listed in his biographical notice to *La Cour Permanente de Justice Internationale*, 62 RECUEIL DES COURS 547, 549 (1937 IV).

³⁸ For a selection of the decisions of the American-German Mixed Claims Tribunal, with references to the literature, see 7 and 8 R. Int'l Arb. Awards (1956).

³⁹ On minorities, see note 12 *supra*. On the waterways, see Auburtin, *Die neue Rechtsstellung der Europäischen Donaukommission*, 9 ZAÖRV 338 (1939).

⁴⁰ Germans, however, were at a disadvantage in competing for League Secretariat jobs because their country did not enter the League until 1926, by which time many French and English bureaucrats were in place. See Kimmich, *Germany and the League of Nations*, in THE LEAGUE OF NATIONS IN RETROSPECT, PROCEEDINGS OF THE SYMPOSIUM ORGANIZED BY THE UNITED NATIONS LIBRARY 118, 122, 124 (1983).

⁴¹ For a history of the academy, see HAGUE ACADEMY OF INTERNATIONAL LAW, LIVRE JUBILAIRE, JUBILEE BOOK, 1923–1973 (R. J. Dupuy ed. 1973).

⁴² The first German lecturer was Triepel, *Les Rapports entre le droit interne et le droit international*, 1 RECUEIL DES COURS 73 (1923).

⁴³ The INTERNATIONAL LAW ASSOCIATION, REPORT OF THE 38TH CONFERENCE HELD AT BUDAPEST, at cxlix (1934), reports that the "German Branch was seriously affected by the advent of the change of the regime and remained inactive for about a year."

⁴⁴ KÜRSCHNERS DEUTSCHER GELEHRTEN-KALENDAR 3829–30 (4th ed. 1931).

One can say several things about this population without being wrong in many cases. Like other German academicians, they were highly nationalistic individuals, their consciousness strongly formed by World War I. A large number of distinguished German professors had signed a manifesto in 1915 defending their fatherland's war aims.⁴⁵ Resentment over the Versailles settlement was coupled with disdain for the republic to which it gave birth. Some internationalists were *Vernunftrepublikaner* who accepted the new Government, without enthusiasm, as something that had to be worked with.⁴⁶ Some also accepted the institutions of Versailles and sought to work within them to defend Germany's interests. A very few were pacifists.⁴⁷

By 1990s American standards, one would have to describe German faculty members as extraordinarily authoritarian in their personal relations. Tenured professors had paternalistic relations with their assistants, who worked their way toward promotion by such tasks as doing their professor's research, helping with his opinions, and administering his seminars. At its best, the role of "doctor-father" (*Doktorvater*) could be positive in making it easier for the aspiring junior to know what was expected; a good doctor-father could be very helpful in guiding a junior's way to a chair elsewhere. Professors took little or no notice of other students. This paternalism prevailed in other relationships in German society, many of which reinforced each other—some of the professors had been army officers in the war and retained something of the military in their bearing.⁴⁸

By and large, the German professoriate was highly conservative politically and weary of the confusion that the Weimar years had brought, the coups and general strikes, the constant turnover of cabinets and party alliances. An orderly and forceful state was what academicians wanted. They felt considerable financial stringency since the Government could not pay its civil servants well and, in particular, did not compensate them for the inflation that had eroded their salaries and savings. While hardly any of them were Nazis, senior faculty members were not unsympathetic to many of the ideas of Hitler and his party.⁴⁹ As the nation seemed to be slipping into chaos, that sympathy, or at least resignation, became stronger.

⁴⁵ K. BÖHME, *AUFRUFE UND REDEN DEUTSCHER PROFESSOREN IM ERSTEN WELTKRIEG* (1975).

⁴⁶ Kempfski, *Gefährdung der Wissenschaft durch die politische Macht: Reflexionen zum Schicksal der Wissenschaft im Dritten Reich*, in 2 Gantzel, *supra* note 10, at 427. Academics' anger at Versailles was demonstrated by the refusal of Heidelberg to hear a talk by internationalist James Brown Scott, who had signed the Treaty for the United States. M. GUTZWILLER, *SIEBZIG JAHRE JURISPRUDENZ: ERINNERUNGEN EINES NEUNZIGJÄHRIGEN* 96–97 (1978).

⁴⁷ For a series of biographies of German pacifists, see C. RAJEWSKY & D. RIESENBERGER, *WIDER DEN KRIEG, GROSSE PAZIFISTEN VON IMMANUEL KANT BIS HEINRICH BÖLL* (1987). See further note 182 *infra*.

⁴⁸ Thus, Kaufmann served as an artillery officer and was severely wounded; this did not long save him from dismissal by the Nazis. Mosler, *Erich Kaufmann zum Gedächtnis*, 32 *ZAÖRV* 235, 237–38 (1972).

⁴⁹ There is general agreement on the rightist tendency of German faculties under Weimar. See, e.g., F. STERN, *DREAMS AND DELUSIONS*, ch. 6 (1987); Abendroth, *Die deutschen Professoren und die Weimarer Republik*, in *HOCHSCHULE UND WISSENSCHAFT IM DRITTEN REICH* 11 (J. Tröger ed. 1984).

III. HOW NAZISM TOOK OVER

As was his wont with all other aspects of German life, Hitler determined to take over the world of German law, including international law. He had no particular regard or respect for law, lawyers or legal institutions, but he was determined not to let any significant aspect of life in Germany escape his control.⁵⁰ On the face of it, one might suppose that simply having absolute control over lawmaking would be enough. One could say to German jurists, "Here it is; it is positive law and must be obeyed." Nazi theorists understood that this was not enough, that hostile or indifferent lawyers could sabotage or slow their program by adhering to old precedents or by reading the new statutes restrictively.⁵¹ Indeed, even a few positivists did so, notably the district attorney who found no legislative authority for the euthanasia program and started a criminal investigation.⁵² In any case, positivism would not suffice for international law because it was impossible to assert that Germany alone could create a new international law. It was necessary to enroll German internationalists as advocates of National Socialist positions on the law of nations.

Nazis approached the university with considerable disdain. A few of them, such as Propaganda Minister Goebbels, had doctorates and intellectual aspirations; but many were street fighters with no respect for academics. In a now-famous statement, Julius Streicher, the movement's leading anti-Semite, said, "If the brains of all university professors were put at one end of the scale and the brains of the Führer at the other, which end, do you think, would tip?"⁵³

It was relatively easy to get control of universities and their law schools. They had always been state, not private, institutions and their autonomy had rested on the sufferance of the states. A simple means of taking away that autonomy was to revoke the right to elect university rectors and faculty deans.⁵⁴ The Government could then place cooperative professors, restyled *Führer*, in those posts. The most notorious instance was the naming of the philosopher Martin Heidegger to the rectorship at Freiburg, where his inaugural address was a clarion call for boundless submission to the regime.⁵⁵ Through these individuals, state ideological control could be introduced

⁵⁰ For a sampling of Hitler's views about justice, see *Hitler über die Justiz—Das Tischgespräch vom 20 August 1942*, 12 *VIERTELJAHRSCHEFTE FÜR ZEITGESCHICHTE* 86 (1964).

⁵¹ For careful studies of the relationships between positivism and National Socialism, see B. RÜTHERS, *DIE UNBEGRENZTE AUSLEGUNG* (2d ed. 1973); and his *ENTARTETES RECHT* (1988).

⁵² The struggle within the German legal bureaucracy over whether to legalize the euthanasia action, to continue it with only the cover of Hitler's informal letter to the doctors in charge, or to stop it is described in L. GRUCHMANN, *supra* note 34, at 497–534.

⁵³ Quoted in K. BRACHER, *supra* note 4, at 272.

⁵⁴ Seier, *Der Rektor als Führer: Zur Hochschulpolitik des Reichserziehungsministeriums, 1934–1945*, 12 *VIERTELJAHRSCHEFTE FÜR ZEITGESCHICHTE* 105 (1964).

⁵⁵ The career of Martin Heidegger has been the focus of new interest through the publication of V. FARIAS, *HEIDEGGER AND NAZISM* (1987). Several Nazi teachers of international law became rectors. See Walz, *Der Rektor als Führer der Universität*, 5 *DEUTSCHES RECHT* 6 (1935); Ritterbusch, *Kieler Blätter 1815 und 1938*, in *GRUNDFRAGEN DER DEUTSCHEN UNIVERSITÄT UND WISSENSCHAFT* 27 (Reichsdozentenbund 1938).

into the law faculties. Other means of control were at hand; denunciations by student agents and others were common.⁵⁶ Various kinds of censorship were introduced, including special clearance requirements for lectures to be given abroad.⁵⁷ Books were taken out of libraries and, in a wave of festive ceremonies, burned.⁵⁸ Lists of not-to-be-cited authors, including Jews, were promulgated, and sharp criticism was leveled at those who lapsed, whether by intention or accident.⁵⁹ With Germany's expansion, the universities of Austria were also brought under control, and later those of Prague and Strasbourg.⁶⁰

Meanwhile, the universities suffered, by the sheer decline in the number of students: on the one hand, Jewish students vanished and women students were discouraged; on the other hand, healthy males were drawn into labor service and the military.⁶¹ Intellectual prowess was increasingly undervalued

⁵⁶ For example, the Catholic-Conservative internationalist Godehard Ebers had several encounters with student denunciations at Cologne and, after the *Anschluss*, at Innsbruck. F. GOLCZEWSKI, *supra* note 27, at 208–11.

⁵⁷ K. BRACHER, *supra* note 4, at 271–72; Messerschmidt, *supra* note 1, at 66; Rüthers & Schmitt, *Die juristische Fachpresse nach der Machtergreifung der Nationalsozialisten*, 1988 JURISTENZEITUNG 369. Almost half of the articles submitted in the early Nazi period failed the ideological test. Fischer, *Die Arbeiten des Reichsrechtsamtes im verflochtenen Kampffahr*, 6 DEUTSCHES RECHT 357, 358 (1936). Later Hague lecturers such as Scheuner did respect the prohibition on citing Jewish authors. See Partsch, Book Review, 112 ARCHIV DES ÖFFENTLICHEN RECHTS 129, 132 (1987).

⁵⁸ R. GRUNBERGER, A SOCIAL HISTORY OF THE THIRD REICH 307 (1971).

⁵⁹ In 3 F. BERBER, LEHRBUCH DES VÖLKERRECHTS, at vi n.1 (1964), we find a reference to criticism of an earlier work of his by Hamel, 5 DEUTSCHES RECHT 133–34 (1935), which said: "That *Gemeinschaft*, politics and law are the results of race and *Volkstum* and that law-making in the new state belongs to Führerdom is nowhere expressed." Hamel goes on to point out that Berber gladly cited non-Aryan works, sometimes with words of special praise. Worst of all, Berber cited a non-Aryan author and Adolf Hitler in the same footnote. The rules about references to Jewish authors seem not to have applied to foreigners. See the appreciative review of H. LAUTERPACHT, FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY, by Schniederköter, 21 ZEITSCHRIFT FÜR VÖLKERRECHT [Z FÜR VR] 253 (1937). Lauterpacht's 5th edition of L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE (1935–37), was praised at p. 6 of a lecture on the laws of war given in 1938 by Ernst Schmitz, deputy director of the Kaiser Wilhelm Institute and honorary professor at Berlin. (A photocopy of the lecture notes was furnished me by the successor institute in Heidelberg and is now in the Harvard Law School library.)

⁶⁰ The incorporation of Austria brought into the Reich three law faculties: Graz, Innsbruck and Vienna. The most notable figure was Alfred Verdross. The *Zeitschrift für öffentliches Recht* became a Nazi journal. The German University of Prague had already been infiltrated by Nazis before 1939, as Kelsen learned during his stay there. R. MÉTALL, HANS KELSEN, LEBEN UND WERK 68–74 (1969). The Reichsuniversität in Strasbourg recreated the Wilhelminic university. The University of Posen in Poland was designed solely for the German population.

⁶¹ Law faculties' enrollments suffered from three factors: (1) a decline in the number of individuals of the age normal for universities due to the fall in the birthrate that began after 1914; (2) a decline in the percentage of those in the normal age range who actually went to universities; and (3) a decline in the relative popularity of law studies among those who did attend universities. In some cases, as in Tübingen, the decline was dramatic—enrollment in the law faculty fell from 478 in 1932 to 40 in 1941. See U. ADAM, HOCHSCHULE UND NATIONALSOZIALISMUS: DIE UNIVERSITÄT TÜBINGEN IM DRITTEN REICH 218–24 (1977). On women law

in a world that glorified deeds and commands. International law, in particular, was downgraded in the new curriculum, which stressed instruction in race and its legal aspects.⁶² After 1939, German universities slowly ground to a halt as students left for the front and bombs flattened buildings and burned other books.⁶³

Changes also took place in other institutions. The Hamburg institute was drastically reorganized and became in essence a branch of the Foreign Ministry.⁶⁴ The Kaiser Wilhelm Institute for International Law lost more and more of its personnel to the armed forces during the war.⁶⁵ Under the leadership of Viktor Bruns, it attempted to maintain its independence and to continue to relate to foreign writers and literature. After the death of Bruns in 1943, Carl Bilfinger, who had become a party member, seems to have set a more collaborationist tone.⁶⁶

In addition, the Nazis created a new institution called the Academy for German Law.⁶⁷ Its head was Hans Frank, who had been the leading legal fighter for the movement in its battles with the left and the republic. Frank hoped to build a new Nazi jurisprudence, including a new civil code. The academy served as a debating platform for discussions on reforming German law, particularly marriage law and the corporation statute. On the international front, it had the additional task of handling Germany's relations with foreign legal institutions. It invited various prominent foreigners to address the membership, allotted scholarships for study in Germany, and instituted special seminars and conferences. The academy presumably had some impact abroad, but that impact is hard to evaluate. The British historian Arnold Toynbee presented a lecture at the academy that in a conciliatory

students, see J. PAUWELS, *WOMEN, NAZIS AND UNIVERSITIES: FEMALE UNIVERSITY STUDENTS IN THE THIRD REICH, 1933-1948*, at 44 (1984).

⁶² For a cautious expression of misgivings about the Nazi decree depriving international law of its status as a required course, see Walz, *Völkerrecht und Reichsjustizausbildungsordnung*, 18 Z FÜR VR 323 (1934).

⁶³ Thus, Allied bombers claimed the first edition of W. GREWE, *EPOCHEN DER VÖLKERRECHTSGESCHICHTE* 15 (1984), and a treatise by Herbert Kraus on international law. See MENSCH UND STAAT IN RECHT UND GESCHICHTE, *FESTSCHRIFT FÜR HERBERT KRAUS* 462 (H. Kruse & H. Seraphim eds. 1954). On the destruction of both the library and unpublished writings at the Kaiser Wilhelm Institute, see Makarov, *Berthold Schenk Graf von Stauffenberg (1905-1944)*, 47 FRIEDENSWARTE 360, 364 (1947). For a description of the wartime years at Cologne, see F. GOLCZEWSKI, *supra* note 27, at 287-97.

⁶⁴ Paußmeyer, *supra* note 1.

⁶⁵ See text at notes 74-76 *infra*.

⁶⁶ In particular, the institute did not support Wilhelm Wengler in his internal struggles with Nazi rivals; indeed, its discharge of Wengler was found illegal by a labor court in 1945. See Schlabrendorff, *Wilhelm Wengler, Wesen und Gestalt*, in 1 MULTITUDO LEGUM IUS UNUM: *FESTSCHRIFT FÜR WILHELM WENGLER ZU SEINEM 65. GEBURTSTAG* 1, 7-8 (J. Tittel ed. 1973). For a very negative view of Bilfinger, see G. KISCH, *DER LEBENSWEG EINES RECHTSHISTORIKERS* 91-92 (1975); and more understandingly, Smend, *Carl Bilfinger*, 20 ZAÖRV 1 (1959-60). For his party membership, see B. VEZINA, *supra* note 27, at 127 n.515.

⁶⁷ For an extensive study, see D. ANDERSON, *THE ACADEMY FOR GERMAN LAW, 1933-1944* (1987). Chapter 6 deals with its foreign and international law work.

way recognized Germany's complaints about Versailles and advocated peaceful change; his memoirs, however, portray him as having been deeply skeptical. The American internationalist James Garner followed his visit with a scathing narration of the treatment by the Third Reich of its internationalists.⁶⁸ And there must have been some moments of unintended comedy, as when Hans Frank explained to his Italian counterparts that Nazi jurists' attacks on Roman law as inferior to Germanic law did not really apply in Rome itself.⁶⁹

The Nazi Government required substantial amounts of international legal work. Gaus and his associates in the Foreign Ministry had a full agenda.⁷⁰ He continued to render yeoman service to the aims of the Reich, although in important cases such as the reoccupation of the Rhineland, he was called in after the event to justify it, rather than consulted beforehand as to its legality. As he looked back on these activities as a witness for the prosecution in the Nuremberg trial of the leaders of the Foreign Office, Gaus expressed regret that he had not left on his own motion at an earlier time.⁷¹ Like many other German professionals, he found the early moves of Hitler congruent with his own values, and when the discrepancy became too obvious it was late in the day.

The other official German international law departments were within the armed forces (the Wehrmacht). The first, concerned with providing advice on international law to guide military activities, was located within the Abwehr.⁷² During the bulk of the period that we are studying, it was supervised by Admiral Wilhelm Canaris, a professional naval officer much torn by doubts about the rightness of Hitler's policies.⁷³ Increasingly, the Abwehr became the focus of rivalry and suspicion on the part of the secret intelligence agencies belonging to the dark realm of Heinrich Himmler. The role of those from the Abwehr who fell victim to the revenge of Hitler and his

⁶⁸ On Toynbee, see *id.* at 403–04, and A. TOYNBEE, *ACQUAINTANCES*, ch. 22 (1967). On Garner, see D. ANDERSON, *supra* note 67, at 402, and Garner, *The Nazi Proscription of German Professors of International Law*, 33 *AJIL* 112 (1939).

⁶⁹ D. ANDERSON, *supra* note 67, at 426–29.

⁷⁰ P. SEABURY, *THE WILHELMSTRASSE: A STUDY OF GERMAN DIPLOMATS UNDER THE NAZI REGIME*, *passim* (1954). The tension between Gaus's participation in drafting the Locarno pact and justifying its cancellation was noted in G. VOGEL, *DIPLOMAT UNTER HITLER UND ADENAUER* 22–23 (1969). See also U. VON HASSELL, *THE VON HASSELL DIARIES, 1938–1944*, at 301 (1947).

⁷¹ *United States v. von Weizsaecker*, 12 *TRIALS OF WAR CRIMINALS*, *supra* note 32, at 1186:

I don't hesitate to say that I would be a great deal happier if, during the Hitler regime I had the strength of mind to decide to resign. . . . I had already been working for over 30 years in the Legal Division, and had been its head for over 15 years and semi-consciously I had a feeling of this position which I held, that it had its own law and its own basis in itself in a certain sense.

Gaus was in fact removed in 1944 as a result of internal intrigues. P. SEABURY, *supra* note 70, at 133.

⁷² For a description of the Abwehr by an insider who was also an international lawyer, see P. LEVERKUEHN, *GERMAN MILITARY INTELLIGENCE* (R. Stevens & C. Fitzgibbon trans. 1954).

⁷³ K. ABSHAGEN, *CANARIS: PATRIOT UND WELTBÜRGER* (1950); H. HÖHNE, *CANARIS* (J. Brownjohn trans. 1979).

minions after the failure of the assassination attempt of July 20, 1944, is a long and distinguished one, including military professionals like Canaris and Hans Oster and amateurs like Dietrich Bonhoeffer the theologian and Hans von Dohnanyi, an international lawyer and former research assistant at the Hamburg institute.⁷⁴

The legal section of the Abwehr included Berthold Count von Stauffenberg, a former assistant at the Kaiser Wilhelm Institute for International Law and brother of the man who carried the bomb into Hitler's headquarters on that fateful July 20.⁷⁵ Another noteworthy figure was Helmuth James Count von Moltke.⁷⁶ These men attempted to limit the increasingly egregious departures from international conventional and customary rules of warfare that Hitler's attitude toward war made inevitable. A second legal branch functioned within the Supreme Command of the Armed Forces (Oberkommando der Wehrmacht) and had a rather general portfolio.⁷⁷

There was a third branch of the Wehrmacht legal service, which specialized in pursuing misdeeds of the opposing armed forces. Its task was to work up the files on such real or alleged Russian atrocities as the massacre at Katyn and the liquidation of East Prussian villages during the great Russian offensive of 1944, as well as to document lesser charges against western combatants.⁷⁸

Germany's relations with international institutions were drastically changed by the new regime. It withdrew from the League of Nations in 1933 and reduced its participation in other international tribunals and commissions as rapidly as it could.⁷⁹ Those who had figured prominently in those labors were suspected of cosmopolitanism, although some of them, such as Viktor Bruns, continued to be employed because of their prestige.⁸⁰ The last person to be employed by the Reich in connection with international institutions was probably Friedrich Berber, who slipped across the border into Switzerland late in the war to become the German representative to the International Red Cross, which was then trying to cope with massive prisoner-of-war problems and related disasters.⁸¹ Or one might attribute that

⁷⁴ E. BETHGE, DIETRICH BONHOEFFER: THEOLOGIAN, CHRISTIAN, CONTEMPORARY (E. Mosbacher trans. 1970). This work also contains references to Dohnanyi, who was Bonhoeffer's brother-in-law.

⁷⁵ Zeller, *Claus und Berthold Stauffenberg*, 12 *VIERTELJAHRSSHEFTE FÜR ZEITGESCHICHTE* 223 (1964). See further note 97 *infra*.

⁷⁶ Makarov, *supra* note 63, at 363.

⁷⁷ The legal office of the Oberkommando der Wehrmacht was in the charge of Rudolf Lehmann. He was convicted for involvement in preparing the Barbarossa Jurisdiction and Commando Orders, in *United States v. von Leeb*, 11 *TRIALS OF WAR CRIMINALS*, *supra* note 32, at 690-95 (1948). There was tension between Moltke and Wagner, head of international affairs in the OKW legal office ("the poison dwarf"). Moltke attributed these tensions to Wagner's being a criminal lawyer, not an internationalist. M. BALFOUR & J. FRISBY, *HELMUTH VON MOLTKE—A LEADER AGAINST HITLER* 282-83 (1972).

⁷⁸ A. DE ZAYAS, *THE WEHRMACHT WAR CRIMES BUREAU, 1939-1945* (1989).

⁷⁹ On Hitler's departure from the League, announced in 1933, see 1 G. WEINBERG, *supra* note 3, ch. 7.

⁸⁰ See text at note 104 *infra*.

⁸¹ See text at note 125 *infra*.

distinction to those who defended Hitler's lieutenants before the war crimes tribunals established by the Allied powers.⁸²

Germans continued to appear at foreign-based private institutions of international law. Although they had to obtain clearance, Germans went to The Hague to lecture through 1939. In 1933–1935 Germany was represented by persons who had been chosen before the transition: Arthur Nussbaum (already dismissed as non-Aryan), Hans Wehberg (already for some years in Switzerland), Karl Strupp (dismissed) and Erich Kaufmann (soon to be dismissed).⁸³ Junior and more flexible internationalists followed. While they staunchly defended their fatherland, their texts at The Hague contained much less bombast than pieces published at home, and none of the anti-Semitism becoming virulent within Germany.

The heart of the Nazi takeover, however, was the changing of personnel. A few months after Hitler became chancellor, a law captioned "the law for the renewal of the bureaucracy" was enacted, which included the professors.⁸⁴ Under this statute about 16 percent of the university faculty members were replaced, including some 22 percent of the law faculties.⁸⁵ Of the tenured professors of international law, several committed suicide (Fleischmann of Halle, Perels of Hamburg, and Neumeyer of Munich),⁸⁶ several went into exile (Kelsen of Cologne, Mendelssohn-Bartholdy of Ham-

⁸² At Nuremberg Schacht was represented by, inter alia, the discharged Professor Herbert Kraus, and Admiral Dönitz by a young naval lawyer, Otto Kranzbühler. They later reflected on their experiences in 13 DE PAUL L. REV. 233 (1964), and 14 *id.* at 333 (1964). Professor Jahrreiss represented General Jodl and delivered a general address on the international law aspects of the case. 17 INTERNATIONAL MILITARY TRIBUNAL [hereinafter IMT], PROC. 478–94 (1947).

⁸³ Nussbaum, *La Clause-or dans les contrats internationaux*, 43 RECUEIL DES COURS 555 (1933 I); Wehberg, *La Police internationale*, 48 *id.* at 1 (1934 II); Strupp, *Les Règles générales du droit de la paix*, 47 *id.* at 257 (1934 I); Kaufmann, *Règles générales du droit de la paix*, 54 *id.* at 309 (1935 IV).

⁸⁴ 1933 Reichsgesetzblatt 175.

⁸⁵ The figures on the proportions of German professors who lost their posts in the Nazi period are hard to reconcile in detail because of the use of different populations (professors only, professors and assistant professors, or all university teachers) and of different time periods. Thus, J. BENDERSKY, *supra* note 2, at 202, says that "before the purges ended over 11 percent of Germany's professors would lose their chairs." I. MÜLLER, *supra* note 2, at 76, says that, of 378 law teachers, 120, almost a third, were discharged. K. BRACHER, *supra* note 4, at 269, gives breakdowns by specialties and universities that puts law faculties at the top of the list in terms of percentage of losses (21.2%). He also notes wide variations among different universities ranging from 18% to 32%. E. HARTSHORNE, *THE GERMAN UNIVERSITIES AND NATIONAL SOCIALISM* 94–95 (1937), found that 1,145 faculty members were dismissed, out of a total of 7,000, or roughly 16%. Building on this study, Garner, *supra* note 68, at 113, concluded that of some 50 or 60 professors of private as well as public international law, 24 lost their posts. Of all the German law faculties, the one most seriously affected was Kiel, where only one full professor survived the purge. E. DÖHRING, *supra* note 28, at 202.

⁸⁶ Wehberg, *Professor Max Fleischmann*, 46 FRIEDENSWARTE 381 (1946); Wehberg, *Karl Neumeyer zum Gedächtnis*, 41 *id.* at 256 (1941); Borchard, *Professor Theodor Niemeyer*, 34 AJIL 334 (1940). On Kurt Perels, see the biography of his nephew who perished as part of the resistance to Hitler. Schreiber, *Friedrich Justus Perels (1910–1945), Rechtsberater der Bekennenden Kirche*, in *STREITBARE JURISTEN, EINE ANDERE TRADITION* 355, 358 (T. Blanke ed. 1988) [hereinafter Blanke].

burg, and Strupp of Frankfurt), and several were dismissed or went into premature retirement (Kaufmann of Berlin and Schücking of Kiel). All in all, seven full professors of international law seem to have been ousted in 1933–1935, and six more were dismissed in 1937–1939.⁸⁷ The delays resulted in part from exemptions under the law as originally put into effect, for example, for men with service in World War I. In some cases, such as that of Herbert Kraus at Göttingen, the victim's maneuvers postponed severance, and in others, sympathetic law school deans or university rectors put off the evil day.⁸⁸ Others dropped out through death, illness or retirement before 1945. The decimation of the profession represented a higher proportion than that of German professors in general, and law professors in particular.⁸⁹ This turnover presented opportunities for those who remained. There was a considerable amount of movement by those who were already *Ordinarien*. Carl Schmitt went from Bonn via Cologne to Berlin, for example, and others shifted chairs as well.⁹⁰

After slow promotions in the Weimar period, opportunities opened up for assistant professors. In particular, they opened up for younger men who were already Nazis or could quickly adopt brown coloration. Their loyalty could be tested or enhanced by passage through a special camp for assistant professors that included military and physical exercises to develop their non-intellectual powers.⁹¹ It is in this group that we find the crassest expressions of National Socialism, such as Norbert Gürke's work on the influence of Jewish scholars on international law.⁹²

Some of the new crop of *Ordinarien*, most notably Ulrich Scheuner, were able to continue after World War II since for the most part they had not been at the front and since there was no lasting general purge of Nazi-appointed professors in the Western zones of occupation.⁹³ Only Carl Schmitt

⁸⁷ Appendix A to this article, *infra* p. 703, attempts to account for all dismissals of tenured professors of international law during the Third Reich.

⁸⁸ On the case of Herbert Kraus, see Halfmann, *Eine "Pflanzstätte bester nationalsozialistischer Rechtsgelehrter": Die juristische Abteilung der Rechts und Staatswissenschaftliche Fakultät*, in H. BECKER, H. J. DAHMS & C. WEGELER, *DIE UNIVERSITÄT GÖTTINGEN UNTER DEM NATIONAL-SOZIALISMUS: DAS VERDRÄNGTE KAPITEL IHRER 250 JÄHRIGEN GESCHICHTE* 88 (1987).

⁸⁹ See note 85 *supra*. The only conceivable American comparison is to McCarthyism, but that was on a very different scale. It has proved almost impossible to arrive at any meaningful estimate of the job losses incurred at that time. One study says that on half of the 58 campuses studied, "the appointments of at least two faculty were threatened." L. LEWIS, *THE COLD WAR ON CAMPUS* 38 (1988); compare E. SCHREIBER, *NO IVORY TOWER* 10, 241 (1986).

⁹⁰ J. BENDERSKY, *supra* note 2, at 189–91, 206.

⁹¹ Wieacker, *Das Kitzberger Lager junger Rechtslehrer*, 1 *DEUTSCHE RECHTSWISSENSCHAFT* 74 (1936). See also B. RÜTHERS, *ENTARTETES RECHT* 41–48 (1988).

⁹² N. GÜRKE, *DER EINFLUSS JÜDISCHER THEORETIKER AUF DIE DEUTSCHE VÖLKERRECHTS-LEHRE* (1938), volume 6 of a series, *Das Judentum in der Rechtswissenschaft*, produced under the auspices of Carl Schmitt. For background, see B. RÜTHERS, *supra* note 91, at 128–31.

⁹³ Reimann, *supra* note 2. Of those who won chairs in 1933, Scheuner was the most conspicuous in international law after 1945. Maunz and Forsthoff were important in constitutional law but not international law. Several of the newcomers prominent in the 1930s do not reappear, e.g., Ritterbusch and Ruehland.

proved unacceptable in the new Germany⁹⁴ and Friedrich Berber found it wise to spend some time in India before finding a new chair in Munich.⁹⁵ Numerous assistant professors and research assistants also survived to form the next layer of full professors in the postwar Germany—Eberhard Menzel, Hermann Mosler and Hans-Jürgen Schlochauer, for example. The executioner deleted some promising international law careers as a consequence of the abortive 1944 conspiracy. Germany could well have used the services of Berthold von Stauffenberg and Helmuth James von Moltke after the war.

IV. THE INTERNATIONALISTS REACT

The options available to a German professor of international law after 1933 were very limited. First, he could resist. In historical perspective the valor of those who did stands out like a candle in the moral darkness of Nazi Germany. The risks they took were enormous and for most of them the outcome was death. However, there were limits even on that choice. To resist, one had to be connected with a nucleus of like-minded persons. There was such a nucleus in the Abwehr and it was there that the resisters made their desperate plans. One can never know which other international lawyers might have joined them had they been informed. Those who resisted on July 20, 1944, had, to varying degrees, been useful collaborators of the regime until then. Like Count von Moltke, they might have argued in legal terms against certain measures of the regime, but they justified and formulated others that did not so clearly violate international law.⁹⁶ Before giving his life with the conspirators, Berthold von Stauffenberg had loyally defended the Nazi laws denaturalizing non-Aryans and Hitler's denunciation of the Locarno pact.⁹⁷ In this he resembled his brother Klaus who, before the day he took the bomb into the Führer's headquarters, had fought valiantly for Germany, and hence for Hitler, on two continents. Only a few resisters—none of them full professors—who were Social Democrats were continually in dangerous and unarmed opposition.⁹⁸

Second, one could emigrate. This was not an easy choice to make.⁹⁹ In personal terms it might mean sacrificing a hard-won chair to try one's hand

⁹⁴ Schmitt's career after 1945 is dealt with in J. BENDERSKY, *supra* note 2, at 264–87.

⁹⁵ See F. BERBER, *ZWISCHEN MACHT UND GEWISSEN: LEBENSERINNERUNGEN*, ch. XII (I. Strauss ed. 1986).

⁹⁶ Makarov, *supra* note 63, at 363.

⁹⁷ Zeller, *supra* note 75. Articles by Stauffenberg are cited in notes 19 *supra* and 177 *infra*.

⁹⁸ For the career of one Social Democrat who became a professor after the war, having spent much of the Nazi period in prison, see WOLFGANG ABENDROTH, *EIN LEBEN IN DER ARBEITERBEWEGUNG* (B. Dietrich & J. Perels eds. 1976); Sterzel, *Wolfgang Abendroth (1906–1985), Revolutionär und Verfassungsjurist der Arbeiterbewegung*, in Blanke, *supra* note 86, at 476.

⁹⁹ A moving attempt to explain the difficulties of emigration in the 1930s to a younger generation, used to greater mobility and less tied emotionally to their home countries, is found in P. LEVI, *THE DROWNED AND THE SAVED* 161–65 (R. Rosenthal trans. 1988). The harshness of emigration as an experience is indicated by the early deaths of three exile scholars in our sample: Albrecht Mendelssohn-Bartholdy, Walther Schücking and Karl Strupp. For a summary of the experience of the German emigration, see H. PROSS, *DIE DEUTSCHE AKADEMISCHE EMIGRATION NACH DEN VEREINIGTEN STAATEN, 1933–41* (1955).

at making a new career in a strange country during a depression. Few in fact made successful careers outside Germany. Of all the full professors of public international law, only Hans Kelsen succeeded in making his mark in the United States.¹⁰⁰ Some of the younger assistant professors had more luck, for example, Stefan Riesenfeld, Wolfgang Friedmann, F. A. Mann and Georg Schwarzenberger.¹⁰¹ At the political level, leaving Germany meant abandoning hope that one might play a role in an internal struggle to change the regime, although one could help by countering Nazi foreign propaganda.¹⁰² That hope, of course, faded as time went on, but it was widely held in 1933–1934, perhaps most tenaciously by conservatives who hoped that the established elites could control the Nazi rabble. The odds were different, naturally, for those who had already lost their posts in Germany and for those who knew they were targeted for racial persecution.

Then one could enter the so-called internal emigration. This meant disconnecting oneself from public life as much as was permitted. A professor of international law could generally survive if he already had tenure by writing little or nothing, or writing only about safe subjects such as the history of international law and diplomatic immunity.¹⁰³ Preparing notes about recent decisions or treaties was morally unobjectionable. In his lectures a professor might be technical and neutral and be perfunctory in giving the obligatory salute, although even this modicum of disrespect might displease activist students in brown uniforms. In seminars he could even venture a bit of sarcasm about the situation—near the end of the semester when he knew his students. He might find a way to do a kindness for somebody who was being victimized for racial or political reasons. And he might send messages to friends abroad telling them about the cruel realities of the Reich. It is often hard to judge who belonged in this category, for these actors left none of the tracks made by those who chose resistance or emigration, and we are forced to rely on the testimony of friends and on occasional letters. Another branch of the internal emigration consisted of those who lost their posts or abandoned their efforts to achieve promotion but did not leave the country. They

¹⁰⁰ Hans Kelsen's difficult progress in the United States is described in Gross, *Hans Kelsen*, 67 AJIL 491 (1973). Both Leo Gross and John Herz, after reading a draft of this essay, urged me to underline Kelsen's personal generosity to students and even adversaries. For his willingness to support Schmitt's appointment in Cologne, see F. GOLCZEWSKI, *supra* note 27, at 299. Schmitt repaid this openmindedness by being the only full professor not to sign the faculty's appeal to retain Kelsen. *Id.* at 117.

¹⁰¹ See Mann, *Conflict of Laws and Public Law*, 132 RECUEIL DES COURS 107, 131 (1971 I); Schwarzenberger, *The Fundamental Principles of International Law*, 87 *id.* at 191, 193 (1955 I); Tribute and Symposium honoring Riesenfeld, 63 CALIF. L. REV. 1384 (1975); Jessup, *Introduction to JUS ET SOCIETAS: ESSAYS IN TRIBUTE TO WOLFGANG FRIEDMANN* (G. Wilner ed. 1979). An interesting example of the reflection of that success back across the Atlantic is the German *IUS INTER NATIONES: FESTSCHRIFT FÜR STEFAN RIESENFELD* (E. Jayme, G. Kegel & M. Lutter eds. 1983).

¹⁰² Thus, after his discharge from Göttingen, Gerhard Leibholz made contact with important members of the British elite and attempted to forge ties between Britain and the German resistance. See Klein, *Gerhard Leibholz*, in *RECHTSWISSENSCHAFT IN GÖTTINGEN: GÖTTINGER JURISTEN AUS 250 JAHREN* 528, 530–31 (F. Loos ed. 1987) [hereinafter Loos].

¹⁰³ See note 115 *infra* for Laun as an example.

found work of other sorts that did not involve taking legal positions about public matters.

At the next point along the spectrum, one tried to pursue a normal career, though without identifying oneself with Nazism internally. Such an international lawyer would write obligatory pieces, putting in some obeisance to the new order and the theories that underlay it but without indulging in racist rhetoric. He was attached to the system, of course, and in a way served it. In fact, Viktor Bruns was arguably the greatest servant of the Third Reich among the international lawyers. Without raising his voice in Nazi frenzy, Bruns provided the regime with the respectability that his long career as scholar, arbitrator and negotiator had built up. As chair of the German academy's committee on international law, he greeted foreign scholars and diplomats, and by remaining in the post assured them that the regime could not really be so bad.¹⁰⁴

Last, one could be an opportunist or a convinced Nazi, embracing all of the doctrines of race, *Volk*, *Lebensraum* and the Führer principle. This phenomenon occurred mostly among the assistant professors of 1933, partly because they had more to gain by currying favor with the powers, but also because they belonged to the age cohort most vulnerable to Nazism. Growing up in a Germany beset by perils both foreign and domestic, the children of the turn of the century fell prey to the allure of a strong leader and a mass party. They tended to be more radical than their predecessors. It is sometimes hard to know how much opportunism and fanaticism were mixed in these personalities.¹⁰⁵ In particular, a reader in the 1990s wonders whether they really believed in the Nazi teachings on anti-Semitism. The Nazis themselves sometimes doubted the genuineness of the prejudice of some scholars, particularly those who, like Carl Schmitt, had enjoyed close relations with Jewish colleagues in earlier years.¹⁰⁶

As one thinks about those who chose these various courses, justice requires consideration of the circumstances under which they had to operate. The pressures to conform ranged from the general social atmosphere of enthusiasm for the new Germany to the cruder manifestations of the criminal law and the state's power to dismiss or promote. Some Germans, those who were classified as partially Jewish by the Nazis, those whose wives were Jewish and those who had participated in leftist politics, were under special pressure.¹⁰⁷

¹⁰⁴ See D. ANDERSON, *supra* note 67, at 447–49.

¹⁰⁵ I tend to place more weight on opportunism than does, for example, Professor Reimann, *supra* note 2. An outstanding illustration of opportunism is the case of Carl Schmitt, described in the text at notes 117–20 *infra*. A striking admission of this is Ulrich Scheuner's explanation for his writings: "Well, you know, I have a weakness for power," quoted in Weber, *Rechtswissenschaft im Dienst der NS-Propaganda*, in 2 Gantzel, *supra* note 10, at 185, 354. See also the comments of Wilhelm Wengler, 56 INSTITUT DE DROIT INTERNATIONAL, ANNUAIRE 318, 322 (1975).

¹⁰⁶ J. BENDERSKY, *supra* note 2, at 229–30, 234–38.

¹⁰⁷ Thus, Gaus reports that he felt constrained in his work in the Foreign Office by concern about his partly Jewish wife. *United States v. von Weizsaecker*, 12 TRIALS OF WAR CRIMINALS, *supra* note 32, at 1187. The pressures felt by the commercial lawyer Julius von Gierke because of his maternal grandparents are reported in Müller-Laube, *Julius von Gierke (1875–1960)*, in Loos, *supra* note 102, at 471, 477–78.

We live in an age when the highest penalty for nonconformity in the academy is the tendency of colleagues not to speak to one while passing in the corridor. The stakes were higher in the Third Reich.

V. SOME INDIVIDUAL DESTINIES

The picture of the German internationalists becomes more concrete and their problems more poignant if we examine the lives of a few exemplars of each of the choices just described.

To begin with the resisters, we pick up the life of a man from outside the circle of full professors, none of whom had the occasion to resist so dramatically—Helmuth James von Moltke. The picture that one's mind retains is not the typical, stiffly posed head-and-shoulders shot in a *Festschrift* or the Hague *Recueil*. It is the photo of Moltke, weary, resigned, but still upright, facing the judges of the People's Court that was about to sentence him to death.¹⁰⁸ Moltke was heir to a Prussian military name that had all the glamor, and more, that Southerners attach to the name Robert E. Lee. Still, he was not himself in any sense a military man. He studied international law in Germany and in England, where he was a member of the bar, and then returned to Germany to private practice.

When World War II broke out, he was drawn into the legal branch of the armed forces headquarters. There he dealt intensively with economic warfare and the production of legal responses to the British blockade system. He also became involved in a series of clashes over the treatment of prisoners of war. These issues, treated substantively in part VII below, pitted Moltke against the hard-line Nazis in the military establishment. The clashes show that he was well aware of the atrocities being committed by the German armed forces and determined to do what little was in his power to mitigate the situation. Moltke sought to minimize violations of international law not only by making legal and pragmatic arguments in favor of complying with the rules, but also by circulating items from the foreign press showing that enemy states were in fact doing so. In one episode he and his colleagues resorted to a modest bit of sabotage. The Nazis forbade the distribution of post cards from German prisoners in the Soviet Union because they feared it would undermine morale. Some intercepted cards came to Moltke's office for analysis and the staff slipped as many of them as they dared into the nearest mailbox. The nature of his work was such that Moltke could not do what others in the *Abwehr* did, turn militarily useful data over to the enemy. At the same time, he was active in discussions about the future of Germany after the end of the Nazi regime within a circle of friends that came to be known by the name of his country estate, Kreisau. He was not, however, directly involved in the attempt on Hitler's life (he was in prison at the time),

¹⁰⁸ CONSCIENCE IN REVOLT 231 (A. Leber ed., R. O'Neill trans. 1957). There were others in the Kreisau resistance circle who could be said to have been influenced by exposure to international law: Adam von Trott zu Solz, Hans-Bernd von Haeften and Paulus van Husen. G. VAN ROON, *NEUORDNUNG IM WIDERSTAND, DER KREISAUER KREIS INNERHALB DER DEUTSCHEN WIDERSTANDSBEWEGUNG* 143, 152, 195 (1967).

as were other members of that circle and Berthold von Stauffenberg, who worked in the same office with him.

Moltke was arrested in January 1944 because of power struggles between Himmler and Canaris over the control of intelligence activities.¹⁰⁹ In 1945 he was executed together with the conspirators. In 1948 an eloquent tribute was paid to him by Professor Wegner, who, after his dismissal from his chair in international law at Breslau, had been persecuted by the regime:

My other defender was my student at Breslau, Count Helmuth James von Moltke. He was indeed the tersest, clearest and most competent jurist that I knew among my students. His life as a student is long past. Before the dead I bow as to a role model and teacher. Count Helmuth James von Moltke was a nobleman of both greatness and goodness. What he did as an English and German lawyer, as defender of the persecuted and despised, belongs to history. He and the Countess, the outstanding student of Martin Wolff, were true friends of legal science and of their professors.

I can no longer thank Count Moltke for what he personally did for me as my defender. . . . But one thing I can still do for Count Helmuth James von Moltke: I can here publicly offer this modest and loyal tribute to a German nobleman who died for justice.¹¹⁰

Karl Strupp stands for those who went into exile. His pre-1933 career was a brilliant one. As tenured professor at Frankfurt, as coeditor of the *Encyclopedia of International Law*, as three-time lecturer at The Hague, and as author of numerous works and writer of numerous contentious opinions, he made a name for himself in the profession and fought hard for the cause of peace and reconciliation.¹¹¹ His exile was in part due to his Jewish lineage—Gürke refers to him as one of the best-known Jewish enthusiasts for the League—and in part due to his substantive positions.¹¹² Strupp tried to manage as a visiting professor in Istanbul, but the climate proved bad for his health. In financial distress, he moved to France where he died shortly before the German onslaught. He had just received a long sought-after invitation to teach in New York at Columbia University's Institute for Social Research, but a heart attack intervened.¹¹³

Strupp's 1934 Hague lectures say little about Nazism directly but rather wistfully express confidence that even though Germany had left the League of Nations, it had affirmed its attachment to the cause of peace. They end with a quotation from the French revolutionary Mirabeau: "one day law will be the sovereign of the world."¹¹⁴ The hardship and frustration that accompanied Strupp's exile were far more typical than the successes of the more prominent few among the émigrés.

¹⁰⁹ Wengler, *Helmuth James von Moltke (1906–1945)*, 48 FRIEDENSWARTE 297, 303 (1948).

¹¹⁰ A. WEGNER, EINFÜHRUNG IN DIE RECHTSWISSENSCHAFT 3 (1948).

¹¹¹ See the *Wörterbuch des Völkerrechts und der Diplomatie*, which Strupp edited from 1924 to 1929.

¹¹² N. GÜRKE, *supra* note 92, at 19, 35.

¹¹³ Wehberg, *Zum Andenken an Karl Strupp*, 40 FRIEDENSWARTE 175, 178 (1940).

¹¹⁴ Strupp, *supra* note 83, at 586.

Rudolf von Laun represents those who withdrew and, without being active resisters, did as little as possible for the regime and in fact did little writing of any sort.¹¹⁵ It is remarkable that Laun, as a Social Democrat, survived at all. We know from reliable testimony and letters that he made several attempts to prevent the appointment of fanatics to the Hamburg law faculty and sought to help others placed in jeopardy by the regime. His classroom performances gave as little weight to the new regime as was possible. But, despite his critical attitude toward Nazism, he refused an invitation to stay at the Michigan Law School after a visit there in 1934–1935 and returned to share the perils of his country. His survival enabled him to play a leading role in the reconstruction of the German international law community after 1945.

Preeminent among those who stayed and carried on without an inward commitment to the regime was Viktor Bruns. Of all this group, he probably had the most distinguished record. He was a founder of the Kaiser Wilhelm Institute and of its journal. His writings were extensive. His participation in the work of international tribunals and other bodies was important. After the Nazi seizure of power, Bruns became Chairman of the Committee on International Law of the Academy for German Law. As such, he represented the new regime to the rest of the international community and lent the prestige of his scholarly achievements to that Government. There is testimony from reliable persons that his sympathies did not lie with the Government and such opponents of Nazism as Stauffenberg, Wengler and Jaenicke were his students.¹¹⁶ Still, it is not unfair to say that, objectively, he proved to be the most useful ally the Government had among the members of the international law community.

Our first case among the enthusiasts or opportunists is that of the devil's advocate, Carl Schmitt.¹¹⁷ Here we have a man of great talent, eloquence and ambition. His rise to the heights of influence had largely to do with his work in constitutional law, supporting first the insidious attacks on Weimar institutions by the regimes immediately preceding Hitler's and then the

¹¹⁵ On Laun, see Weber, *Von Albrecht Mendelssohn-Bartholdy zu Ernst Forsthoff: Die Hamburger Rechtsfakultät im Zeitpunkt des Machtübergangs, 1933 bis 1935*, in 1 Gantzel, *supra* note 1, at 166, 171–79. Laun cut back on his teaching of constitutional law, concentrating on international studies as less controversial; when he did teach constitutional law, he emphasized its historical aspects. His only written products during the period were bland: *Stare Decisis*, 25 VA. L. REV. 12 (1938); *DER SATZ VOM GRUNDE: EIN SYSTEM DER ERKENNTISTHEORIE* (1942) (on the theory of knowledge). There are two celebratory volumes on Laun: *GEGENWARTSPROBLEME DES INTERNATIONALEN RECHTS UND DER RECHTSPHILOSOPHIE: FESTSCHRIFT FÜR RUDOLF LAUN ZU SEINEM SIEBZIGSTEN GEBURTSTAG* (D. Constantopoulos & H. Wehberg eds. 1953); *FESTSCHRIFT ZU EHREN VON RUDOLF LAUN* (C. Hernmark ed. 1948). In conversations at Salonika in August 1988, Dr. Constantopoulos told me of Laun's attempts to intercede on behalf of persecuted persons.

¹¹⁶ For a favorable review of Bruns's contributions, see Borchard, *supra* note 29. He says of Bruns: "Although never a member of the 'Party,' and revolted by much that offended his own elevated principles, he thought it best to carry on, keeping the Institute out of Party control and maintaining its high standards. This was no easy task." *Id.* at 659.

See also the note by Triepel, 11 ZAÖRV 325 (1942).

¹¹⁷ J. BENDERSKY, *supra* note 2, at 263.

Führer's own frontal assault. It was only later that his emphasis shifted to international law, partly because he found himself locked in battle with others who had been Nazis long before he joined the party in 1933 and were anti-Semites while he was still consorting with Jewish colleagues.¹¹⁸ His own vicious attacks on his old colleagues were not enough to save himself from similar attacks for those associations.

During the war years, Schmitt wrote extensively to explicate his ideas of a European *Grossraum*, a system within which Germany would rightly be the dominant power. He analogized this theory to the Monroe Doctrine in the Americas, a notion that does not carry strong appeal to the American international lawyer. Even here he was plagued by the competition of other National Socialist writers who sought to outflank him. The ambiguity of his situation is highlighted by his experience as a house guest of Popitz in Berlin in July 1944.¹¹⁹ In that house he learned that his host had been arrested for participating in the conspiracy. Although he had not trusted Schmitt enough to tell him about the plot, Popitz put him in considerable peril by his mere proximity.

The conspicuousness of his advocacy of Nazism made the reintegration of Schmitt into the postwar university system impossible, although efforts were made on his behalf and he was honored by successive Festschriften. Erich Kaufmann's observation that he was the will-o'-the-wisp who led other jurists into the swamp of Nazism is the abiding judgment.¹²⁰

The other leading opportunist in our story is Friedrich Berber.¹²¹ Less vaultingly ambitious than Schmitt, he made fewer enemies during the Third Reich and did less drastically evil things. Still an assistant professor in 1933, he hoped to be called to a chair at Hamburg to replace Perels; that hope was blocked by Schmitt, who wanted the post for one of his protégés.¹²² Berber wound up becoming head of the Hamburg institute, which he moved to Berlin in 1937. There he turned it into a research and propaganda arm of the Foreign Ministry, to which it was attached. He wrote or directed the writing of propaganda, some of which had a substantial international law content. He also published drastically edited versions of the diplomatic relations of the Reich.¹²³

In 1943, seeing the handwriting on the wall, Berber arranged to be appointed German representative to the International Commission of the Red Cross. His role in Switzerland is subject to various interpretations, but it is clear that he was involved in the last-minute maneuvers of leading Nazis to try to soften their fall in exchange for better treatment of Hitler's victims.¹²⁴

¹¹⁸ *Id.* at 248-49.

¹¹⁹ *Id.* at 263-64.

¹²⁰ E. KAUFMANN, *Carl Schmitt und seine Schule: Offener Brief an Ernst Forsthoff*, in RECHTSIDEE UND RECHT, 3 GESAMMELTE SCHRIFTEN VON ERICH KAUFMANN 375 (1960).

¹²¹ The principal sources on Berber are his own autobiographical self-justification, *supra* note 95, and Weber, *supra* note 105.

¹²² Weber, *supra* note 105, at 253.

¹²³ 1 G. WEINBERG, *supra* note 3, at 366.

¹²⁴ See Weber, *supra* note 105, at 393-409; see also J. FAVEZ, UNE MISSION IMPOSSIBLE? LE CICR, LES DÉPORTATIONS ET LES CAMPS DE CONCENTRATION NAZIS 346 (1988).

After the war, he found it wise to spend several years in India as a government adviser before finding a place at Munich in 1953.

One's impression of Berber, partly from the rather intensive study by the historians of the institute and partly from a brief personal encounter, is of an almost picaresque character, skipping from post to post in a troubled time and doing what the powers wanted, without taking them wholly seriously. The British historian Arnold Toynbee found him to be "sly; and he was double-faced."¹²⁵ He never plunged into the anti-Semitism that shamed Schmitt; nor did he betray old friends as Schmitt did. Indeed, he seems to have indulged in various protective kindnesses along the way.

When we come to the fanatics, as distinguished from the opportunists, it becomes harder to present any rounded picture of their lives or characters. Whatever biographies were written of them in *Festschriften* or other formats tend to conceal the truth; and their later careers have disappeared from our view, as few of them remained in international law after the war.¹²⁶ For example, in the 1930s Theodor Maunz wrote some rather violent words about the need to ignore the niceties of the old rules of warfare. After 1945, he appears only as a constitutional lawyer, fiercely attacked by the left for his earlier work.¹²⁷ Another problem of imagining these people is that when one meets them now they seem almost disconnected personally from what they were and did in the 1930s. For example, I met a man of that generation in another field of law who wrote some very Nazi things during the Third Reich.¹²⁸ I know him as a kindly, avuncular, deeply learned scholar in his eighties, on good terms with hundreds of colleagues and students. I read what he said about the excitement of being a member of the assistant professors' camp at Kitzeberg in the early thirties and I cannot connect the two. Was what he said then opportunistic pretense? Has he grown and learned since then?

¹²⁵ Berber is the only figure here discussed whom I have met. It was at an occasion in Cambridge, Massachusetts, where he genially, but falsely, claimed to have been a friend of my father. There is a lengthy description of an encounter with Berber in A. TOYNBEE, *supra* note 68, at 277-78; Berber arranged an audience with Hitler for the Briton. For a kinder, but not uncritical, view of Berber, see Randelzhofer, *Friedrich Berber*, in *JURISTEN IM PORTRAIT: VERLAG UND AUTOREN IN 4 JAHRZEHNTE: FESTSCHRIFT ZUM 225 JÄHRIGEN JUBILÄUM DES VERLAGES C. H. BECK* 170 (1988).

¹²⁶ In general, the most trustworthy accounts of individual careers are those emanating from Hans Wehberg and his circle in Switzerland; Wehberg combined intimate knowledge of German international lawyers and their work with high moral standards and a considerable amount of charity. One attributes higher value to those *Festschriften* in which Wehberg and such figures as Gerhard Leibholz, Rudolf Laun and Erich Kaufmann were willing to participate.

¹²⁷ Dieseroth, *Kontinuitätsproblem der deutschen Staatsrechtler: Das Beispiel Theodor Maunz*, in *ORDNUNGSMACHT? ÜBER DAS VERHÄLTNISS VON LEGALITÄT, KONSENS UND HERRSCHAFT* 85 (D. Dieseroth, F. Hese & K. Ladeur eds. 1981); see also Reimann, *supra* note 2, at 1652-53. Maunz's Nazi writings in defense of aggressive war without regard to laws are reprinted in *MAUNZ IM DIENSTE DES FASCHISMUS UND DER CSU* (L. Elm, G. Haney & G. Baranowsky eds. 1964). This publication by the East German University of Jena contributed to Maunz's deposition as Bavarian Minister of Culture.

¹²⁸ See sources cited in note 91 *supra*.

We can present at least the externals of one certified fanatic. Norbert Gürke was an Austrian Nazi who had to flee his homeland for forbidden pro-Hitler activity.¹²⁹ He wrote the anti-Jewish international law volume of Schmitt's collection of anti-Semitic treatises. The rest of his work glorified race and blood and *Volk*. Consistently, he joined the army at the start and was wounded in the French campaign of 1940. Because the wound interfered with his athletic prowess, he chose to undergo an operation that proved fatal. His colleague Walz praised his combative and ruthless scholarship.¹³⁰ There must have been others like him in the community of new international lawyers.

VI. INTERNATIONAL LAW DOCTRINES IN PEACETIME

Changes in German international law doctrines became apparent upon the seizure of power, but it is wrong to think of them as resulting from an entirely orderly process.¹³¹ International lawyers did not execute a right wheel all at once. As we have seen, the party did take measures to assure coordination,¹³² but there were overlapping authorities and considerable disorder. Some of the confusion was occasioned by the sheer difficulty of making out what sort of international law National Socialism really implied or needed. In particular, Hitler did not advise the internationalists when he decided to shift from a cautious renegotiation of the status quo to a headlong plunge toward war.¹³³ If it was not always easy for Russians to decipher what sort of international law Marxism required, it was all the more difficult to see what National Socialism called for. Thus, there were some sharp conflicts within the ranks of the Germans, heightened by maneuvers for personal promotion and gain.

The international law literature produced in this period is not easy reading: its premises are basically incoherent and hard to accept in the 1990s. Moreover, the style becomes increasingly truculent and self-congratulatory and, of course, shows the influence of the Nazi vocabulary, the *Lingua Tertii Imperii* (LTI).¹³⁴ The German literature did not gain a cordial reception among internationalists outside the Reich.¹³⁵ The following survey concen-

¹²⁹ Walz, *Prof. Dr. Gürke*, 25 Z FÜR VR 129 (1940).

¹³⁰ *Id.*

¹³¹ Messerschmidt, *supra* note 1, at 62-63.

¹³² See text at notes 56-59, 91.

¹³³ The lack of awareness by German internationalists of Hitler's short-run aggressive plans is stressed in Messerschmidt, *supra* note 1, at 78-79. It is generally thought that the meeting of November 5, 1937, memorialized by the so-called Hossbach Protocol, provided the first warning of these plans even to the military/government elite. Wright & Stafford, *Britain and the Hossbach Memorandum*, MILITÄRGESCHICHTLICHE MITTEILUNGEN, No. 2, 1987, at 77.

¹³⁴ Helpful works on the changes Nazism wrought in the German language are: C. BERNING, VOM "ABSTAMMUNGSNACHWEIS" ZUM "ZUCHTWART": VOKABULAR DES NATIONALSOZIALISMUS (1964); and V. KLEMPERER, LTI, NOTIZBUCH EINES PHILOLOGEN (4th ed. 1987).

¹³⁵ See sources cited *supra* note 1 and book reviews by Kunz, 29 AJIL 554 (1935) (Wolgast); by Kopelmanas, 42 RGDIP 517 (1935); by Engelberg, 46 *id.* at 37 (1939) (on Verdross); and by Kunz, 34 AJIL 173 (1940) (on Schmitt and others). But F. NEUMANN, BEHEMOTH: THE STRUCTURE AND PRACTICE OF NATIONAL SOCIALISM 151 (2d ed. 1944), says, "What is sur-

trates on those matters most starkly affected by Nazism and slights those for which orthodoxy continued to prevail.

The Nature of States

International law has classically been considered to be the law governing relations between states. A state is thought of as having a defined territory, a population and a government in control thereof.¹³⁶ National Socialist thinking reversed these priorities. A *Volk* is an organic, natural entity.¹³⁷ Nazi thinkers liked to cite the classic differentiation originated by the sociologist Tönnies between a *Gemeinschaft* and a *Gesellschaft*.¹³⁸ A *Gesellschaft* is an artificial entity consciously created through the individual wills of its constituents. It is a creature of the liberal world as it has existed since the French Revolution of 1789. A *Gemeinschaft*, in contrast, is a hereditary and organic thing in itself, antecedent to and superior to the individual molecules that happen at the moment to make it up. A *Gesellschaft* expresses its will by aggregating individual wills through artificially constructed constitutional processes. A *Gemeinschaft* has an objective common will arising from the organism and speaking through the leader who understands it. A *Volk* expresses its will through a state. Ideally, a single *Volk* has a single state to express its essence. But the accidents of history have divided some *Völker*, such as the Germans, that should be one and assembled other states, such as the Austro-Hungarian Empire, that are artificial mixtures.¹³⁹ Still, the course of both history and morality moves toward a correspondence of one *Volk*, one Reich and one Führer. Thus, Hitler gave high priority in his foreign policy to returning Germans in Austria to their racial home.

Any analysis of the character of states calls forth the question of their equality. German thinking after 1933 laid considerable emphasis on equality as a basis for the argument that the Versailles settlement was unjust and

prising is that outside Germany, especially in England, experts in international law were seemingly unaware of the game that was being played." The Austrian A. VERDROSS, *VÖLKERRECHT* 29 (1937), accepted Nazi international law at face value.

¹³⁶ RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §201 (1987) [hereinafter RESTATEMENT].

¹³⁷ The matter was thus put by Reinhard Heydrich, Himmler's chief deputy:

National Socialism no longer proceeds from the state as a starting point but from the *Volk*. Hitler pointed the way as early as *Mein Kampf*. He characterizes the state as a "means to an end," as a "structure for the *Volkstum*," for the maintenance of a "*Gemeinschaft* of physically and spiritually similar human beings." (footnote omitted)

Heydrich, *Die Bekämpfung der Staatsfeinde*, 1 *DEUTSCHE RECHTSWISSENSCHAFT* 97, 97 (1936). See generally E. JÄCKEL, *HITLER'S WELTANSCHAUUNG, A BLUEPRINT FOR POWER*, ch. IV (H. Arnold trans. 1972).

¹³⁸ For the usage of *Gemeinschaft* in Nazi thought, see Stolleis, *Gemeinschaft und Volksgemeinschaft—Zur juristischen Terminologie im Nationalsozialismus*, 20 *VIERTELJAHRSSHEFTE FÜR ZEITGESCHICHTE* 16 (1973). And in international law, F. GIESE & E. MENZEL, *VOM DEUTSCHEN VÖLKERRECHTSDENKEN DER GEGENWART* 34-35 (1938).

¹³⁹ See F. GIESE & E. MENZEL, *supra* note 138, at 37, 58-61.

perhaps void because it left Germany in an inferior position.¹⁴⁰ In addition to equality, the argument was technically linked with concepts of inalienable sovereign rights, that is, of a minimal set of rights that governments cannot bargain away.¹⁴¹ German thinking here followed an analysis separate from, but parallel to, one that was then beginning to take shape in such countries as China and Turkey, which were pushing for the surrender of special extra-territorial rights that the western powers had imposed. That strand of thought, after World War II and during the decolonization process, became the central theme of Third World international law.¹⁴² In Germany the main items of objection were the imposition of unilateral arms limitations, accompanied by what we would now call "on-site" inspections, the demilitarization of the Rhineland and the financial controls imposed under the Dawes and Young Plans.¹⁴³

German theory on the sovereign freedom of a state from interference within its own territory was put to an ironic test in 1936. Germany eventually accepted Swiss representations that German agents had violated international law when they seized Berthold Jacob-Solomon, an émigré German publicist, on Swiss soil. Faced with a Swiss threat to proceed with arbitration, as well as foreign repercussions, Hitler reluctantly concluded that it would be discreet to concede the matter and return Jacob to Switzerland.¹⁴⁴ By 1939, with the war in progress, the Nazi regime's approach to such problems was wholly different, and no consideration was given to returning the two British agents seized at Venlo in Holland.¹⁴⁵

In fact, around 1939 the basic mood of German thinking about state equality changed drastically. As Hitler went from one triumph to another, equality no longer seemed to be enough. Indeed, one could have discovered his view at any time by a fair reading of *Mein Kampf*.¹⁴⁶ By 1937 and 1938,

¹⁴⁰ Important works on equality of the early Nazi years are Bilfinger, *Gleichheit und Gleichberechtigung der Staaten*, in HANDBUCH, *supra* note 16, at 99; and Bruns, *Deutschlands Gleichberechtigung als Rechtsproblem*, 1933 JURISTISCHE WOCHENSCHRIFT 2481.

¹⁴¹ See Bilfinger, *supra* note 140, at 99 ("Equality and equality of rights . . . form a basic law of the state that is inextricably tied to its existence as a state and therefore is inalienable").

¹⁴² Morvay, *Unequal Treaties*, in [Instalment] 7 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 514 (R. Bernhardt ed. 1984), surveys the history of the idea of unequal treaties. There does not seem to have been any significant cross-fertilization among German, Turkish and Chinese attacks on treaties regarded by those states as unequal. However, at least one German item reports such attacks and treats them with respect. Tabouillot, *Das Ende der Exterritorialitätsrechte in Mandschukuo*, 3 VÖLKERBUND UND VÖLKERRECHT 459 (1937).

¹⁴³ Schwendemann, *Die Abrüstungsfrage*, in HANDBUCH, *supra* note 16, at 194.

¹⁴⁴ For contemporary analysis, see Preuss, *Settlement of the Jacob Kidnaping Case*, 30 AJIL 123 (1936). More detail appears in H. TUTAS, NATIONALSOZIALISMUS UND EXIL: DIE POLITIK DES DRITTEN REICHES GEGENÜBER DER DEUTSCHEN POLITISCHEN EMIGRATION 1933-1939, at 191-94 (1975); D. BOURGEOIS, LA TROISIÈME REICH ET LA SUISSE, 1933-1941, at 53-57 (1974).

¹⁴⁵ For a participant's account of the affair, in which two British agents were lured to the Dutch border and kidnapped, see S. PAYNE BEST, THE VENLO INCIDENT (1950).

¹⁴⁶ The accuracy of *Mein Kampf* as a guide to Hitler's foreign policy is emphasized in K. BRACHER, *supra* note 4, at 238, 288-89; and E. JÄCKEL, *supra* note 137, ch. II. As early as 1933, Herbert Kraus had observed that the idea of legal equality of states was hard to reconcile with the National Socialist program, in particular with the idea of a "middle Europe" under German

the first theoretical justifications for a greater than equal position for Germany were being developed by German international lawyers. In 1939 Carl Schmitt, still striving for the position of Hitler's chief lawyer, wrote a book propagating the idea of *Grossraum* (Grand Space).¹⁴⁷ That idea had its roots in the geopolitical ideology developed by Karl Haushofer. Within a *Grossraum* one state would be entitled to hegemony on the basis of its possession of a powerful political idea. The hegemonic power would have the right to interfere in the internal matters of subordinate states within the Grand Space so as to bring them into harmony with the grand design. External states would have no right to interfere in the conduct of affairs within the Grand Space. Schmitt had the audacity, or so it may seem to Americans, to regard the proposed hegemony of Germany in Europe as equivalent to the position of the United States in the Americas under the Monroe Doctrine.¹⁴⁸

Schmitt's rivals put forth a competing theory, that of *Lebensraum* (Living Space).¹⁴⁹ Germany, as a racially superior state, was entitled, in a Neo-Darwinian way, to expand spatially as far as its biological needs carried it. It could either sweep the territory clean of other peoples or allow them to coexist with Germans on whatever terms it chose. The latter theory came to gain ground at the higher levels of the Nazi state because it corresponded so closely to what Hitler had in mind for Eastern Europe, for the ghastly work done by the army and the security forces in Poland and the Soviet Union.¹⁵⁰ This style of thinking was designed to stiffen the will of young Germans to carry out those measures. It was, of course, totally counterproductive as far as neutral or hostile foreign countries were concerned. It was picked up by foreign propagandists as a useful focal point for warnings about what one could expect from a German victory in the war. But the last loyal partisans of *Lebensraum* were still singing its praises as the Allied armies probed the frontiers of the old Germany in late 1944.¹⁵¹

State succession issues played a role in the international law discussions of the Nazi period. A few Germans were drawn toward the concept that the

leadership. *Die Krise des zwischenstaatlichen Denkens* (1933), reprinted in *INTERNATIONALE GEGENWARTSFRAGEN—VÖLKERRECHT—STAATENETHIK—INTERNATIONALPOLITIK, AUSGEWÄHLTE KLEINE SCHRIFTEN VON HERBERT KRAUS* 230, 247 (1963). It is there stated that some of his thinking in this paper contributed to the removal of Kraus from his chair a few years later.

¹⁴⁷ C. SCHMITT, *VÖLKERRECHTLICHE GROSSRAUMORDNUNG MIT INTERVENTIONSVERBOT FÜR RAUMFREMDE MÄCHTE: EIN BEITRAG ZUM RECHTSBEGRIFF IM VÖLKERRECHT* (1939). F. NEUMANN, *supra* note 135, pt. 1, ch. V, finds the sources of the Greater German Realm idea in references to the Holy Roman Empire (First Reich), geopolitics, population pressure theory and the new international law.

¹⁴⁸ Hitler used the analogy to the Monroe Doctrine in an address to the Reichstag on April 28, 1940. Hans Frank warned Schmitt not to claim authorship of the idea. J. BENDERSKY, *supra* note 2, at 258–59. See comments in F. NEUMANN, *supra* note 135, at 156–60.

¹⁴⁹ On Schmitt's rivals, see J. BENDERSKY, *supra* note 2, at 259–61. Leading works on the *Lebensraum* idea were Best, *Völkische Grossraumordnung*, 10 *DEUTSCHES RECHT* 1006 (1940); Spanner, *Grossraum und Reich*, 22 *ZÖR* 28 (1942).

¹⁵⁰ On the translation of international law concepts of *Reich* and *Grossraum* into military propaganda, see Messerschmidt, *supra* note 1, at 89.

¹⁵¹ Küchenhoff, *Grossraumgedanke und völkische Idee im Recht*, 12 *ZAÖRV* 34 (1944).

Third Reich represented a clean break with the past and was therefore not bound by commitments that the illegitimate Weimar Republic had undertaken.¹⁵² This route was not, however, intensively pursued. Significantly, the Soviet Union also abandoned the argument after initially taking it more seriously than the Reich.¹⁵³ Hitler's Foreign Ministry did have to cope with the argument that, having integrated Austria into the Reich, Germany was responsible for its external debts. The technicians of the international law section of the Foreign Ministry must have enjoyed pointing out to the British and American claimants that their states had not taken responsibility for the external debts of the Boer Republics and of Texas, respectively.¹⁵⁴

Problems of the continuation of state status were created by Germany after 1939 when it successively attacked and occupied Poland, Denmark, Norway, Holland, Belgium, France, Yugoslavia and, in the end, Hungary and Italy. Germany treated them in different, inconsistent, ways; it annexed parts of Poland, treated other states as countries under military occupation, and left still others some autonomy. In most of these cases, governments in exile were put together to assert the continuity of government and the state.¹⁵⁵ Most of them fielded armies, navies and air forces to fight against the Reich. These forces, according to some Nazis, were not legitimate combatants since they did not represent recognized states and governments. Indeed, in most cases they were fighting against regimes recognized by the Nazis such as those of Pétain and Quisling. In general, the internationalists persuaded the German command not to regard the "Free French" and their like as outlaws, although harsh treatment was in store for Italians who followed the Badoglio regime after the coup of 1943, rather than Mussolini's rump regime at Salò.

The Binding Quality of International Law

If the nature of a state was as described in Nazi theory, what basis could underlie a state's obligation to follow the rules of international law? For some National Socialist thinkers, the answer was that there was none. If the *Volk*

¹⁵² The thesis that the Weimar Republic was so illegitimate as to cause its acts, including its treaties, to be void was advanced by Helmut Nicolai, before 1933 the head of the party's legal office. H. NICOLAI, *DIE RASSEGESETZLICHE RECHTSLEHRE, GRUNDZÜGE EINER NATIONAL-SOZIALISTISCHEN RECHTSPHILOSOPHIE* 56-57 (3d ed. 1934).

¹⁵³ On Soviet doctrines as to noncontinuity between the tsarist and Communist states, see K. GRZYBOWSKI, *SOVIET PUBLIC INTERNATIONAL LAW: DOCTRINES AND DIPLOMATIC PRACTICE* 92-95 (1976).

¹⁵⁴ Garner, *Questions of State Succession Raised by the German Annexation of Austria*, 32 AJIL 421 (1938); and more recently, Hoefflich, *Through a Glass Darkly: Reflections upon the History of the International Law of Public Debt in Connection with State Succession*, 1982 U. ILL. L. REV. 39, 63-65. The correspondence was published in I G. HACKWORTH, *DIGEST OF INTERNATIONAL LAW* 543-48 (1940).

¹⁵⁵ For a review of these events from an Allied perspective, see Oppenheim, *Governments and Authorities in Exile*, 36 AJIL 568 (1942). The Nazi position that these states had ceased to exist through conquest (*debellatio*) is explored in D. MAJER, "FREMDVÖLKISCHE" IM DRITTEN REICH. EIN BEITRAG ZUR NATIONALSOZIALISTISCHEN RECHTSSETZUNG UND RECHTSPRAXIS IN VERWALTUNG UND JUSTIZ UNTER BESONDERER BERÜCKSICHTIGUNG DER EINGEGLIEDERTEN OSTGEBIETE UND DES GENERALGOUVERNEMENTS (1981).

was the highest and finest institution of common life, how could it owe duties to follow rules laid down by some more universal system? On that theory, there was nothing higher than the foreign relations law of the *Volk*, those rules which served its interest and which might from time to time coincide with generally accepted practices of states. But where they diverged, the rules of the *Volk* would predominate. This case was put most strongly by Ludwig Schecher in 1934.¹⁵⁶ His argument against the existence of international law reminds one of the straw men erected by English and American law professors when they wish to demonstrate that international law is really "law" despite Austinian arguments about the absence of a sovereign power.

Logical though Schecher's argument on international legal obligation might be, it was strong medicine for internationalists.¹⁵⁷ It seemed to undermine the conceptual basis of their entire field. Furthermore, some of them argued, Germany could not afford to take that approach while it was weak and underarmed; it needed the protection of international law against the use of force by stronger states. How could one argue that Versailles was unlawful if there was no international law?¹⁵⁸ Thus, these teachers sought to reconstruct a basis for international law out of a variety of materials. Some took the position that there could at least be a common law among states that shared Aryan blood and thus belonged to the same race, even though they were made up of several *Völker*.¹⁵⁹ This idea was never a success among British and Scandinavian internationalists, who might have been eligible for such membership. Others tried to develop the idea that there was some sort of international *Gesellschaft*, though no *Gemeinschaft*, at least among European "advanced" states, which could generate rules for its members.¹⁶⁰ The Soviet Union naturally could not be a party to any such *Gesellschaft*—except between 1939 and 1941—because of its unique claim to the full truth and its racial inferiority.¹⁶¹ Other internationalists simply bypassed the problem and

¹⁵⁶ L. SCHECHER, *DEUTSCHES AUSSENSTAATSRECHT* 136 (1933):

In a complete sense the new principle of the state as the organization of a "national body set aside by its folk qualities, closed to outsiders by its race," is unthinkable without the primacy of state law. The unqualified connection of all members of a *Volk* with their *Volk* as the highest value on earth can, as a matter of law, be established only on the basis that the national state is the highest creator of order for its total living relationships, upon which no legal limitation of its competence is binding. (emphasis in original)

¹⁵⁷ A whole mass of critiques of Schecher is listed in E. BRISTLER, *supra* note 1, at 67–68. See also H. MOSLER, *DIE INTERVENTION IM VÖLKERRECHT* 77 (1937). In Mosler's case, this assertion of the reality of international law seems to have been part of an effort to keep Nazism from feeling free from the limits of that law. In his speech at the 50th anniversary of Mosler's doctorate, Tomuschat noted that Mosler advocated the legitimacy of intervention in cases of extensive religious persecution, etc. B. KNOBBE-KEUK, C. TOMUSCHAT & H. MOSLER, *REDEN ZUM 50. DOKTORJUBILÄUM* 9, 11 (1988).

¹⁵⁸ H. MOSLER, *supra* note 157, at 78.

¹⁵⁹ This was the conclusion drawn by Preuss, *supra* note 1, at 677. F. GIESE & E. MENZEL, *supra* note 138, at 35, sought to refute this by pointing to the anti-Comintern pact of 1937 with Italy and Japan.

¹⁶⁰ On the European community of nations, see F. GIESE & E. MENZEL, *supra* note 138, at 23–25 and 35. They noted Hitler's use of the term "the European family of nations."

¹⁶¹ Maurach, *Die Sowjetunion—Ein Mitglied der Völkerrechtsgemeinschaft?*, 21 *Z FÜR VR* 19 (1937); see also H. MOSLER, *supra* note 157, at 71–72; A. VERDROSS, *supra* note 135, at 54,

wrote about a particular rule of international law as if it mattered, as if it had binding effect.

The Binding Quality of Treaties

The same ultimate jurisprudential problem affected obligations under treaties. But here the political cost of denial was even higher. German policy depended heavily upon the belief by other states that the new Germany's commitment to the agreements Hitler had made was trustworthy. German writers tried to develop a theory of law that would enable them to make distinctions in this regard. They floated some verbiage about Teutonic ideas of the oath and fidelity toward those with whom one maintained such a relationship.¹⁶² But the scope of this justification was limited: How could it bind non-Teutons? How could it create commitments toward outsiders?

In fact, German treaty law thinking was chiefly distinguished by its excuses for terminating treaties. A highly self-judging version of the *clausula rebus sic stantibus* was advocated by several writers, who underlined the negative aspects for a sovereign state of being bound by the unanticipated consequences of its commitments.¹⁶³ To outsiders, this view had overtones of Chancellor Bethmann-Hollweg's damaging remarks in 1914 about the "scrap of paper" quality of the Belgian neutrality agreement¹⁶⁴—especially when *rebus sic stantibus* was asked to justify violating the Munich accord concerning Czechoslovakia before the ink was dry.¹⁶⁵

German jurists focused their attention on the inequality of certain treaties, once again singling out the Versailles settlement. They argued that those conventions treated Germany as a lesser state, in violation of the principle of sovereign equality, and, in particular, desecrated its honor (as by forbidding it an equal right to armaments). Interwoven with this strand of reasoning was the argument that, like contracts, treaties that are imposed by force are void.¹⁶⁶ One of the ironies of history is that when the argument was picked up after 1945 and incorporated in the Vienna Convention on the Law of Treaties, the chief example used was Hitler's imposition of the German protectorate over what was left of Czechoslovakia after Munich.¹⁶⁷ The in-

denying that the USSR was "a normal state within the meaning of international law"; and E. BOCKHOFF, *VÖLKERRECHT GEGEN DEN BOLSCHEWISMUS* (1937).

¹⁶² Walz, *Der Treugedanke im Völkerrecht*, 4 DEUTSCHES RECHT 521 (1934).

¹⁶³ A classic early piece was E. KAUFMANN, *DAS WESEN DES VÖLKERRECHTS UND DIE CLAUSULA REBUS SIC STANTIBUS* (1911).

¹⁶⁴ One writer of the Third Reich had the temerity to repeat the 1914 phrase. Keller, *Völkerrecht von Morgen*, 17 Z FÜR VR 342, 366 (1933).

¹⁶⁵ A. VON WEGENER, *ORIGINS OF WORLD WAR II* 44 (1941): "It would have been absurd to demand of Hitler that he renounce a policy which was in the interests of German safety, now that conditions were changed. The declaration made at Munich related to the time when it was made"

¹⁶⁶ Bleiber, *Aufgezwungene Verträge im Völkerrecht*, 19 Z FÜR VR 385 (1935).

¹⁶⁷ RESTATEMENT, *supra* note 136, §331 Reporters' Note 2, referring to Articles 51 and 52 of the Vienna Convention.

equality-coercion arguments did have the practical advantage of not being completely open-ended, as *rebus sic stantibus* would be; German jurists could argue that some pre-Reich agreements were invalid but that confidence could be placed in Hitler's free commitments.

Particular rancor was demonstrated by the Nazis against international organizations, which they identified with Jewish, pacifist internationalism.¹⁶⁸ Their disdain was aimed not only at the League of Nations, the institution that grew out of, and enforced, the Versailles settlement, but also at such foreign organizations as the American Society of International Law, which they regarded as a Semitic front.¹⁶⁹

International Law and Individuals

As of 1914, it was clearly understood that individuals were involved in international law only insofar as they were nationals of states that could protect them, if they chose, against other states.¹⁷⁰ However, the status of ethnic and religious minorities had often aroused conflict and controversy and had occasioned some special solutions, particularly in Eastern Europe and the Balkans. The Versailles settlement, even while creating new boundaries that gave rise to new minorities, attempted to defuse the issues by establishing multilateral machinery to handle them peacefully.¹⁷¹ A minorities committee, the Council of the League of Nations and the Permanent Court of International Justice all played roles in this process. Germans took an active part, mainly in asserting the rights of Germans who found themselves in Polish territory.

With the Nazi seizure of power, all of this changed. At the start, Germans objected to the emphasis of minority concepts on the protection of individuals because they believed that the collective aspects of the minority groups should be stressed.¹⁷² Hitler was not content with protecting German minorities but used them offensively in extending the German *Grossraum* at the expense of Czechoslovakia, Poland and others (but not at the expense of Fascist Italy vis-à-vis the Tirol).¹⁷³ This expansionist policy was justified to Germans as being a corollary of the superiority of their race, which was entitled to the space in question.

The Nazis had some difficulty in explaining to the outside world, including the League of Nations, why Jews were not a minority in the legal sense, particularly after they were excluded from membership in the German *Volk*

¹⁶⁸ For a Nazi view of the League as a quintessentially Jewish organization, see N. GÜRKE, *supra* note 92, at 18–20.

¹⁶⁹ *Id.* at 17–18, describes the Society as the creation of a pacifist Jew, Oscar Straus.

¹⁷⁰ Schoen, *Zur Lehre von den Subjekten des Völkerrechts*, 23 Z FÜR VR 411 (1939).

¹⁷¹ For reviews of the League minority protection system, see J. ROBINSON, *WERE THE MINORITY TREATIES A FAILURE?* (1943); P. DE AZCARATE, *THE LEAGUE OF NATIONS AND NATIONAL MINORITIES: AN EXPERIMENT* (1945).

¹⁷² Walz, *Neue Grundlagen des Volksgruppenrechts*, 23 Z FÜR VR 150 (1939).

¹⁷³ I G. WEINBERG, *supra* note 3, at 17; C. LATOUR, *SÜDTIROL UND DIE ACHSE BERLIN-ROM 1938–1945* (1962).

and hence from the benefits of German nationality.¹⁷⁴ Nazi scholars emphasized that Yiddish was not an independent language and that Jews were therefore not a true minority; they also asserted that Jews wanted assimilation, not minority status.¹⁷⁵ Before 1933, German writers for the most part had accepted the idea that the Jews of Eastern Europe constituted a minority, while debating the degree of their assimilation. Hitler rejected the whole idea of assimilation as a threat to the integrity of the assimilating race.¹⁷⁶

The treatment of Jews by Germany raised international law problems even in its earlier, less lethal stages. It was actively debated with foreign lawyers whether Germany's depriving Jewish nationals of citizenship, downgrading them to mere nationals, violated any international law rule.¹⁷⁷ As of that time, those, like Berthold von Stauffenberg, who argued that it did not were probably correct. His use of analogies emphasizing the racist characteristics of U.S. nationality law was telling. There was a series of exchanges with the United States over Germany's treatment of American citizens regarded by the Reich as Jews and subject to discriminatory legislation.¹⁷⁸ The Department of State argued that the Reich's actions violated the national treatment provisions of the U.S.-German treaty. More fundamentally, of course, as it grew more barbaric, the Nazis' treatment of Jews inflamed public opinion to varying degrees in different foreign countries, which contributed to the rigor of Germany's enemies in World War II and to the later establishment of the international law concept of genocide.¹⁷⁹

¹⁷⁴ The most elaborate exposition of Nazi ideas about minorities (relabelled *Volksgruppen* or "groups of people") is in F. GIESE & E. MENZEL, *supra* note 138, ch. II. The explanations why Jews were not a minority start at p. 44. For an attack on League of Nations efforts, under the leadership of James McDonald, to assist Jewish refugees as oppressed minorities, see Gürke, *Mr. McDonald und die Judenfrage im Deutschen Reich*, 2 VÖLKERBUND UND VÖLKERRECHT 665 (1935). See also H. TUTAS, *supra* note 144, at 205-391.

¹⁷⁵ On the language issue, see F. GIESE & E. MENZEL, *supra* note 138, at 43: "Yiddish is among the Jews in the German Reich not a means for expressing and developing an independent community life. It is all in all questionable whether it can be spoken by the Jews in the Reich" (quoting H. GERBER, *MINDERHEITENRECHT IM DEUTSCHEN REICH* 53 (1929)).

On the Jewish desire for assimilation in Germany, see *id.* at 48-49.

¹⁷⁶ Thus, Gürke said that "National Socialism has rejected assimilation with all possible decisiveness." He quoted Hitler as saying:

For National Socialism sees the forced assimilation of one people into another not only as not a political aim worth pursuing but, as in effect a danger to the inner unity, and hence the strength, of a people in the long run. Its teaching therefore dogmatically rejects the idea of national assimilation.

N. GÜRKE, *GRUNDZÜGE DES VÖLKERRECHTS* 50 (1936).

¹⁷⁷ Stauffenberg, *Die Entziehung der Staatsangehörigkeit und das Völkerrecht*, 4 ZAÖRV 261 (1934). This article is a response to the denunciation of the legislation in Scelle, *A Propos de la Loi allemande du 14 juillet 1933 sur la déchéance de la nationalité*, 29 REVUE CRITIQUE DE DROIT INTERNATIONAL 63 (1934). Reluctantly, Garner, *Recent German Nationality Legislation*, 30 AJIL 96, 99 (1936), concluded that it "probably cannot be successfully argued that [the law] violates any positive prescription of the law of nations."

¹⁷⁸ 3 G. HACKWORTH, *supra* note 154, at 642-46 (1942).

¹⁷⁹ On the origin of the concept of genocide in Nazi practice, see R. LEMKIN, *AXIS RULE IN OCCUPIED EUROPE* (1944).

VII. THE LAW OF WAR

Jus ad Bellum

Although the Kellogg-Briand pact had the nations of Europe forswearing war as an instrument of national policy,¹⁸⁰ by 1933 that idea had not penetrated deeply into the minds of European statesmen. It certainly played no role in the mind of Adolf Hitler. Still, war weariness was endemic throughout Europe and there were severe political costs to be faced by anybody seen to be a warmonger. Within Weimar Germany these ambiguities produced a peculiar division. Many Germans tolerated the peace of Versailles just as they tolerated the republic, even as they hoped for major changes in Germany's position within that settlement, by peaceful means if possible.¹⁸¹ A few German international lawyers were quite pacifist in orientation and wrote about the preservation of peace as a major goal, even necessity. They were the ones upon whom the ax fell. Schücking and Strupp were early victims; Wehberg had years before gone to Switzerland.¹⁸²

After the pacifists' expulsion, international lawyers of the new breed repeatedly sounded bellicose notes, preparing their students for war.¹⁸³ A *Volk* could not be inhibited from expressing itself and reaching its inherent goals through war. Attaining a *Grossraum* adequate for the German *Volk*, at whatever expense to its inferior occupants, was an end that justified the violence of the means. International lawyers, of course, fought Germany's case in detail, asserting that each of the outbreaks of hostilities was not Germany's fault, that it was due to the aggression of the adversary. But it is an absolute understatement to say that Germany's *Völkerrechtler* after 1933 did nothing for the cause of peace. In sum, they extended Carl Schmitt's emphasis on the friend/enemy dichotomy, with its conclusion that one owed no legal obligations to one's enemy, to the international sphere.¹⁸⁴

¹⁸⁰ 46 Stat. 2343, 2 Bevans 43, 94 LNTS 57. German writers tried to use the Kellogg pact (as they called it, giving no credit to Briand) to argue that Britain and France had acted illegally in coming to the aid of Poland and that it had not changed the rules on neutrality so as to justify U.S. aid to Britain. See Bilfinger, *Die Kriegserklärungen der Westmächte und der Kelloggpaht*, 10 ZAÖRV 1 (1940); Schluter, *Kelloggpaht und Neutralitätsrecht*, 11 *id.* at 24 (1942).

¹⁸¹ But to be seen as active in the policy "fulfillment" of Versailles was to be made a target, sometimes of bullets. See K. EPSTEIN, *MATTHIAS ERZBERGER AND THE DILEMMA OF GERMAN DEMOCRACY* 379-89 (1959).

¹⁸² On German pacifists, see C. RAJEWSKY & D. RIESENBERGER, *supra* note 47. For data on Schücking, see D. ACKER, *supra* note 36; on Wehberg, see the memorial symposium in 56 FRIEDENSWARTE 297 (1962). The hostility of Nazis toward pacifists comes through strongly in their reaction to the grant of the Nobel Peace Prize to Ossietzky, by then in a concentration camp. 3 VÖLKERBUND UND VÖLKERRECHT 632 (1937).

¹⁸³ Thus, T. MAUNZ, *GELTUNG UND NEUBILDUNG MODERNEN KRIEGSVÖLKERRECHTS* 18 (1939), moves from the *Grossraum* theory of Carl Schmitt to the proposition that a war to establish a *Grossraum* cannot be an unjust war. But the academic literature never descended to the linguistic violence against, in particular, the peoples of Eastern Europe that one finds in straight Nazi propaganda.

¹⁸⁴ Schmitt, *Totaler Feind, totaler Krieg, totaler Staat*, 4 VÖLKERBUND UND VÖLKERRECHT 139 (1937).

Jus in Bello

From early in the century, a special preoccupation of German jurists was the law of war. Before 1939, most of their analysis was fairly orthodox, restating the rules of the 1907 Hague Conventions and of the customary law of war.¹⁸⁵ For the greater part, that discussion went private after 1939. Some articles in the journals examined the rules of warfare, chiefly the laws relating to war at sea such as the law of prize, and the law of economic warfare, and at least one article in a journal of the Foreign Ministry's scholarly arm purported to demonstrate the inapplicability of the rules to a war with the Soviet Union.¹⁸⁶

Within the German establishment, however, there were lively debates of great potential significance to human lives. International lawyers in the legal office of the foreign division of Military Intelligence, as well as some in the German branch of the International Red Cross and in the Foreign Office, tried to argue for the application of the rules of war, principally those embodied in the Hague Conventions of 1907 and the Geneva Convention of 1929.¹⁸⁷ They also sought to persuade their chiefs that those rules had become customary international law. The upshot was a sharp difference in the behavior of the German armed forces as between the eastern and western theaters. With some well-remembered exceptions, German behavior in the west was within hailing distance of the received rules.¹⁸⁸ In the east, the rules were jettisoned completely. Nazi racial and imperial concepts, which had been reflected in the literature of the new international lawyers about the Grand Space and Living Space, made it possible to think of the war in the east as a phenomenon so different that the rules did not apply there.¹⁸⁹

¹⁸⁵ F. GIESE & E. MENZEL, *DEUTSCHES KRIEGSFÜHRUNGSRECHT* (1940).

¹⁸⁶ Grewe, *Die neue Kriegsphase*, 8 *MONATSHFTE FÜR AUSWÄRTIGE POLITIK* 748 (1941). Grewe later privately acknowledged the error of this analysis, blaming it on inadequate information. Weber, *supra* note 105, at 365 n.3.

¹⁸⁷ For a general overview of efforts to maintain the laws of war, see Roediger, *Versuche zur Wahrung des humanitären Völkerrechts nach 1933*, in *DEUTSCHES GEISTESLEBEN UND NATIONAL-SOZIALISMUS* 178 (A. Flitner ed. 1965). On Moltke's work, see van Roon, *Graf Moltke als Völkerrechtler im OKW*, 18 *VIERTELJAHRSHFTE FÜR ZEITGESCHICHTE* 12 (1970). The argument that the Hague Convention rules became customary international law is the crux of the famous memorandum on treatment of Russian prisoners of war prepared by Moltke. See note 200 *infra*. The argument was current among German writers in the period before 1940. N. GÜRKE, *supra* note 176, at 55. See also the discussion of customary laws of war in Schmitz's lecture notes, cited *supra* note 59, at 43-45a. For a historical perspective, see Meron, *The Geneva Conventions as Customary Law*, 81 *AJIL* 348 (1987).

¹⁸⁸ The chief exceptions were the commando order, the execution of escaped Allied fliers (the Sagan episode) and the Malmédy massacre of prisoners. For a summary of German western front crimes, with a description of the argumentation these—unlike eastern crimes—aroused at higher echelons, see R. CONOT, *JUSTICE AT NUREMBERG* 307-18 (1983). For a comparison of the treatment of prisoners of war, see A. DURAND, *STALAG LUFT III: THE SECRET STORY* 125-41 (1988).

¹⁸⁹ The most detailed account as to how the German military leaders were persuaded to accept the standards Hitler set for the conduct of the war in the east appears in M. MESSERSCHMIDT, *DIE WEHRMACHT IM NS-STAAT: ZEIT DER INDOKTRINATION* 390-422 (1969).

Rules on occupation. The basic rules of the Hague Convention require that "the lives of persons, and private property . . . must be respected."¹⁹⁰ It is further specified that requisitions may be made only for the use of the army of occupation and that the territory may be exploited only to the extent of use as a "usufructuary" (Americans might say as a life tenant). In fact, the Nazis treated the territories they overran in quite different ways: They annexed parts of Czechoslovakia, Poland, Alsace-Lorraine and Eupen-et-Malmédy. The rest of Poland was termed a *General-Gouvernement* under Hans Frank. Bohemia-Moravia became a protectorate. France was divided into occupied and unoccupied zones and most other territories were treated as occupied.¹⁹¹ Moltke and others argued for the application of the Hague rules in these territories, even while conceding that on the economic side, some alterations had to be made to counterbalance the supply problems created by the British blockade.¹⁹² While the occupation in the west was at first quite orderly, the occupation of Poland and the Soviet Union was brutal from the beginning. After 1942, conditions in the west, particularly for non-Aryans, grew rapidly worse. Thus, in all quarters there were such violations as deportations, use of forced labor, and reprisals against civilian hostages. The arguments of the lawyers had very limited impact.

The treatment of prisoners. German professional officers in 1939 should have been familiar with the provisions of the Hague and Geneva Conventions, especially those who had fought in World War I, a war in which the Hague rules were generally followed. However, one takes with a grain of salt General Jodl's testimony at Nuremberg that he kept a copy of them on his desk at all times, and German officers' education seems on occasion to have been deficient in this respect.¹⁹³ Here again, the group of German international lawyers fought a series of battles to keep Germany in compliance. Acting in an atmosphere of lawlessness and suspicion, they bravely took up the cudgels for helpless clients. Often they mixed the legal points with pragmatic arguments. Admiral Canaris even warned his emissary, General Lahousen, not to speak of humanitarian objections while on a mission to the high command, lest he be laughed into oblivion.¹⁹⁴

¹⁹⁰ Art. 46, Regulations Respecting the Laws and Customs of War on Land, Annex to Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, TS No. 539, 1 Bevans 631.

¹⁹¹ On Poland's status, see Klein, *Zur Stellung des Generalgouvernements in der Verfassung des Grossdeutschen Reichs*, 32 ARCHIV DES ÖFFENTLICHEN RECHTS 227 (1940).

¹⁹² Mueller, *Kriegsrecht oder Willkür? Helmuth James, Graf von Moltke und die Auffassungen im Generalstab des Heeres über die Aufgaben der Militärverwaltung vor Beginn des Russlandkrieges*, MILITÄRGESCHICHTLICHE MITTEILUNGEN, No. 2, 1987, at 125, 138.

¹⁹³ For Jodl testimony, see 15 IMT, PROC. 341 (1948). The relative adherence to the Hague rules in World War I is demonstrated by the contrast in prisoner-of-war death rates in the two conflicts. C. STREIT, *KEINE KAMERADEN, DIE WEHRMACHT UND DIE SOWJETISCHEN KRIEGSGEFANGENEN 1941-1945*, at 10 (1978). As an example of ignorance, Moltke cited a German general's answer to a surrendering Dutch officer's question whether Germany would follow the Hague rules: "General, did you learn about international law in school? I didn't." Van Roon, *supra* note 187, at 17.

¹⁹⁴ 2 IMT, PROC. at 456 (1947).

In vain the lawyers in the Abwehr protested against the commando order, under which commandos were to be executed and not treated as prisoners.¹⁹⁵ They noted that this was a clear violation of the Hague rules since commandos were in uniform and were commanded by responsible officers. They also pointed out that since Germany's own commando operations were the responsibility of the Abwehr, they would suffer the retaliatory moves of the enemy.

The lawyers had better luck in convincing the command that prisoners taken while fighting in the service of governments in exile should be treated as combatants even if there were substitute regimes in their homelands that the Nazis had recognized.¹⁹⁶ Except with respect to the Italians who followed Badoglio and not Mussolini, that interpretation was generally accepted in the west.¹⁹⁷

On the eastern front, the lawyers had little success. The conception of this war as totally different had taken possession of the army high command as well as of Himmler's men. While there was some protest by army officers at what they witnessed in Poland in 1939, events in Russia won not only acquiescence but also collaboration by the army.¹⁹⁸ At the start of the Russian campaign, various efforts were made, with the support of Switzerland and other neutral powers, to have the Hague rules put into effect even though the Soviet Union was not a party to that treaty. The Soviet Union was willing to make the necessary moves, but Hitler was in no mood to agree.¹⁹⁹

The instructions to German troops on the treatment of Russian prisoners constituted an open invitation to kill or torture them.²⁰⁰ In 1942 Moltke, through Canaris, made an attempt to have the instructions modified. The arguments included both the legal view that the Hague-Geneva rules had become customary law that was binding on nonparties, and pragmatic considerations such as the impact on German army discipline, the loss of usable manpower, the danger of retaliation, a loss of prestige among neutrals and heightened resistance on the part of Russians. Ironically, these lawyers, who did not wish Hitler's regime well, were clearly right in thinking that the war in Russia would have been carried out more successfully on a lawful basis.

¹⁹⁵ 15 IMT, PROC., *supra* note 193, at 481, 483-88.

¹⁹⁶ United States v. List, 11 TRIALS OF WAR CRIMINALS, *supra* note 32, at 1078-1112. See van Roon, *supra* note 187, at 51-54; C. ROUSSEAU, LE DROIT DES CONFLITS ARMÉS 74-75 (1983).

¹⁹⁷ A. SEATON, THE GERMAN ARMY, 1933-1945, at 209 (1985), describes the treatment of Italian prisoners by the Wehrmacht after the fall of Mussolini. United States v. List, 11 TRIALS OF WAR CRIMINALS, *supra* note 32, at 1078-1112, 1291-94.

¹⁹⁸ C. STREIT, *supra* note 193, at 296-300; O. BARTOV, THE EASTERN FRONT, 1941-45: GERMAN TROOPS AND THE BARBARIZATION OF WARFARE (1986).

¹⁹⁹ C. STREIT, *supra* note 193, at 224-37.

²⁰⁰ The instructions are summarized in 1 IMT, PROC. 229 (1947), and given in full in United States v. von Leeb, 11 TRIALS OF WAR CRIMINALS, *supra* note 32, at 13-15. For the text of the Canaris memorandum, see 1 IMT, PROC. at 232; 36 *id.* at 317 (German original text); United States v. von Leeb, 11 TRIALS OF WAR CRIMINALS at 2-5. On Moltke's authorship of the Canaris memorandum, see HELMUTH JAMES GRAF VON MOLTKE: VÖLKERRECHT IM DIENSTE DER MENSCHEN 258 (G. van Roon ed. 1986).

But Keitel disagreed and wrote on the memorandum that these views represented an outmoded view of chivalric warfare that had nothing to do with this ideological war.²⁰¹ Consequently, mistreatment of Russian prisoners continued, their condition only slightly improved by the increasing need for their labor. The marginal comments of Keitel were read to the Nuremberg court by the prosecution and, with the testimony of General Lahousen, did much to assure him the death penalty.²⁰²

Other questions. The rules of naval warfare continued to raise issues, basically those foreshadowed in the First World War about the legality of sinking merchant ships without warning and establishing sink-on-sight zones.²⁰³ Invasions of neutral waters, as in the British capture of the *Altmark* in a Norwegian fiord in 1939, gave rise to controversy. Germans wrote articles about the destroyers-for-bases arrangement between the United States and Britain, and American naval activity in support of Britain before the U.S. entry into the war, among other matters.²⁰⁴

Notably, Germany was not always wrong in its criticisms of the behavior of other countries vis-à-vis the laws of war. The actions of neutrals, above all the United States, seemed to depart from the prohibitions under the old rules.²⁰⁵ Lend-lease, the destroyer bases deal, the Atlantic antisubmarine patrol and other actions at least arguably represented such departures. Particularly on the eastern front, it was not only the German forces that ignored conventional and customary restraints on violence.²⁰⁶ The Nuremberg Tribunal itself found some color to the proposition, maintained by the admirals' defense counsel, that the rules of submarine warfare had been relaxed on all sides in the face of the development of naval tactics.²⁰⁷

VIII. CONCLUSION

The abiding interest in the encounter of National Socialism with international law lies not in its doctrinal impact on the law of nations but in its role as

²⁰¹ 19 IMT, PROC. 412 (1948).

²⁰² *Id.*

²⁰³ See, e.g., Schmitz, *Sperrgebiete im Seekrieg*, 8 ZAÖRV 641 (1939).

²⁰⁴ Interestingly, articles on specific wartime problems tended not to appear in the traditional international law journals but in the more propagandistic output of the Institut für Auswärtige Politik, transformed into the Deutsches Institut für Aussenpolitische Forschung. Thus, the destroyer bases deal was signaled in the *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* merely by the reprinting of the English text of the notes, but by Berber's institute with W. GREWE, *ZERSTÖRER GEGEN STÜTZPUNKTE* (1942); and Grewe, *Das Schicksal der Neutralität im europäischen Krieg und im zweiten Weltkrieg*, 1943 JAHRBUCH DER WELTPOLITIK 86, 99. See Weber, *supra* note 105, at 303-04.

²⁰⁵ For a recent German review of this issue, see Gruchmann, *Völkerrecht und Moral: Ein Beitrag zur Problematik der amerikanischen Neutralitätspolitik, 1939-1941*, 8 VIERTELJAHRSSHEFTE FÜR ZEITGESCHICHTE 384 (1960). A major contemporary German tract was F. BERBER, *DIE AMERIKANISCHE NEUTRALITÄT IM KRIEGE 1939-1941* (1943). Berber was able to cite such American writers as Borchard, Briggs and Wright in support of his arguments. See *id.* at 24-25.

²⁰⁶ See A. DE ZAYAS, note 78 *supra*.

²⁰⁷ See the final judgment of the Tribunal, 1 TRIAL OF THE MAJOR WAR CRIMINALS 313 (1947), 6 F.R.D. 69, 169 (1946), stating that Dönitz was not assessed as to his sentence on grounds of breaches of the international law of submarine warfare. As to Raeder, see 1 TRIAL, *supra*, at 317, 6 F.R.D. at 171.

an episode in intellectual history. In terms of Nazism's influence on the corpus of international law, one can say that it was zero, except in a negative sense. The determination of Hitler to wipe out races he characterized as inferior gave rise to the Genocide Convention. His willingness to wage war against his neighbors set the stage for the Judgment in the Nuremberg war crimes trial and the prohibition on the use of force in Article 2(4) of the United Nations Charter, which reflected the post-World War I efforts of Kellogg and Briand. The Führer's choice of methods in waging those wars caused a tightening of the Hague and Geneva rules. But there is something to be learned from the process used by the Nazi movement to make its international jurists produce the doctrines that it wanted and from the way that the international law community in Germany responded.

The seizure of power in 1933 confronted a small community of international lawyers whose thinking had been shaped by working on a body of law created only in part by Germany itself. They were linked in various ways with colleagues outside Germany whose writings they read and reviewed, whom they met at conferences and with whom they dealt on behalf of their government. They were also part of the special and separate German academic community. The responses of the universities, institutes and other institutions were at best passive, and sometimes welcoming, to the new order of things. The responses of individuals are distributed over a fairly wide range. One can say that the internationalists behaved marginally better than other German jurists. Of those who did not sympathize with Nazism, some had little maneuvering ground since their racial heritage or political activities had indelibly stamped them as worthless in the party's eyes. Some of those who survived the first Nazi purge were on the defensive because of their shortcomings from the Nazi perspective. A few internationalists resisted, at great cost to themselves in the end, although most had preserved their position from which they could resist only by rendering services to the state system. A number withdrew from active participation in contemporary international law studies. A few did manage to maintain some contact with foreign literature and institutions.²⁰⁸

The collaborators produced the type of writing the Nazis desired. In the first stage, the Nazis wanted the world and Germans to believe that they were committed to peaceful change. It was fairly easy for the establishment to produce this sort of assurance since peaceful revision of the Versailles imposition had been the goal of almost all Germans since 1919. What the publicists had more difficulty with was producing a coherent intellectual structure to serve as a bridge between racist concepts of the state and law and a meaningful international law. There is something grimly comic about the united effort to suppress Ludwig Schecher and his all-too-clear demonstration that under Nazism there could be no international law but only German foreign relations law.²⁰⁹

²⁰⁸ One moving testimony to this connection is the emotional reaction of Viktor Bruns's coworkers at receiving Borchard's 1943 tribute in the *Journal*, *supra* note 29, which "transcended all the battle lines." Makarov, *supra* note 63, at 364 n.7.

²⁰⁹ See *supra* notes 156-57.

After 1937, the emphasis came to be on building justifications for a new order in Europe, led by the Reich, that would be unequal and achieved by force. The old guard of internationalists, now rather few in number, seem to have been unable to bring themselves to move in this direction; hence, it was left to the younger generation, composed of men with few international contacts and intense exposure to Nazism, to carry this load. The older lawyers did continue to serve the Reich by arguing, for example, that traditional rules of neutrality outlawed American intervention into what was happening in Europe.

Did international lawyers really succeed in helping the Third Reich? They probably helped in some measure to slow the awakening of observers at home and abroad to the fact that Hitler's reworking of the European state structure was going to be more radical and violent than what had gone before. But those who wrote the critical literature outside Germany were quite hostile to what the Germans produced and it is unlikely that other foreign internationalists were much persuaded. German output after 1940 was largely for internal consumption. The denigration of Russian and other Slavic peoples that appeared in the German international law literature must have contributed somewhat to the utter ruthlessness with which Germans conducted the war in the east and to the lack of meaningful protest against those measures.

On the other hand, German internationalists were further removed from the scenes of true horror than, say, the criminal lawyers, and what they wrote was less vulgarly racist than what purely domestic branches of law generated during those years. It was possible, if one was well established in 1933, to write a fairly neutral and unobjectionable type of work. But it took steady nerves to do that and to resist the temptation to curry favor by saying the "right" things. It was a frightening time in which to live and one's judgments about what people did during that time must take account of those pressures.

Does this experience have implications for international lawyers in other times and places? Any affirmative suggestion must be hedged with many qualifications, for the Nazi experience was, and, one hopes, will remain, unique even for repressive and fascistic states. But some readers of the *Journal* may find themselves in countries where for the present the normal freedoms have been withdrawn by a military or authoritarian regime; others may find themselves in governmental positions where they are asked to do or say things that run against their conscientious views even though the state overall is not undemocratic. One might thus venture a few general observations. First, even in so-called totalitarian regimes there is some room for moral decisions, though opposition actions may have little practical effect. They may at a minimum give comfort to persons in trouble with the regime. Second, politically, failure to resign or protest will in some quarters be taken as approval of government measures as a matter of legality or policy or both. Third, attention must be paid to the dynamics of an authoritarian government, its tendency to demand more and more in the name of loyalty and to discard people of an increasingly centrist position. What is yielded today is not enough tomorrow. Fourth, it must not be assumed that by staying in

one's governmental or academic position one can prevent even worse things from happening. The actor must take into account the fact that his or her judgment is apt to be warped by the all-too-human frailties of inertia, financial self-interest and a sense of irreplaceability. Exit is thus less apt to be the worst solution than our judgment at the time makes it appear to be.

Finally, a reminder that nothing lasts forever, not even dictatorships. The Thousand Year Reich barely made it to twelve. Nowadays most military dictatorships endure about a decade. The 70-year endurance of the Communist regime in Russia and its 40-year survival in Eastern Europe are unique. This knowledge should serve as encouragement to holding out and as a reminder that though the mills of the gods do not grind as finely as they should, they do grind. The situation of those who took indefensible positions during one period of history can be rather unpleasant when times change.

APPENDIX A

GERMAN FULL PROFESSORS OF PUBLIC INTERNATIONAL LAW—1933

The following table lists by university each of the full professors of public international law teaching in the winter semester of 1932–1933. Except for Walther Schücking, each taught something else as well. The primary sources are the 1931 edition of *Kürschners Deutscher Gelehrten-Kalender* and volume 117 of the *Deutsches Hochschulverzeichnis*. Cross-checks were made with Garner, *The Nazi Proscription of German Professors of International Law* (33 AJIL 112 (1938)), H. Göppinger, *Die Verfolgung der Juristen jüdischer Abstammung durch den Nationalsozialismus* (1963), various Festschriften and other sources. Some ambiguities and doubtful cases remain. We have included honorary full professors but not emeritus professors.

<i>University</i>	<i>Name</i>	<i>Year of Birth</i>
Berlin	Viktor Bruns	1884
	Erich Kaufmann (honorary)	1880
	Heinrich Triepel	1868
Bonn	Richard Thoma	1884
Breslau	Hans Helfritz	1877
	Arthur Wegner	1900
Cologne	Godehard Ebers	1880
	Hans Kelsen	1881
Erlangen	Max Wenzel	1882
Frankfurt	Friedrich Giese	1882
	Karl Strupp	1886
Freiburg	Fritz Marschall von Bieberstein	1883
	Wilhelm van Calker	1869
Giessen	None	
Göttingen	Paul Schön	1867
	Herbert Kraus	1884
	Gerhard Leibholz	1901
Greifswald	Hermann Jahrreiss	1894
	Carl Bilfinger	1879
	Max Fleischmann	1872
Halle	Rudolf von Laun	1882
	Albrecht Mendelssohn-Bartholdy	1874
	Kurt Perels	1878
Heidelberg	Walter Jellinek	1885
Jena	None	
Kiel	Walther Schönborn	1883
	Walther Schücking	1875
Königsberg	Ernst von Hippel	1895
Leipzig	Franz Exner	1881
	Walter Simons	1861
Marburg	Johann Brecht	1879
Munich	Karl Neumeyer	1869
Münster	Heinrich Drost	1898
Rostock	Edgar Tartarin-Tarnheyden	1882
	Ernst Wolgast	1888
Tübingen	Hans Gerber	1889
Würzburg	Christopher Meurer	1856

The following professors were forced out:

1933-1935

Erich Kaufmann
Hans Kelsen
Albrecht Mendelssohn-Bartholdy
Karl Neumeyer
Kurt Perels
Walther Schücking
Karl Strupp

1937-1939

Godehard Ebers
Max Fleischmann
Walter Jellinek
Herbert Kraus
Gerhard Leibholz
Arthur Wegner

In the listing of Jewish international lawyers in Norbert Gürke, *Der Einfluss jüdischer Theoretiker auf die deutsche Völkerrechtslehre* (1938), the following names appear from among those listed above: Fleischmann, Kaufmann, Kelsen, Neumeyer and Strupp. The classification by the Nazis of who was Jewish followed arbitrary rules of their own making; for one thing, they included those who had long been converted to Christianity.

APPENDIX B

THE JOURNALS OF NAZI INTERNATIONAL LAW

During the Third Reich there were a few journals devoted specifically to public international law. The ranking journal was the *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, published by the Kaiser Wilhelm Institute and edited by Viktor Bruns during the period 1933-1944. Each issue included reports on the conclusion of treaties and other international events, somewhat like the work of the *American Journal of International Law*.

The *Zeitschrift für Völkerrecht* was published by the institute at the University of Kiel. Professor Walz was the editor during the Third Reich.

Niemeyers Zeitschrift für internationales Recht was founded in 1890 and had included important liberal writers among its authors—Fleischmann, Kaufmann, Mendelssohn-Bartholdy and Wehberg. Losses among its editors were heavy and it ultimately was merged into the *Zeitschrift für Völkerrecht*, above, after its editor Herbert Kraus was forced out of academic life.

Völkerrecht und Völkerbund was founded in 1934 by Professor Freytag-Loringhoven to pursue National Socialist issues of international law and policy. It ceased publication in 1938.

Some Nazi international law was published in the general-purpose organs of the new institutions. The Academy of German Law published a *Zeitschrift der Akademie für deutsches Recht* under the editorship of Hans Frank. The association of Nazi lawyers published *Deutsches Recht*. Hans Frank was, again, its editor in chief. For sources, see J. Fournier, *La Conception nationale-socialiste du droit des gens*, pp. 195-98 (1939).

EDITORIAL COMMENT

THE IMPOSITION OF ATTORNEY SANCTIONS FOR CLAIMS ARISING FROM THE U.S. AIR RAID ON LIBYA

As three-month-old Khloud al-Oraiba slept in her home in a residential area of Benghazi, Libya, she was killed by shrapnel penetrating her chest. Her father, Hasan, 38, was killed by shrapnel to his skull. Many other bombs fell that night of April 15, 1986, on residential areas of Benghazi and Tripoli, and over two hundred civilians were killed or wounded. They were the victims of a clandestine attack by United States Navy and Air Force aircraft on a mission to assassinate Muammar el-Qaddafi, the head of state of Libya, and to encourage the civilian population to overthrow Qaddafi.

Spokespersons for the United States told the media that the attack was ordered by President Reagan to protect U.S. lives and property against terrorism. Allegations were made that Libya was responsible for the bombing of a West Berlin disco on April 5, 1986, in which two American soldiers were killed, among many other casualties.¹ However, West Berlin police officials and the Federal Republic of Germany publicly disputed the U.S. allegation that Libya was responsible for the bombing, and undertook prosecutions of persons with Syrian connections.² In May the Pentagon announced that the American bombers had erroneously and inadvertently hit civilian areas in the raid on Libya.

Forty of the wounded victims and the estates of fifteen deceased victims brought a complaint in federal district court in Washington, D.C., against the United States and other defendants. On the theory of negligence contained in the Pentagon's announcement, the plaintiffs asked for damages against the United States under the Federal Tort Claims Act.³ On the con-

¹ In an article published in 1987, Vice President George Bush said that the action upon "selected targets in Libya" was "taken in retaliation against Libyan-sponsored attacks on Americans, particularly the Libyan-organized bombing of a Berlin nightclub several days earlier." Bush, *Prelude to Retaliation: Building a Governmental Consensus Against Terrorism*, SAIS REV., Winter-Spring 1987, at 1.

² As of this writing, the United States has not released any evidence challenging the position of West Berlin and the Federal Republic.

³ 28 U.S.C. §1346(b) (1982). The Act contains sovereign immunity exceptions for acts of United States officials that involve the exercise of discretion, that arise from combatant activities in time of war, and that arise in a foreign country. 28 U.S.C. §2680(a), (j) and (k). Arguably, the claimed negligence negates the discretion exception, the fact that the United States was not at war with Libya negates the wartime exception, and the fact that the decisions were made in the United States and that only their operative effect occurred abroad negates the foreign-country exception. The latter argument has been characterized as "headquarters claims." See *Beattie v. United States*, 617 F.2d 91, 96-97 (D.C. Cir. 1979); *Vogelaar v. United States*, 665 F.Supp. 1295, 1300-02 (E.D. Mich. 1987).

In addition, the plaintiffs invoked the Foreign Claims Act, 10 U.S.C. §2734. The Act's regulations require the Air Force to "[p]ay claims arising from accident or malfunction of aircraft operations, including airborne ordnance, occurring while preparing for, going to, or returning from a combat mission." 32 C.F.R. §842.64(m).

trary theory that the bombardment of civilian areas was deliberate, the plaintiffs named numerous additional defendants, including Ronald Reagan, Margaret Thatcher, Secretary of Defense Caspar Weinberger, various generals and admirals, and the United Kingdom and the United States of America. They alleged that the defendants were involved in the commission of war crimes resulting in the deaths and injuries to the plaintiffs.⁴ Compensatory and punitive damages were demanded against them.

A federal district court dismissed the *Saltany* complaint on the ground that all the defendants had sovereign immunity.⁵ On appeal, the Court of Appeals for the District of Columbia Circuit summarily upheld the dismissal and also imposed sanctions on counsel for the plaintiffs under Rule 11 for bringing a frivolous lawsuit.⁶ The imposition of sanctions casts a serious chilling effect upon all attorneys who engage in international human rights litigation.

The circuit court gave two general reasons for imposing sanctions. First, it regarded the action as an attempt to use the federal courts to serve as a forum for public statements of protest—to the detriment of parties with serious disputes waiting to be heard. I would agree that courts do not exist as public forums, but the question is whether Ramsey Clark and Lawrence W. Schilling, counsel for the plaintiffs in this case, in fact attempted to use the court as a forum. There is no evidence in the record that they did so. The court of appeals, consisting of Judges James Buckley, Douglas Ginsburg and David Sentelle, apparently felt that the attorneys for the plaintiffs could not possibly have been motivated by any genuine concern for vindicating the human rights of the Libyan civilians wounded and killed by the U.S. bombardment of their homes. If this is indeed the attitude of the judges, it signifies the vast distance yet to be traversed between the routine conception of international human rights lawyers who regard every human being no matter where situated as entitled to fundamental rights, and the routine attitudes of federal judges whose preoccupation with domestic litigation perhaps insulates them psychologically against extraterritorial claims upon their attention.

The second reason for imposing sanctions was the finding by the district court, Judge Jackson presiding, that "[t]he case offered no hope whatsoever of success, and plaintiffs' attorneys surely knew it."⁷ Although Judge Jackson

⁴ The United Kingdom and its head of government, Margaret Thatcher, were named as co-conspirators in planning and carrying out the attack upon Libya for allowing U.S. planes headed for Libya to take off from U.S. bases in the United Kingdom and to fly over the airspace of the United Kingdom.

⁵ *Saltany v. Reagan*, 702 F.Supp. 319 (D.D.C. 1988).

⁶ *Saltany v. Reagan*, 886 F.2d 438 (D.C. Cir. 1989). Only defendant United Kingdom cross-appealed from the denial of sanctions by the district court. The court of appeals reversed, and imposed sanctions on counsel for the plaintiffs consisting of the costs and attorneys' fees of the United Kingdom.

⁷ 702 F.Supp. at 322. The district court did not impose sanctions; it said that the case is not so much frivolous as it is audacious. The court of appeals, however, cited the finding below that the case offered no hope whatsoever of success, and held that such a finding necessitated a Rule 11 violation.

did not impose sanctions, the court of appeals held that Judge Jackson's finding evidenced a Rule 11 violation and therefore sanctions were imposed at the appellate level.

It may very well be true that there was no hope of success in a case brought before these particular judges. The three-judge panel on appeal consisted of judges who had all been appointed by President Reagan. The complaint accused President Reagan of being a war criminal. It is not unreasonable to suppose that such judges would view the complaint with abhorrence and disgust.

Rule 11 sanctions, however, are supposed to be invoked not when a particular case offends a particular judge, but only when a complaint is not "warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law."⁸ It appears that the claim for damages under the Federal Tort Claims Act was well pleaded and reasonably sustainable under existing law. The court of appeals did not discuss the merits of this claim in its summary affirmance of the dismissal of the complaint and in its imposition of sanctions.

Apart from the Federal Tort Claims Act, were the allegations of war crimes in the complaint so unwarranted by existing law that they would justify the invocation of Rule 11 sanctions? This question raises two subsidiary ones: (1) whether the acts of the defendants constituted war crimes, and (2) whether the defendants were nevertheless clearly immune from liability.

(1) Article 25 of the Hague Regulations of 1907 provides: "The attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended, is prohibited."⁹ The United States is a party to the Hague Convention of 1907, and in any event the rules therein were found by the Nuremberg Tribunal to have entered into customary international law by 1939.¹⁰ Although the Hague prohibition is unqualified, any defendant who is alleged to have committed such a war crime would be entitled to raise various defenses, some of which might be allowed by custom-

⁸ FED. R. CIV. P. 11.

⁹ Annex to the Convention, Regulations respecting the Laws and Customs of War on Land, Art. 25, Convention (No. IV) respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, TS No. 539, 205 Parry's TS 277.

¹⁰ The Nurnberg Trial, 6 F.R.D. 69, 130 (1946). Under Article 6(a) of the Charter of the International Military Tribunal at Nuremberg, Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 3 Bevans 1238, 82 UNTS 279, the term "war crime" is defined to include "murder"; Article 6(c) defines the term "crime against humanity" to include "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population."

It is hardly a defense to argue that war crimes can only be committed during wartime, and that the United States and Libya were not at war in 1986. Since Nuremberg, and especially since the Far East trials where the memory of the "sneak attack" by Japan on Pearl Harbor colored the entire proceedings, it has been clear that war crimes are acts of war irrespective of whether there has been a formal declaration of war. Indeed, the failure of the United States to announce that a state of war existed between it and Libya—as well as the failure to give notice to the inhabitants of Tripoli and Benghazi that they were about to be bombed—could itself be a violation of the Hague Convention relative to the Opening of Hostilities (No. III), Oct. 18, 1907, 36 Stat. 2259, TS No. 538, 205 Parry's TS 263.

ary law, including superior orders, retaliation (for the West Berlin disco bombing), forcible countermeasures, *tu quoque*, self-défense, counterterrorism and military necessity. However, in the *Saltany* case, the district court, for the purpose of dismissing the complaint, assumed its allegations to be true. Hence, the availability *vel non* of customary law defenses is not relevant to the question of the sufficiency of the complaint. It appears that on the facts of *Saltany* as I recounted them at the beginning of this Editorial, the plaintiffs made out a solid *prima facie* case of war crime.¹¹

(2) Is the defense of sovereign immunity available against a war crime allegation? Under international law, there would be no such thing as a war crime if that defense were available. The entire proceedings of the Military Tribunal at Nuremberg, the roughly three thousand trials of war criminals in various European courts at the time of Nuremberg, and the extensive decisions of the Military Tribunal of the Far East would all have been aborted if the defendants had been given immunity.¹²

The *Saltany* decision rests on the sole ground that the allegations of war crimes, although assumed to be well pleaded, must be dismissed on the basis of sovereign immunity. Is this a flat repudiation of the Nuremberg precedent? The answer depends on whether a connection exists between the international law of war and the domestic law of the United States.

Such a connection was established in the case of *In re Yamashita*.¹³ General Tomoyuki Yamashita had been convicted by a U.S. military commission for failing to prevent war crimes by soldiers under his command in the Philippines.¹⁴ He petitioned the U.S. Supreme Court for habeas review. The United States Government urged in the Supreme Court that military trials of war criminals are political matters completely outside the arena of judicial review.¹⁵ The Court rejected this argument. It considered whether the charge preferred against General Yamashita was a violation of the law of war. The Court consulted for this purpose the Hague Regulations annexed to the fourth Hague Convention of 1907. It found that violations of those Regulations, amounting to war crimes, had been committed by the soldiers under Yamashita's command.¹⁶ The Court said, "We do not make the laws

¹¹ To be sure, the complaint is in tort; the *Saltany* case is no criminal or military proceeding. Yet traditional tort doctrine allows for the recovery of damages for harm inflicted in violation of criminal law.

¹² Article 7 of the Charter of the International Military Tribunal at Nuremberg, *supra* note 10, is typical: "The official position of defendants, whether as heads of state, or responsible officials in government departments, shall not be considered as freeing them from responsibility, or mitigating punishment." See 6 F.R.D. at 110. Although many of the defendants explicitly claimed sovereign immunity at their trials, these claims were rejected by the tribunals in every case.

¹³ 327 U.S. 1 (1946). The *Yamashita* trial before the U.S. military commission is reported in 4 UNITED NATIONS WAR CRIMES COMMISSION, LAW REPORTS OF TRIALS OF WAR CRIMINALS 1 (1948).

¹⁴ 4 UNITED NATIONS WAR CRIMES COMMISSION, *supra* note 13. For a conceptual analysis, see D'Amato, *Superior Orders vs. Command Responsibility*, 80 AJIL 604 (1986); Levie, *Some Comments on Professor D'Amato's "Paradox,"* 80 AJIL 608 (1986).

¹⁵ See 327 U.S. at 30 (Murphy, J., dissenting, calling this a "noxious doctrine").

¹⁶ 327 U.S. at 14-16.

of war but we respect them so far as they do not conflict with the commands of Congress or the Constitution."¹⁷ The Court further found that the defendant was entitled to Fifth Amendment protection, and that the evidentiary standards applied in his trial—while looser than those in civil trials in the United States—were within the purview of the Fifth Amendment.¹⁸

Over a century earlier, the Supreme Court had held, in *Little v. Barreme*, that a captain of a U.S. warship acting directly under the President's orders could be held personally liable in trespass for seizing a neutral vessel on the high seas.¹⁹ Chief Justice Marshall, for a unanimous Court, held that the commander of a ship of war, in obeying instructions from the President of the United States, acts at his peril.²⁰ If those instructions are not warranted by law, he is answerable in damages to any person injured by their execution. Damages were assessed in favor of the Danish owner of the seized vessel.²¹ Since the seizure of a neutral vessel falls short of being a "war crime" even though it is a violation of the international law of war, the complaint in the *Saltany* case on this point makes out an a fortiori claim for tort liability.

The district court in *Saltany* did not say that the defendants had committed no war crime; rather, the court, in dismissing the complaint on sovereign immunity grounds, assumed that all the well-pleaded factual allegations of the complaint were true and that the plaintiffs were entitled to draw all favorable inferences from them. The decision therefore amounts to holding that the President, acting as commander in chief, may order and execute the commission of war crimes anywhere in the world, in war or in peace, and without congressional authorization, and that neither he nor his subordinates who carry out his orders can be held civilly accountable in any United States court. It is a bold decision, effectively reversing the combined effect of *In re Yamashita* and *Little v. Barreme*, and a host of related Supreme Court cases. If the court itself departed from these precedents, how could it legitimately impose sanctions on the plaintiffs' counsel for relying upon them?

The court of appeals focused upon defendants United Kingdom and its head of government, Margaret Thatcher, in levying sanctions under Rule 11. These defendants acted independently of the authority of President Reagan, and chose to allow British airspace to be used for the Libyan bombing mission.²² At first glance, their immunity appears to be secured by the language of the Supreme Court in *Argentine Republic v. Amerasia Hess Ship-*

¹⁷ *Id.* at 16.

¹⁸ *Id.* at 23. For elaboration and analysis of this point, see D'Amato, Gould & Woods, *War Crimes and Vietnam: The "Nuremberg Defense" and the Military Service Resister*, 57 CALIF. L. REV. 1055, 1072-73 (1969), reprinted in 3 THE VIETNAM WAR AND INTERNATIONAL LAW 407 (R. Falk ed. 1972). Cf. *Switkes v. Laird*, 316 F.Supp. 358 (S.D.N.Y. 1970).

¹⁹ 6 U.S. (2 Cranch) 170 (1804).

²⁰ In *Little v. Barreme*, the President acted without congressional authority. Similarly, the raid on Libya was ordered by President Reagan in his capacity as commander in chief, without leave of Congress.

²¹ *Little v. Barreme* remains unimpeached in its authority. See *Youngstown Steel & Tube Co. v. Sawyer*, 343 U.S. 579, 661 (1951); *Butz v. Economou*, 438 U.S. 478, 490 (1978).

²² Other nations refused requests from the United States to participate in the attack or permit aircraft to fly over their territory for that purpose.

ping Corp.,²³ holding that Argentina's use of military force on the high seas allegedly in violation of international law fell outside any of the exceptions to sovereign immunity provided by the Foreign Sovereign Immunities Act of 1976.²⁴ The Supreme Court said that the FSIA provides the "sole basis for obtaining jurisdiction over a foreign state in our courts."²⁵ However, there have been many cases in many areas of the law where absolute language such as this was later qualified when an entirely different and hitherto un contemplated issue came up.²⁶ An argument could be advanced that the allegation of a war crime (which itself could not exist if the defense of sovereign immunity were allowed) was not in the contemplation of Congress when it enacted the FSIA.²⁷ The FSIA itself was intended to cut back the scope of immunity that American courts had previously accorded foreign sovereigns.²⁸ Congress could hardly be presumed to have intended to broaden the scope of sovereign immunity so as to repudiate the historic precedent of Nuremberg when its attention was entirely preoccupied with limiting the scope of sovereign immunity for commercial litigation. Although the plaintiffs' argument that the FSIA was not intended to bar claims of damage resulting from acts that constitute war crimes might not have won the day in federal court, it is far from being unwarranted in existing law and even farther from being unwarranted by a good faith argument for the modification or reversal of existing law.

In filing the *Saltany* case, the plaintiffs' counsel, in my opinion, alleged a *prima facie* meritorious claim for relief under the Federal Tort Claims Act. With respect to the war crimes allegations, they were either courageous or foolhardy. Yet their clients' injuries were real—they were inflicted by bombs dropping at night in peacetime on civilian homes in residential areas. Under elementary principles of justice, the victims' rights were violated and they are entitled to a remedy. Their injuries are not sham injuries, and a complaint structured on the Nuremberg principles is not a sham case. If under the judicial system of the United States no remedy is found to be available, counsel for the victims should not be punished for asking.

It is perhaps understandable as a matter of human nature that American judges who were willing to accept the trial and capital punishment of foreign

²³ 109 S.Ct. 683 (1989).

²⁴ 28 U.S.C. §§1330, 1602–11 (1982) [hereinafter FSIA].

²⁵ 109 S.Ct. at 688.

²⁶ The quoted language from *Amerada Hess* is a holding with respect to the application of the Alien Tort Statute, but a dictum with respect to other issues not characterized by the facts before the Supreme Court.

²⁷ A war crime is qualitatively different from the violation of a typical international rule of law. International customary law typically is subject to free derogation by nations that enter into a treaty to act differently. Moreover, international customary law has traditionally allowed sovereign immunity as a defense to domestic litigation against foreign governmental action in alleged violation of that customary law. In this latter respect, *Amerada Hess* is a traditional case well within the contemplation of Congress in enacting the FSIA (*Amerada Hess* was innovative only with respect to its holding on the Alien Tort Claims Act, a separate issue).

²⁸ See 28 U.S.C. §1602 ("Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned . . ."). Congress enacted the FSIA to allow United States courts to take full advantage of this restrictive view of sovereign immunity under international law.

governmental and military leaders for the commission of international war crimes after World War II might today feel that American governmental and military leaders and their allies abroad are unaccountable under the same international law. There may be a double standard, but probably most judges in most courts in any country in the world today would do the same thing if their governmental and military leaders were sued on a war crimes charge. American judges neither lead nor lag behind the rest of the world in this respect. Although I have no admiration for the "political question" doctrine, it would have been understandable if the *Saltany* complaint had been dismissed on that vague ground. At least the invocation of political questions would have candidly indicated the court's sense of powerlessness over the adjudication of such issues, no matter how legally meritorious they might have been.

But by imposing sanctions on the attorneys who dared to represent the plaintiffs in the *Saltany* case, the court of appeals gave a retrogressive example for courts elsewhere in the world. It acted zealously and excessively to shield political interests and political sensibilities. Its decision imperils all lawyers who, in a shrinking and interdependent world, wish to bring any claim in our courts on behalf of aliens. What international attorney would not now feel constrained when asked to file an unusual or innovative case on behalf of foreign persons in a United States court? When the court of appeals refused to address the *Saltany* claim for administrative relief, and brushed aside without reflective consideration the well-pleaded war crimes allegations, it served notice on all attorneys that, irrespective of the language of Rule 11, whoever files a case that offends a judge risks severe professional sanction. In my opinion, this ruling deals a significant blow to the cause of freedom and the adversary system of a great nation.

ANTHONY D'AMATO



NOTES AND COMMENTS

KIDNAPING BY GOVERNMENT ORDER: A FOLLOW-UP

In my full-length article *U.S. Law Enforcement Abroad*, I argued that government-sponsored abduction from foreign countries was not only distasteful, but contrary to international law and U.S. constitutional law.¹ Though I acknowledged that the reported decisions here and abroad did not, on the whole, support my argument, I suggested that these decisions were out of step with contemporary international law and current American views of due process of law.² I expressed skepticism about many of the defenses of the practice that had been raised by American officials and had too often, in my judgment, been accepted by American courts. In particular, I urged that no great faith be placed in assertions by the U.S. Government that abduction of persons who ended up in American custody were carried out solely by the police of the foreign country, that the United States had no knowledge of or participation in torture, or that the foreign country really consented to the operation, though it could not say so publicly.

Since the article went to press, another episode of transborder kidnaping has come to light, with the difference that this one received major attention in the press in the United States and Mexico, and indeed became the subject of serious communication (not to say confrontation) between the presidents of the United States and Mexico.

The bare facts are now known.³ On April 3, 1990, Dr. Humberto Alvarez Machain, a gynecologist from Guadalajara, Mexico, was taken by force from his home by four men in civilian clothes identifying themselves as "security agents," put on a private plane in a nearby city, and flown to El Paso, Texas. There he was met by agents of the U.S. Drug Enforcement Administration, immediately arrested, and given the *Miranda* warnings.

On April 9, Dr. Alvarez Machain was arraigned on charges related to the abduction, torture, and murder in 1985 of Enrique Camarena, an American agent of the DEA who had been working in Mexico. Specifically, Alvarez Machain was accused of having administered drugs to Camarena to revive him after torture so that his captors could interrogate him further about what the DEA knew about their operations in Mexico. The next day Alvarez Machain was flown to Los Angeles, where the prosecution of suspects in the Camarena case was under way.

¹ Lowenfeld, *U.S. Law Enforcement Abroad: The Constitution and International Law, Continued*, 84 AJIL 444 (1990).

² See, in particular, *Ker v. Illinois*, 119 U.S. 436 (1886).

³ I have drawn for this account on reports in the *New York Times*, the *Washington Post*, the *Los Angeles Times*, *U.S. News and World Report* (May 14, 1990) and *Time* (Apr. 23, 1990). It is possible that there will be a judicial finding by the U.S. district judge in California, who conducted a hearing as described below, but the judge had not, as of this writing, issued any finding or order.

It is clear that the U.S. Government has been determined for some time to bring all those who participated in the abduction, torture, and murder of Camarena to justice,⁴ and that it was dissatisfied with the cooperation it had received from the Mexican authorities. Someone, it is not clear who, seems to have decided that a request for extradition of Alvarez Machain would be fruitless,⁵ and that the Government of Mexico would not, on its own, prosecute the killers of Enrique Camarena, including "Dr. Mengele," as the DEA called him.

From here on the facts get murky. The Mexican Government accused the U.S. Government of arranging the abduction of Dr. Alvarez Machain. The U.S. Government denied it. The Mexican Attorney General said, "This is an affront to the nation." The U.S. Attorney General said he was sorry for the incident, and would launch an investigation. Reports in the Mexican press said that the DEA had offered a bounty to anyone who would bring the doctor to the United States. Some reports mentioned \$100,000, others \$50,000. This, too, was denied. Though the first accounts said that the abductors of Dr. Alvarez Machain had immediately returned to Mexico, it turned out that the leader of the group, and perhaps others, had remained in the United States under the protection and with the financial support of the DEA, though a warrant for their arrest was issued by the Mexican Government. It was reported that the leader of the group had at one time held a high position in the Mexican Federal Judicial Police, which may be where the connection with the DEA began, but it is not clear that he held such a position at the time of the abduction. Alvarez Machain alleged, but the DEA denied, that an American agent had been among the kidnapers.

⁴ For a discussion of the jurisdictional aspects of the indictment, see my article in the October 1989 issue of the *Journal*, 83 AJIL 880 (1989). The prosecution in the case of the persons accused of the abduction and murder of Enrique Camarena—19 at last count, not all of whom are before the court—was brought under 18 U.S.C. §1114, entitled "Protection of officers and employees of the United States," and §1117, conspiracy to violate (inter alia) §1114. For a similar case, involving acts by Colombian nationals in Colombia, see *United States v. Benitez*, 741 F.2d 1312 (11th Cir. 1984), *cert. denied*, 471 U.S. 1137 (1985).

⁵ Under Article 9(1) of the Treaty of Extradition between the United States and Mexico, May 4, 1978, 31 UST 5059, TIAS No. 9656, each country is authorized, but not required, to extradite its own nationals. Paragraph 2 of Article 9 provides:

If extradition is not granted pursuant to paragraph 1 of this Article, the requested Party shall submit the case to its competent authorities for the purpose of prosecution, provided that Party has jurisdiction over the offense.

In addition to the question of nationality, of course, another problem with extradition of the persons accused in the Camarena case was that the crime was not committed in the territory of the requesting state. Article 1(2) provides on this point:

For an offense committed outside the territory of the requesting Party, the requested Party shall grant extradition if:

- a) its laws would provide for the punishment of such an offense committed in similar circumstances, or
- b) the person sought is a national of the requesting Party, and that Party has jurisdiction under its own laws to try that person.

At this point, the federal district judge before whom Dr. Alvarez Machain had been brought, Judge Edward Rafeedie, decided to call a hearing on the conduct of the U.S. authorities. He observed that this was the third instance of an abduction in the same case. (The other two were Juan Ramón Matta Ballesteros and René Martín Verdugo-Urquidez, who had been brought to the United States on other charges, as detailed in my article,⁶ but were named in superseding indictments in the Camarena case.)

Just before the hearing, the DEA spokesman in Washington announced that it had paid \$20,000 to the persons who had brought the doctor to the United States, but only for expenses. At the hearing, the DEA agent who was in charge of "Operation Leyenda," Hector Berrellez, testified that the DEA had indeed authorized the payment of \$50,000 for the abduction of Dr. Alvarez Machain; in addition to the \$20,000 paid to the captors for expenses, they had been paid \$6,000 per week since the abduction. Berrellez said the payments had been authorized by an Assistant Administrator of the DEA in Washington. "No higher?" the judge asked. Berrellez answered, "It probably did, but not to my knowledge."

The U.S. attorneys at the hearing denied that any DEA agents had assisted in the abduction,⁷ and denied that the doctor had been tortured. In its brief, the U.S. Government argued that even if Alvarez Machain had been kidnapped, "that fact is irrelevant to the ability of this court to go forward on the charges against him." That, of course, is the *Ker-Frisbie* doctrine. In Alvarez Machain's case, however, the Mexican Government had filed several formal protests, and had demanded the doctor's return, on the grounds that his abduction had violated Mexico's sovereignty. The U.S. attorney's response, like that of the French court in the *Argaud* case,⁸ was that the accused had no standing to raise any international law argument, which was for states only.

There is, it must be said, another version to the story, as told to the court by Special Agent Berrellez.⁹ According to this version, a comandante (major) in the Mexican Federal Judicial Police came to Los Angeles in December 1989 with a proposal for an exchange. If the DEA could arrange for the return of a Mexican national residing in California who was wanted by the Mexican Government on charges of having stolen some \$500 million from various Mexican politicians, the Mexican authorities would give to the United States a fugitive sought in connection with the Camarena case. The Mexican police officer asserted that he had come to the United States "with the full knowledge and authority of the Attorney General of Mexico." The DEA wanted Alvarez Machain, and the Mexican official accepted. The

⁶ 84 AJIL at 446, 448.

⁷ Thus, the U.S. Government did not assert in court the legal position set out in the Justice Department's memorandum of June 1989, described in my article, *id.* at 484-88. When Vice President Quayle visited Mexico at the end of April and was asked about the so-called snatch authority, he is reported to have dodged the question.

⁸ See my article, *id.* at 475-76.

⁹ This and the following paragraphs are based on the prepared statement of Special Agent Berrellez of May 17, 1990, as submitted to the district court, supplemented by press reports of the hearing.

MFJP would apprehend Alvarez Machain in Mexico and turn him over to the United States. If Alvarez Machain was delivered as promised, the DEA agents undertook to cause a determination of the immigration status of the man sought by the Mexicans. If, as they suspected, he was in the United States illegally, the U.S. Government would deport him. "This plan," Berrellez testified, "was agreed upon." Berrellez's statement says: "During the meeting Castillo [the comandante] emphasized that neither he nor his associate wanted their identities revealed because it would 'upset' Mexican citizens. Therefore, Castillo suggested that the arrangement be 'under the table' between the governments of the United States and Mexico."

As the DEA special agent's narrative continues, further conversations were held between various intermediaries, including a former Mexican police lieutenant now living in Los Angeles. The Mexicans said they did not want to use a government plane to transport Alvarez Machain to the United States, and they asked for an advance payment of \$50,000 for an airplane and other expenses. Berrellez says he told his intermediary to tell the Mexican official that

while the U.S. Government would be happy to receive Alvarez-Machain, no DEA agent or other representative of the U.S. Government would be involved in the apprehension and transport of Alvarez-Machain out of Mexico. I emphasized that no U.S. funds would be advanced for such an operation to be conducted by the Mexican officials. I further emphasized to Garate [the intermediary] that if Alvarez-Machain was tortured or harmed in any way he would not be accepted by the U.S. Government.

It seems that Dr. Alvarez Machain was apprehended in January 1990 and held in a safe house, but the promised transfer to El Paso did not take place; according to the DEA's informant, Alvarez Machain paid a bribe to secure his release from the MFJP. A second effort was launched in March; Berrellez says he told the Mexicans with whom he was dealing that there would be no advance payment, but that if the operation was successful, the DEA would pay a \$50,000 reward and would reimburse the expenses. The DEA arranged a code for the plane bringing Alvarez Machain to El Paso, so that the plane would not have to identify itself to airport and immigration authorities.

If this version is correct, one may view with somewhat greater skepticism the protests of the Mexican Government, though we may never know whether the comandante who claimed to speak with the full authority of his government was telling the whole truth.¹⁰ Even if the DEA's version is com-

¹⁰ At a speech in Los Angeles on April 23, President Carlos Salinas de Gortari called for stricter respect for international law and an end to "unilateral actions outside the law and infringing the rights of other nations."

A few days later, the Attorneys General of the two countries met in Santa Fe, and Attorney General Thornburgh presented substantially the same story as came out in the DEA's testimony before Judge Rafeedie. Mexican officials rejected that version. The meeting, it was reported, "was not a cordial affair."

pletely accurate,¹¹ the story is still one of deals "under the table," and the assertion of the DEA that none of its agents was involved in the abduction depends on how one defines the word "agent." As for the proposed exchange,¹² it does not do either nation proud. I would hope this is not another case where "doing unto others" leads to lower standards for all concerned.¹³

As of June 1, 1990, one cannot reach any definite conclusion about the *Alvarez-Machain* affair. I think, however, the affair supports several of the conclusions I drew in my article, with the added potential that this time there will be a national and international audience for what has until now been known to hardly anyone:

(1) There are no nice abductions. The post-*Toscanino* attempts to separate the bad from the not-so-bad are a failure.

(2) Assertions that the authorities of the state from which a suspect is abducted have given their consent are unreliable, at every level.

(3) When it comes to payoffs, cooperative ventures, rewards, and the like, everybody lies.

(4) At least one judge in Los Angeles—incidentally an appointee of President Reagan—is troubled by the scenario described in my article and here again illustrated. At this writing, there has been no ruling in the *Alvarez-Machain* case, either on the prisoner's petition for dismissal on the grounds of misconduct by the prosecution and lack of jurisdiction,¹⁴ or on Mexico's request for his return to stand trial on a recently issued Mexican warrant. We may yet, however, see an opportunity for reconsideration of the *Ker-Frisbie* doctrine, without any escape valve, such as alleged acquiescence of the foreign state concerned.

ANDREAS F. LOWENFELD*

President Bush, at his news conference on May 3, 1990, said, "yes, there were some misunderstandings here and I've told our key people to eliminate the misunderstanding. We don't need misunderstanding with Mexico"

¹¹ Special Agent Berrellez's statement dated May 17, 1990, makes no mention of the \$20,000 payment for expenses, which was announced in Washington on May 25, or of the continuing payments, which came out at the hearing.

¹² This writer has no information about what, if anything, was done about the man sought by the Mexicans.

¹³ Antonio Garate Bustamante, the former Mexican police lieutenant who was the DEA's principal intermediary, gave an interview to the *Los Angeles Times* in which he said that Mexican officials brought the kidnaping on themselves by failing to punish all who had participated in the murder of Camarena. "We're not the dirty guys," he is quoted as saying. "We did it because we had a reason and they started it." *DEA Operative Details his Role in Kidnaping*, L.A. Times, Apr. 28, 1990, at A1, col. 2.

¹⁴ See FED. R. CRIM. P. 12(b)(1).

* Charles L. Denison Professor of Law, New York University.

CORRESPONDENCE

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April 10, 1990

TO THE EDITOR IN CHIEF:

In his important article on *Prolonged Military Occupations: The Israeli-Occupied Territories Since 1967*, Professor Adam Roberts explains that he is a specialist in international relations rather than international law (84 AJIL 44, 45 (1990)). Giving sympathetic weight to his disclaimer, it is nonetheless startling to find at several key points in his paper that he fails even to consider facts and legal issues which to a lawyer would seem dispositive against his case. One of the lawyer's most important professional obligations is to disclose to a court any fact or precedents which could be considered contrary to his position. Is the scholar's obligation to his readers less demanding?

First, Roberts comments that Israel's position in the territories it occupies should be characterized as a "military occupation" because it is "a formal system of external control by a force whose presence is not sanctioned by international agreement" (p. 44). Whatever the merits of Roberts's observation as part of a legal definition of military occupation, it is without factual or legal justification as a characterization of Israel's position as occupying power in the West Bank and the Gaza Strip. The Israeli occupation of those areas is not only sanctioned, but in effect directed, by the international agreements embodied in Security Council Resolutions 242 and 338, which Professor Roberts does not mention in this connection.¹

In Article 25 of the United Nations Charter, the member states agree to obey "decisions" of the Security Council as binding. Security Council Resolutions 242 and 338, taken together, constitute a legally binding "decision" that the Israeli occupation should continue until Israel and the Arab states of the region establish "a just and lasting peace in the Middle East," pursuant to the principles of Resolution 242. The present writer is in a position to attest that the Soviet Union, Egypt, Jordan, Syria and Lebanon, at least, agreed to Resolution 242 in 1967 before it was put to a Security Council vote, and has been assured that the same procedure was followed in the case of Resolution 338, adopted in 1973.

The reason the Security Council ruled in 1967 that there should be no Israeli withdrawals without peace is well-known, but bears repeating. Anatoly F. Dobrynin, then Soviet Ambassador to Washington, said this feature of Resolution 242 was the first occasion in the Cold War when the Soviet Union used the phrase "package deal" in a positive sense.

The Suez War of 1956 was brought to an end when the United States, Great Britain and the Secretary-General of the United Nations, Dag Hammarskjöld, acted as mediators and midwives for an agreement between Israel and Egypt, pursuant to which the Israelis withdrew from the Sinai in

¹ The two resolutions are mentioned in a different context at p. 113 of Roberts's article.

exchange for a number of Egyptian promises, including a promise to make peace. President Nasser broke all those promises, and finally closed the Strait of Tiran to Israeli shipping, thus precipitating the 1967 war. After the 1967 war there was general agreement on the policy of treating the occupied territories as gages for peace.

A second important point in Roberts's argument suffers from the same defect. He argues at some length (pp. 61-86) that the Arab inhabitants of the West Bank and the Gaza Strip constitute a "people" entitled to self-determination and the military aid of friendly states in achieving it; that those areas are Arab territories in some juridical sense; that the fourth Geneva Convention applies to the Israeli occupation; and that Jewish settlements in those territories are illegal under the Geneva Convention, as instances in which an occupying power "deports" or "transfers" its own people to the occupied territory. That each step in Roberts's chain of reasoning is legally untenable is of secondary importance for present purposes. What is important to the point being made in this letter is that Professor Roberts does not mention or discuss the fact that the essence of his argument was rejected by the highest authorities of the world community immediately after the First World War and that this judgment was reiterated and confirmed by many court decisions and Security Council resolutions upholding the legality of the Palestine Mandate, and recommending, urging or commanding the states of the region to make peace with Israel.

In 1919 the victorious Allies met the claims of Arab nationalism by carving the Turkish territories of the region into some 21 Arab states, from Saudi Arabia to the Mandates for Iraq, Syria and Lebanon. They deliberately reserved Palestine for another purpose, also to be sought through a mandate. The Mandates for Syria, Lebanon and Iraq were trusts for the benefit of the indigenous populations, and they were to become self-governing when their people were deemed ready for that responsibility. The primary objective of the Palestine Mandate was different. With the emphatic support of the United States, the League of Nations and Turkey, the defeated sovereign, the Allies established the Palestine Mandate in order to support the national liberation of "the Jewish people" because of "their historic connection with the land." The mandate encouraged the Jews to establish a "National Home" in Palestine and granted them the right to make close settlements without prejudice to "the civil and religious rights of the existing non-Jewish communities in Palestine." The term "civil rights" in that sentence is carefully distinguished from "political rights."

The right of the Jewish people to settle in Palestine has never been terminated for the West Bank. The mandate authorized the postponement or withholding of Jewish settlement only in the Transjordanian province of Palestine, now Jordan; that was done in 1923. The only way in which the mandate right of settlement in the West Bank can be brought to an end is through the annexation of the area by an existing state or by the creation of a new one.

Many believe that the Palestine Mandate was somehow terminated in 1947, when the British Government resigned as mandatory, or in 1948, when the British withdrew. This is incorrect. A trust never terminates when a trustee dies, resigns, embezzles the trust property, or is dismissed. The authority responsible for the trust appoints a new trustee, or otherwise

arranges for its winding up. Thus, in the case of the Mandate for German South West Africa, the International Court of Justice found the South African Government to have been derelict in its duties as the mandatory power, and it was therefore deemed to have resigned. The Court ruled specifically that the mandate survived as a trust. Nearly twenty years of strenuous diplomacy then fulfilled the purposes of the mandate by creating the new state of Namibia. In Palestine, the British Mandate ceased to be operative as to the territories of Israel and Jordan when those states were created and recognized by the international community, but its rules apply still to the West Bank and the Gaza Strip, which have not yet been allocated either to Israel or to Jordan or become an independent state. Jordan attempted to annex the West Bank in 1951, but that annexation has not been generally recognized, especially by the Arab states, and now Jordan has abandoned all its claims to the territory.

The State Department has never denied that under the mandate "the Jewish people" has the right to settle in the area; instead, it took the position that Jewish settlements in the West Bank violated Article 49(6) of the fourth Geneva Convention of 1949, dealing with the protection of civilian persons in time of war. Professor Roberts reaches the same conclusion. Where the territory of one contracting party is occupied by another contracting party, the Convention prohibits many of the inhumane practices of the Nazis and the Soviet Union during and before the Second World War—the mass transfer of people into or out of occupied territories for purposes of extermination, slave labor or colonization, for example. The sixth paragraph of Article 49 provides that the occupying power "shall not deport or transfer part of its own civilian population into the territory it occupies." The Jewish settlers in the West Bank are most emphatically volunteers. They have not been "deported" or "transferred" to the area by the Government of Israel, and their movement involves none of the atrocious purposes or harmful effects on the existing population it is the goal of the Geneva Convention to prevent. Furthermore, the Convention in terms applies only to acts by one signatory "carried out on the territory of another." The West Bank is not the territory of a signatory power, but an unallocated part of the British Mandate. It is hard, therefore, to see how even the most narrow and literal-minded reading of the Convention could make it apply to the process of Jewish settlement in territories of the British Mandate west of the Jordan River. Even if the Geneva Convention could be construed to prevent settlements during the period of occupation, it could not terminate the rights conferred by the mandate. They can be ended only by the establishment and recognition of a new state or the incorporation of the territories into an old one.

As claimants to the territory, the Israelis have denied that they are required to comply with the Geneva Convention, but announced that they will do so for the humanitarian provisions of the Convention as a matter of grace. The Israeli courts apply the Convention routinely, sometimes deciding against the Israeli Government. Assuming for the moment the general applicability of the Convention, it could well be considered a violation if the Israelis deported convicts to the area or encouraged the settlement in the territories of people who had no right to live there. But how can the Convention be deemed to apply to Jews who do have a right to settle in the territories under international law?—a legal right assured by treaty and specifically

protected by Article 80 of the United Nations Charter, generally known as "the Palestine Article." The Jewish right of settlement in the area is equivalent in every way to the right of the existing population to live there.

Another principle of international law may affect the problem of the Jewish settlements. Under international law, an occupying power is supposed to apply the prevailing law of the occupied territory at the municipal level unless it interferes with the necessities of security or administration or is "repugnant to elementary conceptions of justice." From 1949 to 1967, when Jordan was the military occupant of the West Bank, it applied its own laws to prevent any Jews from living in the territory. To suggest that Israel as occupant is required to enforce such Jordanian laws is simply absurd. When the Allies occupied Germany after the Second World War, the abrogation of the Nuremberg Laws was among their first acts.²

In short, Roberts is presenting the problem of terminating the Israeli occupation of the territories as if the only relevant legal question were the arbitrary denial of Palestinian national rights by the brute force of a military occupation. The true issue is altogether different, as Weizmann once said—"not the clash of right and wrong, but the clash of two rights." Both the Israelis and the Palestinian Arabs have claims. It does no practical good if the matter is analyzed by considering only the arguments of one side. And if scholars choose to ignore some of the evidence and some of the legal issues, the injury is to even deeper interests.

The same flaw appears at other points in Roberts's article, but it would be a work of supererogation to document them all.

EUGENE V. ROSTOW

Professor Roberts replies:

Professor Rostow advances a challenging position with vigor, clarity and certitude—for all of which your readers will share my appreciation. Having long supported the view he espouses, that at the heart of the conflict between Israelis and Palestinian Arabs is "the clash of two rights," I agree with much that he says. However, in places he relies on doubtful assertions; attributes to me positions I do not hold; appears to ignore points made in my article; and accuses me of "considering only the arguments of one side"—a grave charge which compels me to reply. The six most significant issues on which we differ are:

1. *Grounds for viewing the situation as "military occupation."* I said in the first paragraph of my article (p. 44) that the situation in the territories under Israeli control had "two classic features of a military occupation." The first was "a formal system of external control by a force whose presence is not sanctioned by international agreement." Professor Rostow suggests in his second paragraph that this one feature was my principal ground for characterizing the situation as "military occupation." It was not. Other grounds

² The literature on these subjects ignored by Roberts is well represented by Professor Julius Stone's book *Israel and Palestine: Assault on the Law of Nations* (1981).

were mentioned in the article, for example on pp. 44 and 61–70. Lack of international agreement is indeed one classic feature of military occupation, but it is not absolutely essential as part of a legal definition. Many occupations in this century—such as that of the left bank of the Rhine by the Allied and associated powers under the Versailles Treaty of June 28, 1919, and the Rhineland Agreement of the same date—have been on the basis of international agreement of one kind or another. Thus, the answer to the question whether a situation has been sanctioned by international agreement is not necessarily determinative in considering whether that situation is properly characterized as an occupation.

Regarding Israel's presence in the territories held since 1967, there has obviously been much international disagreement—including continuation of policies of nonrecognition, and states of war. However, I quite agree there has also been some (albeit limited) degree of international agreement about the presence of Israeli forces in the territories. Professor Rostow rightly draws attention to the significance in this context of Security Council Resolution 242 of November 22, 1967. Both the principles enshrined in it are worth quoting in full:

- (i) Withdrawal of Israel armed forces from territories occupied in the recent conflict;
- (ii) Termination of all claims or states of belligerency and respect for and acknowledgement of the sovereignty, territorial integrity and political independence of every State in the area and their right to live in peace within secure and recognized boundaries free from threats or acts of force.

This resolution, reaffirmed in Security Council Resolution 338 of October 22, 1973, does indeed, as Professor Rostow says, show that after the 1967 war there was agreement on the policy of treating the occupied territories as gages for peace. I have absolutely no quarrel with this view.

The element of agreement contained in these resolutions has evidently not been seen by the Security Council itself as an obstacle to defining Israel's position as that of occupant. For example, the Security Council has viewed the territories as occupied, and has stated that the fourth 1949 Geneva Convention is applicable, in Resolutions 605 (December 22, 1987) and 607 (January 5, 1988), which I mentioned along with others on pp. 69–70, note 88.

2. *Applicability of the fourth Geneva Convention.* Professor Rostow indicates that the proposition "that the fourth Geneva Convention applies to the Israeli occupation" is one of several steps in my argument which is "legally untenable." However, it is, as he knows, found legally tenable by most governments (including those of our respective countries, the United States and the United Kingdom), and by many international organizations. The support for this proposition was outlined on p. 69 of my article.

Later in his letter, Professor Rostow says: "the Convention in terms applies only to acts by one signatory 'carried out on the territory of another.'" The last seven words, which he puts in quotation marks, do not appear in the Convention. They presumably refer to Article 2. The approach which they reflect has not been found persuasive in respect of the West Bank and Gaza, for reasons outlined on pp. 63–66 of my article.

3. *Self-determination of inhabitants.* According to Professor Rostow, I argue "that the Arab inhabitants of the West Bank and the Gaza Strip constitute a 'people' entitled to self-determination and the military aid of friendly states in achieving it." He is confusing the reporting of important positions with arguing for them. On pp. 75-79, I reported the emergence in the territories, and in the international community, of a view favoring self-determination. On pp. 79-83 and 97, I did not argue for "military aid of friendly states." I repeatedly criticized the inadequacies and inconsistencies of UN resolutions on this matter. I am opposed to such aid in this case.

4. *Israeli settlements.* Professor Rostow reasserts forcefully the argument that the Jewish settlements, being voluntary, are not covered by Article 49(6) of the fourth Geneva Convention. I did report this view, together with other interpretations, on pp. 83-86 and 89-91. I am well aware of the brief treatment of this subject in Julius Stone's book *Israel and Palestine*, but chose to refer to other authorities (all Israeli, as it happens) favoring settlements because they dealt with the matter in much more detail. The fact that there can be honest disagreement about so basic a matter as the legality of the settlements highlights the importance—to which I alluded on pp. 95 and 101—of procedures, both national and international, for implementing and interpreting law in the light of changing conditions.

5. *Palestine Mandate.* In support of the Jewish settlements, Professor Rostow additionally argues at length, as he has done in a number of articles over many years, that the rules of the 1922 League of Nations Mandate for Palestine have never ceased to apply to the West Bank and Gaza. This view was also favored by Professor Stone in *Israel and Palestine*. I am all for reviving the dead, but I did not discuss this argument mainly because it goes against the weight of historical evidence. The contrast with the South West Africa Mandate, the evolution of which can be traced like a continuous thread through International Court of Justice and UN decisions, is striking. The view that the Palestine Mandate still exists in some form has commanded very little support, especially among policy makers. If it were to be advanced seriously on the diplomatic level, it would be interesting to see what line Israel and other UN members would take on certain key issues: (1) the measures taken to carry out its provisions over the years; (2) submission to the ICJ of any disputes about its interpretation or application; and (3) possible modifications of its terms.

6. *Terminating the occupation.* At the end, I am accused of "presenting the problem of terminating the Israeli occupation of the territories as if the only relevant legal question were the arbitrary denial of Palestinian national rights by the brute force of a military occupation." That is not my view: see my criticisms of Palestinian positions on this matter (e.g., pp. 66-68, 78-79 and 102), and my acceptance of the reality of Israeli security concerns (e.g., p. 102). It was partly on account of such factors that I concluded that the occupation is likely, alas, to be yet further prolonged.

THE FRANCIS DEÁK PRIZE

The Board of Editors takes great pleasure in announcing that the Deák Prize for 1990 has been awarded to Professor Anne-Marie Burley, of the University of Chicago Law School, for her article, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, which appeared in the July 1989 issue of the *Journal* at page 461.

The Deák Prize, which honors the memory of Francis Deák, is given annually to one of the younger contributors to the *Journal* for an article demonstrating excellence in scholarship. The grant of an award to the winning author is made possible by the Institute for Continuing Education in Law and Librarianship. The Board of Editors wishes to thank the President of the Institute, Mr. Philip F. Cohen, for his continuing generous support of international legal studies, and to congratulate Professor Burley for her thoughtful and imaginative research.

CONTEMPORARY PRACTICE OF THE UNITED STATES RELATING TO INTERNATIONAL LAW

MARIAN NASH LEICH*

The material in this section is arranged according to the system employed in the annual *Digest of United States Practice in International Law*, published by the Department of State.

ALIENS

(U.S. *Digest*, Ch. 3, §3)

Deferred Departure and Other Relief—People's Republic of China Nationals

On April 11, 1990, President George Bush issued Executive Order No. 12,711, Policy Implementation with Respect to Nationals of the People's Republic of China, in which he directed the Attorney General to defer until January 1, 1994, the enforced departure of all nationals of the People's Republic of China and their dependents who were in the United States on or after June 5, 1989, up to and including the date of the executive order. In the order the President further directed the Attorney General and the Secretary of State to take all steps necessary with respect to such persons (1) to waive through January 1, 1994, the requirement of a valid passport, and (2) to process and provide necessary documents, both within the United States and at U.S. consulates overseas, to facilitate their travel across the borders of other nations and reentry into the United States in the same status that they had upon departure.

Section 3 of Executive Order No. 12,711 directed the Secretary of State and the Attorney General to provide the following protections:

(a) irrevocable waiver of the 2-year home country residence requirement [§212(e) of the Immigration and Nationality Act of 1952, as amended (8 U.S.C. §1182(e) (1988))] that may be exercised until January 1, 1994, for such PRC nationals;

(b) maintenance of lawful status for purposes of adjustment of status or change of nonimmigrant status for such PRC nationals who were in lawful status at any time on or after June 5, 1989, up to and including . . . [April 11, 1990];

(c) authorization for employment of such PRC nationals through January 1, 1994; and

(d) notice of expiration of nonimmigrant status (if applicable) rather than the institution of deportation proceedings, and explanation of options available for such PRC nationals eligible for deferral of enforced departure whose nonimmigrant status has expired.

* Office of the Legal Adviser, Department of State.

In section 4 of the executive order, the President directed the Secretary of State and the Attorney General to provide for "enhanced consideration" under the immigration laws for individuals from any country who express a fear of persecution upon returning to their country related to its policy of forced abortion or coerced sterilization, as implemented by the Attorney General's regulation effective January 29, 1990.

In section 5, the President directed the Attorney General to ensure that the Immigration and Naturalization Service make final and public its position on training for individuals in F-1 (student) visa status and on the re-statement into lawful nonimmigrant status of such PRC nationals who have withdrawn their applications for asylum.

Finally, section 6 of the executive order directs the Departments of State and Justice to "consider other steps to assist such PRC nationals in their efforts to utilize the protections" extended by the President pursuant to the order.¹

TERRITORIAL JURISDICTION

(U.S. *Digest*, Ch. 6, §1)

Irregular Apprehensions of Criminal Suspects

Prompted by reports of an opinion issued by the Office of Legal Counsel of the Department of Justice, that the Federal Bureau of Investigation was authorized as a matter of United States domestic law to conduct extraterritorial arrests of individuals for violations of U.S. law, the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary held a hearing on November 8, 1989, to consider the matter.

In his testimony, the Legal Adviser of the Department of State, Abraham D. Sofaer, discussed issues not addressed by the Office of Legal Counsel's opinion—the international law and foreign policy implications of such arrests. Portions of his prepared statement follow:

[T]he Congress and the President have the power under the Constitution in various circumstances to act inconsistently with international law. . . . In practice, despite their power to act otherwise, each of the branches of our government has shown a healthy respect for international law.

The Federal courts have treated international law as part of United States law since our early days as a nation. . . .

Presidents, and other Executive officers, have recognized the importance and authority of international law. . . .

Congress, similarly, has demonstrated substantial respect for international law. While the principle that Congress can override international law for purposes of our domestic law is well-established, actual examples of such actions are few, and the record is overwhelmingly to the contrary. . . .

¹ 55 Fed. Reg. 13,897-98 (1990).

. . . . [C]ertain forms of criminal activity have been subjected to universal jurisdiction. Multilateral conventions impose an obligation on parties to prosecute or extradite for hijacking, hostage-taking, aircraft sabotage, and other forms of terrorist behavior. Other agreements deal with international drug dealers, and create an obligation on parties to prosecute or extradite those criminals as well.

The adverse effects of the principle of territorial integrity on law enforcement are also mitigated by the willingness of states to consent to foreign law enforcement action on their territory. No particular formality or publicity is required for such consent to be legally effective. Even tacit consent is sufficient if given by appropriate officials. For political reasons a state may decide to deny after the fact that it had consented to an operation. This would not vitiate the legality of an action, if consent had in fact been given. In still other cases, a foreign state may cooperate by quietly placing an individual wanted by the United States on board a plane or vessel over which the United States has jurisdiction.

Despite its importance, however, the principle of territorial integrity is not entitled to absolute deference in international law. Every state retains the right of self-defense, recognized in Article 51 of the UN Charter. Thus, a state may take appropriate action in order to protect itself and its citizens against terrorist attacks. This includes the right to rescue American citizens and to take action in a foreign state where that state is providing direct assistance to terrorists, or is unwilling or unable to prevent terrorists from continuing attacks upon U.S. citizens. Any use of force in self-defense must meet the standards of necessity and proportionality to be lawful. But if these conditions are met, the fact that the use of force breaches the territorial integrity of a state does not render it unlawful.

Thus, the United States defended Israel's rescue mission at Entebbe in 1976, notwithstanding the temporary breach of Uganda's territorial integrity. The U.S. representative to the United Nations stated that "given the attitude of the Ugandan authorities, cooperation with or reliance on them in rescuing the passengers and crew was impracticable." The United States was acting consistently with international law in taking forcible action against Libya in 1986 for its role in terrorist attacks against the United States. Even in the area of forcible abductions, the international community seems willing to take into account particular circumstances in assessing a violation of territorial integrity. While the international community criticized the forcible abduction of Adolf Eichmann from Argentina, it did not call for his return and even Argentina was satisfied by an Israeli expression of regret for any violation of Argentine law and sovereignty.

In considering the availability of the doctrine of self-defense to justify a breach of territorial integrity, it is essential to recognize that the President is not bound by the interpretations of international law taken by other states. The President should carefully consider those views, since the U.S. must be prepared to defend its interpretation of the law. But self-defense is a right deemed "inherent" in the Charter. Here, more than anywhere else in international law, a state must act in good faith, but must also be free to protect its nationals from all forms of aggression. State-sponsored terrorism has created new dangers for civilized

peoples, and the responses of the United States in Libya and elsewhere have gained ever wider recognition as having been necessary and effective methods for defending Americans.

While the law must be given full respect even in matters of self-defense, we must not permit the law to be manipulated to render the free world ineffective in dealing with those who have no regard for law. We must not allow law to be so exploited, but rather must insist on the continued development of legal rules that enable states to deal effectively with new forms of aggression.

This brings me to the increasingly serious threat to the domestic security of the United States and other nations by narcotics traffickers. In recent months evidence has accumulated that some of these traffickers have been trained in terrorist tactics. They have enormous resources and small armies at their command. Their *modus operandi* is to try to intimidate or disrupt the legal process in states. They have threatened violence against United States citizens, officials, and property. They have been provided safe-haven, or given approval to transit, by governments in complicity with the drug traffickers.

We are reaching the point . . . at which the activities and threats of some drug traffickers may be so serious and damaging as to give rise to the right to resort to self-defense. The evidence of imminent harm from traffickers' threats would have to be strong to sustain a self-defense argument. Arrests in foreign states without their consent have no legal justification under international law aside from self-defense. But where a criminal organization grows to a point where it can and does perpetrate violent attacks against the United States, it can become a proper object of measures in self-defense.

While international law therefore permits extraterritorial "arrests" in situations which permit a valid claim of self-defense, decisions about any extraterritorial arrest entail grave potential implications for U.S. personnel, for the United States, and for our relations with other states. These considerations must be carefully weighed by the Secretary of State, who is statutorily responsible for the management of foreign affairs and for the security of U.S. officials overseas (22 U.S.C. 2656 and 22 U.S.C. 3927), and by the Ambassador to the country in question, who has statutory responsibility for the direction and supervision of U.S. government employees in the country to which he or she is assigned (22 U.S.C. 3927).

The actual implications of a nonconsensual arrest in foreign territory may vary with such factors as the seriousness of the offense for which the apprehended person is arrested; the citizenship of the offender; whether the foreign government itself had tried to bring the offenders to justice or would have consented to the apprehension had it been asked; and the general tenor of bilateral relations with the United States. However, any proposal for unilateral action would need to be reviewed from the standpoint of a variety of potential policy implications.

First, such operations create substantial risks to the U.S. agents involved. Actions involving arrests by U.S. officials on foreign territory

require plans to get those officials into the foreign state, to protect those officials while in the foreign state, to remove the officials with the person arrested from that state, and finally to bring them safely back to United States territory. While the officials involved might include FBI agents seeking to make an arrest, such operations may also require the use of a wide range of U.S. assets and personnel.

Apart from being killed in action, U.S. agents involved in such operations risk apprehension and punishment for their actions. Our agents would not normally enjoy immunity from prosecution or civil suit in the foreign country involved for any violations of local law which occur. (In 1952, the Soviets abducted Dr. Walter Linse from the U.S. sector of Berlin to the Soviet sector, where he was tried and convicted by a Soviet Tribunal. Two of Linse's abductors were subsequently apprehended in West Berlin and sentenced for kidnapping.) Moreover, many states will not accord POW status to military personnel apprehended in support of an unconsented law enforcement action. The United States could also face requests from the foreign country for extradition of the agents. Obviously the United States would not extradite its agents for carrying out an authorized mission, but our failure to do so could lead the foreign country to cease extradition cooperation with us. Moreover, our agents would be vulnerable to extradition from third countries they visit.

Beyond the risks to our agents, the possibility also exists of suits against the United States in the foreign country's courts for the illegal actions taken in that country. For example, U.S. courts held that Chile was not immune from suit in the United States for its involvement in the assassination of a Chilean, Letelier, in the United States. The United States could also face challenges for such actions in international fora, including the International Court of Justice.

An unconsented, extraterritorial arrest would inevitably have an adverse impact on our bilateral relations with the country in which we act. Less obviously, such arrests could also greatly reduce law enforcement cooperation with that or other countries. The United States has attached substantial importance over the past decade to improving bilateral and multilateral law enforcement cooperation. For many countries, these agreements reflect the commitment of the United States to confine itself to cooperative measures, rather than unilateral action, in the pursuit of U.S. law enforcement objectives. If the United States disregards these agreed law enforcement norms and mechanisms, and acts unilaterally, we must be prepared for states to decline to cooperate under these arrangements or to denounce them. Foreign states have reacted adversely to extraterritorial U.S. laws, even when those laws involve enforcement action taken only in the United States. The breadth of our discovery practices and antitrust laws has led some states to pass blocking and secrecy statutes that preclude cooperation with the United States. Their reaction to unconsented extraterritorial arrests could be more extreme.

Finally, we need to consider the fact that our legal position may be seized upon by other nations to engage in irresponsible conduct against our interests. Reciprocity is at the heart of international law; all nations need to take into account the reactions of other nations to conduct which departs from accepted norms.

It is the seriousness of these various policy implications, and our general respect for international law, that has led each witness today to emphasize that no change has been made in United States policy concerning extraterritorial arrests. Our policy remains to cooperate with foreign states in achieving law enforcement objectives.¹

CLAIMS SETTLEMENT AGREEMENTS

(U.S. *Digest*, Ch. 9, §3)

Iran-United States Claims Tribunal

On November 9, 1989, the Subcommittee on Europe and the Middle East of the House Committee on Foreign Affairs held a hearing on the economic and political situation in Iran, the status of Iranian assets and the Iran-United States Claims Tribunal, U.S. policy on American hostages in the Middle East, and Iran's foreign policy and relations with other countries.

The Legal Adviser of the Department of State, Abraham D. Sofaer, presented a prepared statement on the status of matters at the Claims Tribunal, that read in part:

As of January 1981, US banks held a total of nearly \$10 billion of Iranian assets which had been frozen in 1979 at the outset of the hostage crisis. The Algiers Accords provided for the use of most of these assets for the initial funding of three escrow accounts. Specifically, about \$3.7 billion [\$3.667 billion] was placed in Dollar Account No. 1 (held by the N.Y. Federal Reserve Bank) for syndicated bank claims; about \$1.4 billion [\$1.418 billion] in Dollar Account No. 2 (held by the Bank of England) for non-syndicated bank claims; and \$1 billion in the Security Account (held by the Netherlands Central Bank) for Tribunal awards to other US claimants. The rest of the frozen Iranian funds—almost \$3.9 billion—was returned to Iran. Since January 1981, each of these accounts has been accumulating interest, which has provided substantial additional funds for the payment of US claims.

Under the Accords, Iran has an obligation to replenish the Security Account whenever its balance drops below \$500 million as a result of Tribunal awards to American nationals; to date, Iran has been able to replenish the Security Account from accumulated interest paid on the Account. Under the Accords, the balance of each of the three accounts is to be returned to Iran when all claims against the account in question have been paid.

¹ *Authority of the Federal Bureau of Investigation to Seize Suspects Abroad: Hearing Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. (1989); to be found, also, at Dept. of State File No. P90 0071-0004, 0013/0021. William P. Barr, Assistant Attorney General, Office of Legal Counsel, appeared on behalf of the Department of Justice. His prepared statement is at *id.*, 0022/0036, and will be published in the *Hearing, supra*.

Excerpts of the statements of Judge Sofaer and Mr. Barr, together with a discussion of the issues, appeared in Lowenfeld, *U.S. Law Enforcement Abroad: The Constitution and International Law, Continued*, 84 AJIL 444, 484-88 (1990).

In 1987 [May 13, 1987] the Tribunal, in ruling on an application filed by Iran, ordered the return to Iran of the balance of Dollar Account No. 1, less a small amount needed to deal with a few remaining syndicated bank claims.¹ The US sought a ruling from the Tribunal refusing to order the return to Iran of the balance of the Account, but instead leaving the disposition of the balance to bilateral negotiation. But the Tribunal rejected that request. Instead, it ordered the return to Iran of almost the entire balance (a total of nearly \$500 million); less than \$10 million remains in the Account today to deal with the last claims.²

Dollar Account No. 2 now contains a balance of over \$820 million, of which less than \$10 million is needed to pay the few remaining claims against the Account. Last week [November 3, 1989], the US and Iran reached agreement on the following distribution of the balance of the Account: \$243 million (or about 30% of the balance) will go to the Security Account, where it will be used to pay Tribunal awards to American claimants; \$567 million (or about 70%) will be returned to Iran; and the remainder (about \$10 million) will be retained in the Account to pay the few remaining claims.

¹ On August 20, 1986, in *Islamic Republic of Iran and United States of America* (Case A15), ITL 63-A15 (I:G)-FT, 12 IRAN-U.S. CLAIMS TRIBUNAL REP. 40 (1986 II), the Full Tribunal (6-3) determined, among other things, that implementation of General Principle A of the General Declaration of Algiers (the first, basic Declaration, initialed on January 19, 1981) required the two parties to enter into negotiation immediately and to negotiate in good faith with a view to achieving agreement: (1) on the claims then pending against Dollar Account No. 1 and on the amount that should consequently be kept in the account to pay them; (2) on the amount not so needed (which upon conclusion of the agreement should be transferred to Iran); and (3) as part of the agreement, on the terms of a release by Iran of all claims against the United States for administration of Dollar Account No. 1.

By an award signed and filed on May 4, 1987, the Full Tribunal, acting on a request by the Islamic Republic of Iran, ordered the transfer by the United States (i.e., by the Federal Reserve Bank of New York) to Iran (i.e., to the Dollar Account of Bank Markazi Jomhouri Islami Iran at the Bank of England) of the excess of U.S. \$63 million, plus the interest earned thereon since September 30, 1986 (the date of the calculation by the United States of the amount of the pending claims), up to and including the date of transfer. (The parties had agreed that the amount of U.S. \$63 million provisionally should be kept in the account for the full and final settlement of the pending claims.) AWD 306-A15(I:G)-FT, 14 *id.* at 311, 319 (1987 I). On May 13, 1987, the United States returned the amount of \$454,390,207.71 to Iran from Dollar Account No. 1.

² On April 13, 1988, Bank Markazi Jomhouri Islami Iran and the Federal Reserve Bank of New York, acting as fiscal agent of the United States, signed an agreement that listed the remaining claims against Dollar Account No. 1 and assigned a certain amount of funds in the account to cover the maximum amount of each claim, the total claims against the account as of September 30, 1986, having been \$63 million. The agreement provided that as each claimant settled with Iran, Iran would receive the difference between the settlement amount and the maximum amount assigned to that claim. On April 15, 1988, pursuant to the agreement, Iran received \$37,900,000 from Dollar Account No. 1, to reflect settlements made since September 30, 1986. By December 1989, 30 of the 44 claims listed in the 1988 agreement had been settled, and the balance in the account was less than \$10 million.

JOHN H. KNOX

[Mr. Knox is an Attorney-Adviser in the Office of the Legal Adviser, Office of International Claims and Investment Disputes, Interpretive and Official Iranian Claims Division.] For the agreement, see Dept. of State File No. P90 0080-2214/2274.

Iran's decision to transfer to the Security Account almost a quarter of a billion dollars of Iranian funds is an important step which will provide a significant source of added security for US nationals with claims before the Tribunal. By taking this step, Iran has signalled its continued commitment to fulfill its obligations under the Algiers Accords.

Our acquiescence in the transfer of \$567 million to Iran from this Account was also entirely appropriate. The claims on this Account have largely been adjudicated, so no American claimant will be prejudiced by the transfer. Had we chosen to litigate this issue, we would at best have been able only to delay the return of these funds to Iran. Instead, we avoided the costs of contentious and expensive litigation, and reached a result which is in the interests of US claimants.

Meanwhile, the Claims Tribunal has decided a considerable portion of the claims put before it. To date, it has awarded over \$1.3 billion to US claimants, and a number of other large claims have been heard and await judgment. The Tribunal has provided a businesslike forum in which American claimants can seek the full value of their legitimate claims, including interest.

Many claims remain undecided, however, including the great majority (over 2700) of the so-called small claims—that is, claims of US nationals for less than \$250,000. In addition, the Tribunal has only begun the enormous task of resolving the large government-to-government claims between Iran and the US, particularly the Iranian claims arising out of the sale of defense articles and services prior to 1979. It would obviously be desirable to resolve these issues by negotiation—if that can be done on reasonable terms—so as to avoid the necessity for case-by-case arbitration that could take many years.

In our discussions last week with Iranian representatives, we made some progress in establishing a process within which the parties should be able to clear up many of the remaining disputes. Specifically, we resolved several relatively small government-to-government claims that were before the Claims Tribunal. These claims involved disputes over the performance of contracts for the supply of goods and services prior to 1979. In none of these cases did we agree to return military properties to Iran, which we have no intention of doing. We did, however, make monetary settlements which, we believe, were fair deals based on the circumstances involved. If we are able to make similar settlements of larger cases or groups of cases before the Tribunal, we intend to do so.

Finally, I want to make clear that these discussions with Iranian representatives in The Hague are entirely technical and legal in character. If the resolution of these technical issues should contribute to improvement in US-Iranian relations, that would of course be to the benefit of both our countries. Nonetheless, our discussions in The Hague have not been directed at political objectives, but at the resolution of legal matters before the Tribunal.³

In response to various questions from the subcommittee Chairman, Congressman Lee H. Hamilton, and other subcommittee members, regarding Dollar Account No. 2, the Legal Adviser stated, further:

³ *United States-Iranian Relations: Hearing Before the Subcomm. on Europe and the Middle East of the House Comm. on Foreign Affairs, 101st Cong., 1st Sess. 18, 19–24 (1989).*

The money is Iran's money and it is in the Bank of England. We have no control over those funds whatsoever. What we have agreed to is a disposition of the funds in that Account in accordance with a certain arrangement . . . arrived at by mutual discussions.

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We were faced with a very similar situation three years ago with Dollar Account No. 1, where a handful of claims remained. We did not agree to the return to Iran of any of the funds in Dollar Account No. 1 and Iran brought an action in the Tribunal to have the Tribunal order the return of those funds in Dollar Account No. 1 which could not conceivably be at issue.

That is, the amount of claims against Dollar Account No. 1 were such that over \$500 million of Dollar Account No. 1 were not at issue anymore.

We resisted that suit in the Tribunal and we lost. The Tribunal ordered us, after several months of litigation, to transfer those funds—and those funds were within our control in the New York Fed—to Iran. We had to do it because non-compliance with the Tribunal order could lead to a suit in Federal court in the United States under the Algiers Accords, where Iran could sue the government of the United States and get us ordered by our own courts to comply with our treaty obligations.

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I was anticipating that if we had not reached agreement on Dollar Account No. 2 eventually, Iran would have been forced to bring a suit against us. Instead of being a demonstration of some practicality and good will on both sides, it would have turned into another fight that we would have lost.⁴

Following the hearing, the Department of State forwarded written responses to a number of questions submitted by the subcommittee. Excerpts from the questions and answers follow:

II. U.S.-IRANIAN RELATIONS

. QUESTION:

2. What is the status of discussions on U.S. compensation for the victims of the Iran Air Flight 655 disaster last summer?

— Is Iran cooperating at all?

— Is the U.S. proceeding to make payments to third country nationals since the Iranian government has not cooperated?

— Have any Iranian nationals filed law suits against the United States for loss of family?

— What is the status of those law suits?

ANSWER: The United States offer of *ex gratia* compensation for the families of the Iranian nationals who died on Iran Air Flight 655 has been presented to the Government of Iran and explained in detail. At this point, Iran has not accepted the offer, nor has it provided the information needed to calculate payments to individual family members. Rather, Iran has sought compensation for the families of the victims in

⁴ *Id.* at 25-27.

the suit it filed at the International Court of Justice (ICJ), in addition to its other demands in that case.

In light of the pendency of the suit, the United States has not dealt directly with individual Iranian families on the matter of compensation.

In the meantime, the U.S. is proceeding to implement the offers of *ex gratia* compensation for third country nationals. Compensation for families of non-Iranian victims is not affected by Iran's posture on this matter.

All of the third country governments have indicated that they intend to defer to their nationals with regard to our offer. Several countries have indicated that at least some of their nationals will accept our offer, and we expect some payments to be made in the near future.

For the time being, we are continuing to respond to questions from the third country governments and their nationals.

To date, the U.S. has been named in two lawsuits filed in U.S. courts.

The first was filed in the United States District Court for the Central District of California on behalf of the family members and economic dependents of four Iranian victims of the Iran Air shootdown. The case was *Ahmad Ghaderi Nejad, et al., vs. United States of America, et al.*, Nos. CV 89-3991 AWT, CV 89-4610 AWT, CV 89-4618 AWT, CV 89-4665 AWT, CV 89-5254 AWT.

On September 25, 1989, the U.S. filed a motion to dismiss on jurisdictional grounds. The motion was based upon: The nonjusticiable nature of claims (which are political questions not genuinely sounding in tort); the Senate Secrets Doctrine, which precludes litigation where disclosure of classified material would be necessary; and the sovereign immunity of the United States, which has not been waived on the facts giving rise to the litigation.

On November 7, 1989, the court dismissed the case with prejudice on the basis of the United States Government's motion.

A second action was filed on November 27, 1989, in the Western District of Washington on behalf of one Iranian family and the class of all persons killed in the incident. The case is *Mitra Koohi et al., vs. United States et al.*, C.A. No. C89-1699.

The time to file the government's responsive motion has not lapsed. Such a motion will be filed in due course.

QUESTION:

3. What is the next step in the World Court law suit brought by Iran against the United States for the downing of the Iran Air plane?

- When will arguments be heard?
- Have there been any preliminary discussions?

ANSWER: On May 17, 1989, Iran filed its applications (or "complaint") before the International Court of Justice relating to the downing of Iran Air Flight 655. Since that time the United States has appointed an Agent—the State Department Legal Adviser, Abraham D. Sofaer—and the President of the Court has met with the Parties to discuss how the Court should proceed. The next likely steps will be for the Court to

appoint (in accordance with its rules) an *ad hoc* judge chosen by Iran, and to address the jurisdictional objections of the United States. We are awaiting a decision of the Court on the scheduling of jurisdictional proceedings.

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III: IRANIAN ASSETS ISSUE

QUESTION:

1. Iran also has 6 FMS [foreign military sales] claims against the United States totalling \$10 billion, but only really two of them have been adjudicated, a small one in Iran's favor and a larger helicopter case in the U.S.'s favor.

- Why has progress been so slow on these claims?
- How much money is in the Iran FMS Trust Fund today before these remaining claims are settled and does this figure include interest accrued over the last decade?
- Have any FMS claims awards been made to Iran pending resolution of issues relating to billing for equipment and services rendered as well as payment for equipment held in the United States?
- When can we expect the resolution of these issues relating to billing procedures?

ANSWER: The Tribunal has a very large docket. It has been addressing Iran's FMS claims against the United States at the same time it considers numerous other claims between the two governments and thousands of claims brought by private nationals of one government against the other government.

The Trust Fund is the subject of complex, technical litigation. The amount to which Iran may be entitled will be determined after all litigation concerning the Trust Fund is complete. The Trust Fund balances have not been credited with interest.

No FMS claims awards have been made to Iran pending resolution of FMS issues relating to billing for equipment and services. In August 1988, however, the Tribunal issued a partial award concerning equipment held in the United States. The Tribunal held that the United States was not required by the Algiers Accords to return the equipment to Iran but must instead pay Iran the value of the equipment as of March 26, 1981, the date on which the United States informed Iran that it would not allow the export of the equipment. The parties are currently engaged in briefing the valuation issue.

A final decision on the issues concerning billing procedures will probably not be issued by the Tribunal for at least a year or two, possibly longer.

QUESTION:

2. How are you determining the valuation of Iranian properties still held by the United States?

- What is your estimate of the value of this equipment as of 1981?
- Is it correct that none of this equipment will have to be shipped to Iran but that Iran must be compensated for its value as of 1981?
- When will you have completed your valuation of that equipment?

ANSWER: The Tribunal issued an award holding that Iran is entitled to the full value of Iranian military property held by the United States as of 26 March 1981. It then ordered further briefing of the value of the items as of this date. The United States is in the process of determining the full value of the goods as of March 1981, taking into account age, condition, state of disrepair, and other relevant factors.

The Department of State, working with Department of Defense, is still in the process of identifying and analyzing the equipment at issue. Iran has filed a briefing claiming the value of this equipment to be \$415.7 million, including interest. We will present our views to the Tribunal in a brief that we anticipate will be filed in April of 1990. We estimate that our valuation will be substantially below Iran's.

. . . .

QUESTION:

3. Is it accurate that there are some 3,800 U.S. weapons that Iran had bought before 1981 but did not receive by 1981?

- Are the main items on this list an F-14, two helicopters, missiles and spares, a TSQ-73 system (air defense), and ammunition?
- Why is it so difficult to evaluate what this equipment is worth?

ANSWER: The property subject to the Tribunal's award consists of two categories. The first category consists of approximately 3,800 items that Iran had returned to the United States for repair, calibration, or modification. For the most part, these items are not "weapons" as such, but parts of military equipment such as circuit cards, valves, fuses, and the like. The second category consists of other Iranian-titled equipment which was in the United States at Iran's request for various purposes.

There are additional items which Iran bought before 1981 but as to which title never passed to Iran. However, the 3,800 U.S. weapons referred to in the question appear to be a reference to the 3,800 items returned for repair.

The major items comprising the second category of property referenced in the prior question include an F-14, two helicopters, a Hawk Battery and spares, three TSQ-73 firing control systems and spares, and a submarine.

The valuation process is so difficult in part because the Tribunal's August 1988 award was the first notice the parties had that they would be expected to value the equipment as of the March 26, 1981 date. Thus, neither party had been collecting or preserving documentation and information with respect to physical deterioration and market condition as of that point.

Moreover, the valuation process itself is inherently complex. The first category of property consists of more than 3,800 individual items returned for repair. An assessment must first be made as to the 1981 condition of each of 3,800 items. Even if an item was repaired, a value must be assigned that reasonably reflects its prior use by Iran. If not repaired, an entirely different value must be assigned.

The second category of property consists of highly complex military systems, almost all of which were used by Iran in the United States (e.g., for training of Iranian military personnel). Reasonable adjustment must be made, as of 1981, for depreciation, refurbishment requirements, and

other non-recoverable costs. Other factors such as availability of willing purchasers, sales of comparable equipment, and technical obsolescence may also be relevant. The Hawk Battery, for example, consists of over 40 individual component subunits, each of which must be valued separately.

QUESTION:

4. You have stated that the amount of FMS claims Iran seeks—some \$10 billion—is vastly inflated.

— Why is it inflated?

— Do you estimate the total to be far less than half the figure they give?

— One official was quoted as saying that the value of this equipment is about \$250 million. Is that figure accurate?

— Was their figure of \$10 billion in your view simply taken from thin air because it equalled the assets the United States turned over originally in 1981 to Iran and to the Hague Tribunal?

— How long will it take to get a better fix on the actual amount of FMS claims due Iran? Several years?

— What is delaying the process? The U.S. valuation process or Iran or the pace of work of the Hague Tribunal?

ANSWER: Of the \$10 billion, \$5 billion is for nonspecific “consequential” damages which Iran claims is owed as a result of alleged breaches by the United States of obligations relating to the FMS program. We doubt that Iran will be able to recover much, if anything, on this claim. Much of the remainder of the Iranian claim is based on allegations of defects, non-deliveries and overcharges which we believe are without merit or greatly exaggerated.

Apart from its claim for consequential damages, Iran has not yet presented specific evidence in support of large portions of its claims, including its claims of more than \$2 billion in overbilling. It is impossible to speculate on how much Iran will prove and recover.

The figure of \$250 million relates to one aspect of the FMS case—the value of Iranian military properties detained in the U.S. We are working to formulate estimates of the equipment’s value as of 1981.

We do not know why Iran selected the \$10 billion figure, beyond the fact that it includes the portions of Iran’s claim (sections 1 through 5) in which it has sought particular dollar amounts in damages, as well as a \$5 billion figure for consequential damages.

It will probably be at least one year, and more likely several years, before we have a good idea of how much is due Iran. We are working now on the valuation of Iran’s equipment in the United States; that issue may be decided in a little over another year. As to the issues concerning overbilling, additional time will be required to evaluate both the legal arguments and the factual support that can be mustered. In a number of cases the final charges for Iranian purchases cannot be determined until the overall procurement contracts under which the U.S. purchased these items are closed and the costs accounted for.

There has not really been “delay” in reviewing Iran’s FMS claims. It is simply inevitable that in a case of this magnitude and complexity years will be needed to wrap up the contracts and address the issues.

QUESTION:

5. Will the Security Account claims be the major focus of work at The Hague in the coming months?

— How many claims in rough magnitude have been adjudicated and how many remain?

— Is Iran still committed to keep that account above \$500 million at all times?

— In your negotiations over dissolving Dollar Account No. 2, did Iran reaffirm its commitment to keep the balance in the Security Account above \$500 million?

ANSWER: Under the Algiers Accords, the Security Account is used on a continuing basis for the payment of awards by the Iran–United States Claims Tribunal to American claimants. Of a total of 3,856 claims filed at the Tribunal, approximately 2,600 remain. Of those disposed of, about 800 were the results of terminations of cases by the claimant, 220 of awards on agreed terms, and 230 of adjudications. American claimants have been awarded approximately \$1.3 billion by the Tribunal. Iran is committed under the Algiers Accords to replenish the Security Account whenever it falls below \$500 million. Iran has affirmed to the United States, including at the November 1989 discussions, that it intends to honor this commitment.

QUESTION:

6. Is it fair to say that the claims in the Security Account will take years to adjudicate?

ANSWER: If all the cases that remain and are not withdrawn need to be adjudicated by the Tribunal, it is fair to say this will take many years. If it is possible to resolve large numbers of these cases by negotiations, the process would be considerably shortened.

QUESTION:

7. In an answer to the subcommittee, the State Department said that the United States is “always prepared to settle claims on a realistic basis. Until Iran is ready to do so as well, there is nothing we can do to release the funds.”

— Which accounts are you referring to?

— Precisely where, other than in the FMS claims areas, is Iran being unrealistic?

— What can be done to speed up the process on both sides?

ANSWER: In general, the Algiers Accords created several accounts for the payment of claims by Americans, and provided that the balance would not be returned until the claims in question are paid.

In our view, a number of Iran’s claims or its defenses to American claims are unrealistic, such as its \$10 billion claim for the former Shah’s assets, its \$770 million claim for damages to Iranian railways in World War II, and its opposition to the payment of valid claims by “dual national” claimants—that is, claimants who have both U.S. and Iranian nationality. If we can expedite the Tribunal process by negotiations which serve the interests of the U.S. and American citizens, we will attempt to do so.⁵

⁵ *Id.* at 64–71.

INTELLECTUAL PROPERTY

(U.S. *Digest*, Ch. 10, §7)*International Registration of Audio-visual Works*

On January 24, 1990, President George Bush transmitted to the Senate for advice and consent to ratification the Treaty on the International Registration of Audiovisual Works, done at Geneva, April 20, 1989, which establishes a multilateral system to facilitate enforcement of rights, to increase legal security concerning audio-visual works in foreign countries, and to contribute to the fight against piracy. In his letter of transmittal, the President noted that the Treaty is in essence administrative and procedural in nature; that it is not a copyright treaty and would not affect substantive national copyright laws, and that its registration system is voluntary, for use at the option of the producers (or "rightsholders") of audio-visual works.

The President's letter of transmittal was accompanied by a report on the Treaty and the Regulations thereunder, signed by Acting Secretary of State Lawrence Eagleburger under date of December 22, 1989, and reading as follows:

The purpose of the Treaty is to facilitate enforcement of rights and increase the legal security in transactions relating to audiovisual works and to contribute to the fight against piracy. The Treaty provides for the establishment of an international register for applications and related materials concerning the exercise of rights in audiovisual works such as motion pictures and television programs, including in particular rights relating to their exploitation. Statements recorded in the International Register are given *prima facie* effect in countries party to the Treaty. Public access to the elements entered into the international system will be facilitated by publication in a timely gazette. A comprehensive database of rights owners will also be maintained from which WIPO will be able to provide information electronically to interested parties. The International Bureau of the World Intellectual Property Organization will serve as the secretariat for the Treaty.

Essentially, this Treaty is procedural in nature; it is not a substantive copyright treaty and explicitly provides that it shall not be interpreted as affecting national copyright laws. The International Register established by the Treaty is voluntary in the sense that it may be used at the option of the producers or rightsholders of audiovisual works. Further, there are to be no financial contributions from governments; rather the International Register is to be self-financing from the payment of fees for registration and other services, and the sale of publications such as the Gazette. The start-up costs are to be borne by the Government of Austria and the International Register will be located in Austria.

Following is a summary of the text of the Treaty.

Article 1 establishes a "Union" of the Contracting States for the international registration of audiovisual works.

Article 2 defines an "audiovisual work" as one consisting of "a series of fixed related images, with or without accompanying sound, susceptible of being made visible and, where accompanied by sound, susceptible of being made audible."

Article 3 provides for the establishment of the International Register for the purpose of recording statements concerning the identity of audiovisual works (e.g., title, producer, director) and rights in such works (e.g., reproduction, distribution, public performance). This article also provides for an administrative unit called the International Registry, which is to be located in Austria. In this regard, a bilateral agreement has been concluded between the Government of Austria and WIPO. Only applicants from Contracting States may file an initial application for inclusion of a statement in the International Register but subsequent applications relating to previous registrations may be filed by any person or legal entity.

Article 4 is the most important article in the Treaty in that it deals with the legal effects of statements recorded in the International Register. As a general rule each Contracting State undertakes to recognize that a statement recorded in the International Register shall be considered true until the contrary is proved. However, this principle is subject to two exceptions. Article 4(1)(i) makes an exception for cases where under a Contracting State's copyright or other intellectual property law the statement cannot be valid. The second exception, Article 4(1)(ii), applies in cases where the statement is contradicted by another statement recorded in the International Register. Article 4(2) is a safeguard clause that provides that the Treaty does not affect the copyright law, or other intellectual property law, of any Contracting State or any rights under the Berne Copyright Convention for the Protection of Literary and Artistic Works or any other treaty concerning intellectual property rights.

Article 5 provides for an Assembly consisting of all the Contracting States and sets forth in detail the various "tasks" of that body, including the establishment of a consultative committee of representatives of non-governmental organizations with an interest and expertise in audiovisual works. This committee will have an important advisory role concerning registration fees and the Administrative Instructions which govern the administration of the Treaty and the Regulations.

Pursuant to Article 5(7) most of the decisions of the Assembly will be taken by a simple majority vote except for amendments of the Regulations, which require a two-thirds vote, and amendments of certain articles regarding the Assembly itself and finances, which require a three-fourths vote.

In order to encourage adherence to the Treaty, the expenses of one delegate to the Assembly from each Contracting State shall be paid from funds of the Union.

Article 6 relates to the International Bureau, and its various tasks, including keeping the International Register.

Article 7 concerns finances of the Union with particular reference to the budget of the Union which shall be financed from non-governmental sources, including fees and other charges for services, sales of publications, and voluntary donations.

Article 8 provides that the Regulations, annexed to the Treaty, are adopted at the same time as the Treaty. These regulations may be amended, as necessary, by the Assembly by a two-thirds majority of the votes cast.

Article 9 states that the Treaty may be revised by a conference of the Contracting States, which is to be convoked by the Assembly. Certain non-substantive articles may be revised either in a revision conference or according to a procedure elaborated in Article 10.

Article 10 sets forth the procedure for revision of a number of non-substantive articles by the Assembly. Amendments to these articles are to be adopted by three-fourths of the votes cast in the Assembly and subsequently must be accepted by three-fourths of the Contracting States by written notification of acceptance to the Director General of WIPO. (Any such amendment will be binding on all Contracting States parties to the Treaty at the time the amendment was adopted.) This two-step procedure is intended to safeguard against any precipitous action by the Assembly, while ensuring that non-substantive changes may be made within a reasonable period of time.

Article 11 provides that the Treaty is open to member States of the World Intellectual Property Organization.

Article 12 provides that the Treaty shall enter into force three months after five States have ratified or acceded to the Treaty.

Article 13 provides that no reservations may be made to the Treaty with one exception. A State may declare that it will not apply Article 4(1) on the *prima facie* effect of statements recorded in the International Register to statements which do not concern the exploitation of intellectual property rights in audiovisual works (e.g., statements about mortgages or liens).

Article 14 allows a Contracting State to denounce the Treaty which shall take effect one year after notification to the Director General. However, a Contracting State must be a party to the Treaty for at least five years before it can denounce the Treaty.

Article 15 provides that the Treaty shall remain open for signature until December 31, 1989.

Article 16 sets forth the role of the Director General of WIPO as the depositary of the Treaty.

Article 17 requires the Director General to notify member States about certain events referred to in various articles (e.g., amending the Regulations).

Following is a summary of the Regulations which are annexed to the Treaty and which were approved at the Diplomatic Conference.

Rule 1 contains the "definitions" for the purposes of the Regulations (e.g., "work-related application", "person-related application").

Rule 2 sets forth in detail the requirements for a "person-related application" and a "work-related application." Applications may be filed in English or French.

Rule 3 covers the processing and examination of applications. For an application to be accepted, the applicant must state the source of his right and must also state whether that right was originally vested in him or was derived from another. If the right was derived from another, the applicant must give the name and address of the natural person or legal entity from whom the right was obtained and must describe the legal

means by which he obtained it. Additionally, the applicant must state that the statements are to the best of the applicant's knowledge true and that accompanying documents are originals or true copies of originals. If such statements are not present, the application will be rejected. The Rule sets out a specific procedure whereby corrections regarding inadvertent omissions, conflicting statements, etc., may be made within 30 days of an invitation by the International Registry. This rule also provides a procedure to resolve contradictions between applications within 60 days.

Rule 4 provides that each application shall have a filing date and a registration number.

Rule 5 states that where an application is not rejected all statements contained in the application will be registered in the International Register and the registration will be published in "the Gazette."

Rule 6 relates to "the Gazette" in which the prescribed elements of all registrations will be published. The Gazette will be in English except that elements regarding applications that were filed in French will also be in French.

Rule 7 provides that the International Registry will provide information regarding any registration, certified copies of any registration certificates, and other services (e.g., a monitoring service) for which fees will be charged.

Rule 8 concerns fees which are to be determined by the Director General after consulting the Consultative Committee. The fees are subject to review and change by the Assembly. Fees for applicants from developing countries who are Contracting States will be reduced initially by 15 percent with the possibility of further reductions by the Assembly.

Rule 9 provides for Administrative Instructions regarding the Treaty and the Regulations to be drawn up, or modified, by the Director General after consultation with the Consultative Committee. The Instructions and any modifications will be published in the Gazette.

United States ratification will not require any amendments to the U.S. copyright law, or any other implementing legislation.

Ratification of the Treaty on the International Registration of Audio-visual Works is supported by the Copyright Office, as the principal substantive agency interested in the Treaty. In the private sector the American Film Marketing Association, a trade association representing 111 member companies who license the distribution rights of American independent films in the international market, strongly supports expeditious ratification. The Motion Picture Association of America has no official position on the Treaty.¹

¹ S. TREATY DOC. No. 8, 101st Cong., 2d Sess., at V-VIII (1990). On the basis of a recommendation by the Governing Bodies of the World Intellectual Property Organization, committees of experts were convened in March and November 1988, to prepare for the diplomatic conference held in Geneva, April 10-20, 1989, at which the Treaty was adopted.

INTERNATIONAL DECISIONS

KEITH HIGHT AND GEORGE KAHALE III

International Court of Justice—advisory jurisdiction—Convention on the Privileges and Immunities of the United Nations—reservations

APPLICABILITY OF ARTICLE VI, SECTION 22, OF THE CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS. 1989 ICJ Rep. 177, 29 ILM 98 (1990).

International Court of Justice, December 15, 1989.

On May 24, 1989, the Economic and Social Council of the United Nations (ECOSOC) adopted Resolution 1989/75, requesting an advisory opinion from the International Court of Justice on the applicability of Article VI, section 22 of the Convention on the Privileges and Immunities of the United Nations¹ (Convention) to the case of Dumitru Mazilu, a Romanian national who was a special rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities (Sub-Commission).² Section 22 of the Convention specifies the privileges and immunities of experts on missions for the United Nations. Rejecting a challenge to its jurisdiction by Romania, the Court unanimously held that Article VI, section 22 of the Convention was applicable.³

On March 13, 1984, upon nomination by Romania, Mazilu was elected to the Sub-Commission for a term of three years. The Sub-Commission subsequently asked Mazilu to prepare a report on human rights and youth,⁴ which was to be submitted at the 39th session of the Sub-Commission in 1986. When that session was deferred until 1987, Mazilu's three-year term, like that of the other members of the Sub-Commission, was extended for a year. The 39th session convened in Geneva on August 10, 1987, but Mazilu did not appear; nor was any report from him presented. Romania submitted a letter in which it stated that he had suffered a heart attack and fallen seriously ill in May 1987.

On September 4, 1987, the Sub-Commission deferred consideration of Mazilu's report to its next session, scheduled for 1988.⁵ Although his term as a member of the Sub-Commission was due to expire on December 31, 1987, the Sub-Commission explicitly referred to the report Mazilu was to submit and to him as its rapporteur.

Various attempts by the United Nations during the next half year to establish regular communication with Mazilu and enable him to travel to Geneva were unsuccessful. However, he did inform the Under-Secretary-General

¹ Feb. 13, 1946, 21 UST 1418, TIAS No. 6900, 1 UNTS 4.

² The request was made pursuant to Article 96, paragraph 2 of the United Nations Charter and in accordance with General Assembly Resolution 89 (I) of December 11, 1946, on a priority basis.

³ Judges Oda, Evensen and Shahabuddeen appended separate opinions to the decision.

⁴ Sub-Comm'n Res. 1985/12 (Aug. 29).

⁵ Sub-Comm'n Dec. 1987/112 (Sept. 4).

for Human Rights by letter that he had been hospitalized twice and forced as of December 1, 1987, to retire from his various governmental posts; and that despite strong pressure on him and his family, he had refused to comply with the Government's request that he voluntarily decline to submit the report. He stated further that the Romanian authorities were refusing to grant him a permit to travel to Geneva.

On February 29, 1988, elections were held for new members of the Sub-Commission. Among those elected was Ion Diaconu, a Romanian national, who in June of that year asked to prepare a report on human rights and youth. The United Nations took the position that although Mazilu's term as a member of the Sub-Commission had expired at the end of 1987, he was still mandated as a special rapporteur on the subject and was charged with drawing up a report, unless or until the Sub-Commission or a competent superior body decided otherwise.

Special efforts by the Sub-Commission to secure Mazilu's attendance at its 40th session, held in August 1988, again proved futile. The Romanian Government responded to the Sub-Commission's request for assistance in locating Mazilu and facilitating a visit to him by members of the Sub-Commission and the Secretariat by stating that "the case of Mr. Mazilu was an internal matter between a citizen and his own Government and for that reason no visit to Mr. Mazilu would be allowed."⁶

On September 1, 1988, the Sub-Commission requested that the Secretary-General make one more approach to Romania, invoking the Convention and asking for that Government's cooperation.⁷ The Romanian Government responded by an aide-mémoire of January 6, 1989, asserting that Mazilu had applied for disability retirement on account of his heart condition and had been examined "in accordance with Romanian law . . . by a panel of doctors which decided to place him on the retired list . . . for an initial period of one year"; and that "at the end of the first year . . . , he was examined by a similar panel of doctors which decided to extend his retirement on grounds of ill-health."⁸ Romania also denied that the Convention was applicable to Mazilu's case and maintained that it "does not equate rapporteurs, whose activities are only occasional, with experts on missions for the United Nations."⁹ Even if rapporteurs enjoyed some of the status of experts, Romania stated, "they can enjoy only functional immunities and privileges . . . connected with their activities for the United Nations, during the period of their mission, and then only in the countries in which they perform the mission and in countries of transit."¹⁰ These privileges and immunities did not apply, in Romania's view, to the country where the expert was permanently resident: "[I]n the country of which he is a national . . . an expert only enjoys privileges . . . in respect of actual activities spoken or written which he performs in connection with his mission."¹¹ Finally, Romania was firmly opposed to any reference of the matter to the Court.

⁶ 1989 ICJ REP. 177, 183, para. 19.

⁸ 1989 ICJ REP. at 184, para. 23.

¹⁰ *Id.*

⁷ Sub-Comm'n Res. 1988/37 (Sept. 1).

⁹ *Id.* at 185, para. 24.

¹¹ *Id.*

In considering the request for an advisory opinion, the Court was strictly limited to the question of the applicability of section 22 of the Convention to Mazilu and not to which "privileges and immunities Mr. Mazilu might enjoy as a result of his status and whether or not these had been violated."¹² But before it could proceed to the substantive question, the Court had to determine whether it was barred from delivering an advisory opinion by Romania's 1956 reservation to the Convention, which stated that "for the purpose of the submission of any dispute whatsoever to the Court . . . , the consent of all the parties to the dispute is required," including cases in which the "advisory opinion of the International Court is to be accepted as decisive."¹³

In its ruling in the 1950 *Peace Treaties* case, the Court had pointed out that while consent was the basis of its jurisdiction in contentious cases, advisory opinions were not dependent upon the consent of states and in principle should not be refused. By their nature nonbinding, advisory opinions are given by the Court to help the organs requesting them to determine their future course of action.¹⁴ This reasoning was equally valid in situations "where a legal question was pending not between two States, but between the United Nations and a member State."¹⁵

The Court went on to point out that section 30 of the Convention, to which the Romanian reservation applied, operated "on a different plane and in a different context" than did Article 96 of the Charter, upon which ECOSOC's request for an advisory opinion had been based. The former was a dispute settlement mechanism that had been drawn up to take account of differences between the United Nations and a state party to the Convention. However, in the instant case, since no reference to section 30 had been made, the Court did not have to determine the effect of the Romanian reservation to that provision. In view of its finding that the nature and purpose of the proceedings was "that of a request for advice on the applicability of a part of the General Convention, and not the bringing of a dispute before the Court for determination," the Court found that there was no danger of disrupting the unity of the Convention or modifying the content and extent of the obligations entered into by Romania.¹⁶ Nor was there a "compelling reason," in the sense adverted to by the Court in the *Western Sahara* case,¹⁷ to avoid giving the opinion without Romania's consent. The question of the *applicability* of the Convention should not be confused with the *application* of the Convention in the case of Mazilu.¹⁸

After analyzing the relevant portions of the Convention, the Court concluded that the purpose of section 22 is to "enable the United Nations to entrust missions to persons who do not have the status of an official of the

¹² *Id.* at 187, para. 27.

¹³ *Id.* at 188, para. 29.

¹⁴ Interpretation of Peace Treaties, 1950 ICJ REP. 65, 71 (Advisory Opinion of Mar. 30).

¹⁵ 1989 ICJ REP. at 189, para. 31.

¹⁶ *Id.* at 190, para. 35.

¹⁷ *Western Sahara*, 1975 ICJ REP. 12, 25, paras. 32-33 (Advisory Opinion of Oct. 16) (considerations of judicial propriety might impel the Court to refuse an opinion when consent is lacking).

¹⁸ 1989 ICJ REP. at 190-91, paras. 37-39.

Organization," and to guarantee them the privileges and immunities necessary to carry out their functions independently.¹⁹ It is widespread practice in the United Nations to entrust missions to experts who are not permanent officials of the Organization. While the term "mission" (in both English and French) originally implied a journey, it had "long since acquired a broader meaning and nowadays embrace[s] in general the tasks entrusted to a person, whether or not those tasks involve travel."²⁰

Addressing the question whether the privileges and immunities provided for under Article VI of the Convention could be invoked against the state of which the expert is a national or is permanently resident, the Court determined that, as the immunities are conferred to ensure the independence of international officials and experts in the interests of the Organization, they must be respected by all states. Several states had made reservations with regard to persons who were their nationals or permanently resident in their territory, the Court observed, and the "very fact that it was felt necessary to make such reservations confirms the conclusion that, in the absence of such reservations, experts on missions enjoy the privileges and immunities provided for under the Convention in their relations with the States of which they are nationals."²¹

In the concluding paragraphs of its decision, the Court determined that section 22 of the Convention was applicable to special rapporteurs of the Sub-Commission: "Since their status is neither that of a representative of a member State nor that of a United Nations official, . . . they must be regarded as experts on missions . . . even in the event that they are not, or are no longer, members of the Sub-Commission."²² Consequently, Mazilu, whose status was that of an ex-member of the Sub-Commission who had been mandated as a special rapporteur, and had remained one throughout the period in question, was entitled to enjoy the privileges and immunities provided for in section 22 of the Convention. With regard to the implied contention by Romania that it had a unilateral right to determine Mazilu's status as a result of his alleged physical and mental incapacity to carry out his task as special rapporteur, the Court concluded that "it was for the United Nations to decide whether in the circumstances it wished to retain Mr. Mazilu as special rapporteur."²³

In his separate opinion, Judge Oda, while essentially agreeing with the Court's conclusions, explained why he believed that ECOSOC's request for an advisory opinion actually gave the Court scope to give "certain pronouncements on the modalities of the *application* of Section 22 of the Convention to the *case* of Mr. Mazilu."²⁴ Pointing out that Romania had implicitly taken the position that it had a right unilaterally to determine Mazilu's status, a position the Court had rejected in the final part of its decision, Judge Oda stated that "the Court should not have neglected to recount and deal explicitly with the way in which Mr. Mazilu, in Romania, was isolated from

¹⁹ *Id.* at 194, para. 47.

²⁰ *Id.* at 195, para. 49.

²¹ *Id.*, para. 51.

²² *Id.* at 197, para. 55.

²³ *Id.* at 198, para. 59.

²⁴ *Id.* at 200, para. 1 (Oda, J., sep. op.) (emphasis in original).

contacts with the United Nations Centre for Human Rights in Geneva and prevented from travelling to Geneva for the completion of the task entrusted to him." These facts were "fundamental" to Mazilu's case, in Judge Oda's view.²⁵

Judge Evensen, in his short separate opinion, focused on the pressure on Mazilu's family, an aspect of the case that he felt needed special attention. The integrity of the family and of family life is a fundamental principle of human rights, Judge Evensen observed, deriving "not only from conventional international law or customary international law but from 'general principles of law recognized by civilized nations.'" ²⁶ In Judge Evensen's view, respect for this principle is an integral part of the privileges and immunities guaranteed under section 22 of the Convention.

In his comprehensive and detailed separate opinion, Judge Shahabuddeen commented upon various aspects of the case. Concerning the priority basis of the request for an advisory opinion, Judge Shahabuddeen concluded that it was within the Court's judicial power to determine the need for priority in all cases. In the key section of his opinion, Judge Shahabuddeen set out his reasons for determining that Article VI, section 22 of the Convention is applicable even when the expert is in countries wholly unconnected with his mission (including the country of his nationality or permanent residence), so as "to enable him to embark on such a journey undertaken in connection with the discharge of [his] functions."²⁷ Otherwise, the privileges and immunities conferred upon an expert during the time spent on journeys in connection with a mission "could turn out to be illusory, with the further result that the mission itself could remain undischarged."²⁸

The primary significance of this decision lies in the unanimous reaffirmation by the Court of its relationship with the other organs of the United Nations in the performance of its advisory role and of its right to provide legal advice to those organs, when duly requested, independently of the consent of individual member states. This principle has become firmly established in the Court's advisory jurisprudence and, indeed, could be regarded as forming the very basis of the Court's right to carry out its functions under Article 96 of the Charter. In addition, the decision is significant for its rejection of the Romanian Government's implicit attempt unilaterally to terminate Mazilu's status as special rapporteur and to interfere with the independent functioning of an expert of the United Nations. The downfall of the Ceausescu regime as a result of a popular uprising that broke out immediately after the delivery of the advisory opinion makes it impossible to assess how the opinion would have contributed to resolving the "difference" between the former Romanian Government and the United Nations.

TERRY D. GILL

*Institute of Public International Law
University of Utrecht*

²⁵ *Id.* at 208, para. 23.

²⁶ 1989 ICJ REP. at 210-11 (Evensen, J., sep. op.).

²⁷ 1989 ICJ REP. at 219 (Shahabuddeen, J., sep. op.).

²⁸ *Id.* at 221.

Extraterritorial jurisdiction—applicability of constitutional restraints to U.S. officials acting abroad—searches by U.S. officials of alien-owned premises in foreign country

UNITED STATES v. VERDUGO-URQUIDEZ. 110 S.Ct. 1056, 29 ILM 441 (1990).

U.S. Supreme Court, February 28, 1990.

American criminal law has expanded its reach, seeking to regulate conduct abroad that injures the United States, such as drug smuggling and international economic crimes. American police frequently venture offshore or over the border to find evidence and defendants. What standards should govern American police activities that occur offshore and affect foreign nationals? If United States criminal law is applied to citizens of foreign states, do the protections of the Constitution tag along?

The Supreme Court's new answer is: not the Fourth Amendment.¹ At least, not the warrant clause. In *United States v. Verdugo-Urquidez*, the Supreme Court made clear that it is reluctant to find within the Constitution any detailed code of conduct for U.S. law officers in overseas investigations. A majority of the Court (Chief Justice Rehnquist and Justices White, O'Connor, Scalia and Kennedy) held that search warrants are not required for searches conducted abroad by American agents, where the search is directed at a foreign national who lacks a "substantial connection" to the United States. So far as the Constitution is concerned, the property of such foreign citizens can be seized without a warrant by U.S. agents, even while the target of the search is being held to answer criminal charges in a U.S. court. A plurality of the Court (Chief Justice Rehnquist, joined by Justices White, O'Connor and Scalia) went further to suggest that the other protections of the Fourth Amendment to the Constitution—for instance, that a search and seizure be based on probable cause and be conducted in a reasonable manner—are equally unavailable to nonresident alien defendants in searches abroad.

The decision comes at the close of a century in which the Supreme Court has created a uniform code of investigative rules for state and federal law enforcement within the United States. A Fourth Amendment once held to restrict only federal officers was extended to protect against state and local intrusions.² It requires that a warrant be obtained for any domestic criminal search of a home or business, unless there are exigent circumstances.³ Where

¹ The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

² See *Wolf v. Colorado*, 338 U.S. 25, 27-28 (1949) (Frankfurter, J.) ("The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause" of the Fourteenth Amendment).

³ See *McDonald v. United States*, 335 U.S. 451 (1948); *Michigan v. Tyler*, 436 U.S. 499 (1978).

a warrant cannot be obtained because of time and emergency, a criminal search must still be based upon probable cause—reason to believe the search will disclose evidence, contraband or instrumentalities of a crime—and it must be conducted reasonably. An exclusionary rule forbids the use of unconstitutionally seized evidence in criminal prosecutions against the victim of the search, and the rule was extended by the Warren Court from federal trials to state trials as well.⁴ The sense was that there should not be two standards of protection for privacy, if only because it offered unwise opportunities for shell games with jurisdiction.⁵ But it is now apparent that this constitutional guardianship of privacy will not extend easily past the waters' edge.

In 1986 agents of the U.S. Drug Enforcement Administration (DEA) conducted a search of the homes of René Martín Verdugo-Urquidez in Mexicali and San Felipe, Mexico, shortly after he was forcibly delivered by Mexican police to the U.S. border, where marshals arrested him on drug charges. Following the arrest, an American agent stationed in Calexico, California, telephoned DEA agents in Mexico City to request the search of the defendant's homes, seeking evidence to strengthen the Government's drug case and any evidence to connect Verdugo-Urquidez to the murder of DEA agent Enrique Camarena Salazar. Thus, the search was put in motion from U.S. territory.⁶ The Mexico City DEA agents tried to reach an official of the Mexican Attorney General's office, and then obtained approval for a search from the Director General of the Mexican Federal Judicial Police. The DEA agents were also told by the local police comandante that he was checking with a representative of the Mexican Attorney General. None of the DEA agents notified or sought counsel from the United States Attorney's office handling the *Verdugo-Urquidez* prosecution. No warrant from a U.S. judge was sought; no warrant from Mexican judicial authorities was obtained either, despite Article 16 of the Mexican Constitution.⁷ The search was carried out on a Saturday evening and in the early morning hours of Sunday at Verdugo-Urquidez's properties by DEA agents and Mexican police officials. Verdugo-Urquidez was in the federal correctional center in San Diego by the time the search was executed. The search was rather broad by U.S.

⁴ See *Weeks v. United States*, 232 U.S. 383, 391–92 (1914); *Mapp v. Ohio*, 367 U.S. 643 (1961). In *United States v. Leon*, 468 U.S. 897 (1984), a good faith exception was added to the exclusionary rule; if a police officer in good faith relies on a search warrant that proves faulty, the evidence seized can still be used.

⁵ In *Elkins v. United States*, 364 U.S. 206 (1960), prior to the *Mapp* decision, the Court forbade the "silver platter" doctrine, which formerly allowed federal prosecutors to introduce evidence seized in violation of the Constitution by state agents.

⁶ The *Verdugo-Urquidez* Court will nonetheless characterize the search events as wholly extra-territorial.

⁷ Article 16 of the Constitution of Mexico states: "No one shall be molested in his person, family, domicile, papers, or possessions except by virtue of a written order of the competent authority stating the legal grounds and justification for the action taken. . . . Every search warrant . . . can be issued only by judicial authority and . . . must be in writing." Flanz & Moreno, *Constitution of Mexico*, in *CONSTITUTIONS OF THE COUNTRIES OF THE WORLD* (A. Blaustein & G. Flanz eds. 1988) [hereinafter *CONST.*].

standards; the defendant's unexamined files were seized by the comandante and given to the DEA agents when the Mexican police grew tired and wished to conclude the joint search. Verdugo-Urquidez moved to suppress the fruits of the search at his subsequent narcotics trial in the United States.

The trial court held that the search was a joint venture of the U.S. and Mexican police, and that the Fourth Amendment applied.⁸ Failure to obtain a search warrant from either a U.S. or a Mexican judge voided the search, said District Judge J. Lawrence Irving, because no exigent circumstances had been shown. The search was also conducted unreasonably; it was overbroad and was made after midnight with no showing of necessity, and the DEA did not leave an inventory of seized property at the site. Although the Federal Rules of Criminal Procedure do not explicitly authorize any federal judge to issue warrants for a search conducted outside his or her judicial district,⁹ the trial judge concluded that this omission could not limit Fourth Amendment requirements.¹⁰

The Court of Appeals for the Ninth Circuit affirmed (2-1). The opinion by Judge David Thompson, joined by Judge William Norris, held that the warrant clause of the Fourth Amendment applied to any search abroad by U.S. agents when the defendant-owner of the property was in custody in the United States.¹¹ The district judge had intimated that a Mexican search

⁸ See *United States v. Verdugo-Urquidez*, 86-0107-JLI-Crim. (S.D. Cal. Feb. 5, 1987), reproduced as App. B to the Government's Petition for Certiorari in the United States Supreme Court, *United States v. Verdugo-Urquidez*, No. 88-1353 (LEXIS, Briefs file).

⁹ See FED. R. CRIM. P. 41(a) ("A search warrant authorized by this rule may be issued by a federal magistrate . . . within the district wherein the property or person sought is located . . .").

¹⁰ Other cases have held that the federal courts have "inherent authority" to issue search warrants required by the Fourth Amendment, even where Rule 41 fails to provide for the case. See *United States v. Torres*, 751 F.2d 875, 878 (7th Cir. 1984) (Posner, J.) (stating that the power to issue a warrant was historically, and still is, an "inherent" or "common law" power. "Indeed, it is an aspect of the court's power to regulate procedure. A search warrant is often used to obtain evidence for use in a criminal proceeding, and is thus a form of (or at least an analogue to) pretrial discovery"), *cert. denied*, 470 U.S. 1087 (1985); *United States v. Biasucci*, 786 F.2d 504, 509 n.6 (2d Cir.), *cert. denied*, 479 U.S. 827 (1986); *United States v. Ianniello*, 621 F.Supp. 1455, 1467 (S.D.N.Y. 1985). See also *United States v. New York Telephone Co.*, 434 U.S. 159, 168 n.14 (1977) (acknowledging, without disapproval, that some courts of appeals had derived authority for judicial orders authorizing "pen registers" from an "inherent power closely akin to" FED. R. CRIM. P. 41); *Eisentrager v. Forrestal*, 174 F.2d 961 (D.C. Cir. 1949) (Congress's omission to assign statutory jurisdiction to issue writs of habeas corpus cannot restrict federal courts' exercise of the writ, *rev'd on other grounds sub nom. Johnson v. Eisentrager*, 339 U.S. 763 (1950); FED. R. CRIM. P. 54(b)(2) ("These rules apply to proceedings for offenses committed upon the high seas or elsewhere out of the jurisdiction of any particular state or district . . ."); *id.* 57(b) ("If no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these rules or with any applicable statute"); 18 U.S.C. §3238 (1988).

These cases are close cousins to the lingering suggestion of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), and *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816), that the Article III jurisdiction of federal courts may be self-executing, even without the legislative assignment of jurisdiction.

¹¹ *United States v. Verdugo-Urquidez*, 856 F.2d 1214 (9th Cir. 1988).

warrant might satisfy the Fourth Amendment requirement, but the Ninth Circuit majority was unequivocal in finding that a U.S. warrant had to be obtained. The dissenting judge, Alfred Wallace, suggested that under the U.S. Constitution, formed by "We The People," Fourth Amendment protections were designed for "the people" who belonged to the polity as citizens or resident aliens; a nonresident alien such as Verdugo-Urquidez had no standing to make a Fourth Amendment claim for an extraterritorial search.¹²

In reversing the Ninth Circuit, Chief Justice Rehnquist argued that the Fourth Amendment was distinguishable from the guarantees of the Bill of Rights protecting fairness at trial; a Fourth Amendment violation was "fully accomplished" at the time the search and seizure took place, and introduction of its fruits would not further compromise any Fourth Amendment right. Hence, the case should be seen as concerning only an extraterritorial matter; "if there were a constitutional violation, it occurred solely in Mexico."¹³ But there was no violation, the Chief Justice concluded. The text of the Fourth Amendment speaks solely of the right of "the people" to be secure in persons, houses, papers and effects, and "the people" is a "term of art" referring only to persons who are part of the national community, or who have "sufficient connection" with the United States. Protection of aliens against extraterritorial action by the United States was not within the Framers' concern, said the Chief Justice, citing the prize seizures of French vessels during the 1798 quasi-war with France. Prior case law, such as *Balzac v. Porto Rico*,¹⁴ showed that fundamental rights, including that of trial by jury, were not always applied outside the territorial United States even where the United States had dominion. An alien brought to the United States under arrest has a "legal but involuntary presence" in the United States and should not be considered as having a sufficient connection to enjoy Fourth Amendment protections against an extraterritorial search. To require a search warrant for an extraterritorial search would have a harmful effect on U.S. operations abroad, including use of the armed forces.

It is clear that a majority of the Court believes that the warrant requirement does not apply abroad against nonresident aliens. But the other ideal of the Fourth Amendment, that searches be reasonable, may still have force in an overseas search. In joining Chief Justice Rehnquist's opinion, providing the fifth vote for the Court, Justice Kennedy qualified his own views in concurrence. He pointedly rejected the plurality's argument that the Fourth Amendment reference to "the right of the *people* to be secure" excludes nonresident aliens *per se*. Justice Kennedy was also of the opinion that a foreign citizen would enjoy the protections of the Due Process Clause of the Fifth Amendment¹⁵ in "American trial proceedings." It is therefore conceivable that in Kennedy's view, the Fourth Amendment requirement of reason-

¹² *Id.* at 1231 (Wallace, J., dissenting).

¹³ 110 S.Ct. 1056, 1060.

¹⁴ 258 U.S. 298 (1922).

¹⁵ The Due Process Clause of the Fifth Amendment provides, "nor shall any person . . . be deprived of life, liberty, or property, without due process of law."

ableness would still govern overseas searches.¹⁶ Certainly, a grossly unreasonable search could violate due process. The Government conceded in its brief that "the Due Process Clause can be invoked to bar the admission of evidence in American courts where that evidence was obtained by a method that 'shocks the conscience' or fails to 'respect certain decencies of civilized conduct.'" ¹⁷

Justice Stevens offered another middle position, with more explicit protection for foreign citizens. Stevens concurred in the Court's judgment but declined to join the Chief Justice's opinion. No warrant is needed for overseas searches of noncitizens, Stevens agreed,¹⁸ but the Fourth Amendment does require that searches be "reasonable"; here, on the facts, the search was.

Three dissented. Justice Blackmun agreed with Justice Stevens's halving of the Fourth Amendment: the warrant requirement did not apply, but reasonableness should, in circumstances where the property owner was already within the United States at the time of the search, and perhaps wherever the search was designed to enforce U.S. criminal law against the target of the search. Blackmun would have remanded to the court of appeals to determine the reasonableness of the search.

Justice Brennan, joined by Justice Marshall, concluded in dissent that "mutuality" demands that the United States extend constitutional protections together with the prohibitions of its laws; the Fourth Amendment, including the warrant requirement, was "an unavoidable correlative of the Government's power to enforce the criminal law."¹⁹

American troops operating abroad would not need a lawyer with them, said Justices Brennan and Marshall, offering two inconsistent reasons. It is the very act of "investigating and prosecuting" a foreign national that brings him within the class of people protected by the Fourth Amendment; if there were no criminal investigation, the Fourth Amendment might not apply. But even if the Fourth Amendment were applied to noncriminal situations, "exigent circumstances" could excuse compliance with the warrant requirement, and strict standards of probable cause might yield in assessing "reasonableness" in the context of national security; doctrines of qualified immunity could defeat suits for damages under the Fourth Amendment. The

¹⁶ On the other hand, Justice Kennedy noted his view that "differing and perhaps unascertainable conceptions of reasonableness and privacy" may "prevail abroad." 110 S.Ct. at 1068 (Kennedy, J., concurring).

¹⁷ Brief for the United States, *United States v. Verdugo-Urquidez*, No. 88-1353, at 30 (citing *Rochin v. California*, 342 U.S. 165, 172, 173 (1952)). It was, of course, the Due Process Clause of the Fourteenth Amendment that provided the route for protecting core principles of privacy in state cases.

¹⁸ Justice Stevens found the warrant requirement inapplicable because "American magistrates have no power to authorize such searches." 110 S.Ct. at 1068 (Stevens, J., concurring). Whether or not one agrees with the result, the explanation is thin. There is a difference between a necessary and a sufficient condition. An American magistrate's approval may be prerequisite in domestic law, even though American agents should additionally seek the permission of appropriate foreign authorities under international and foreign law.

¹⁹ 110 S.Ct. at 1070 (Brennan, J., dissenting).

indecisive rationale of the dissent may only convince the reader that the full detailed strictures of Fourth Amendment law, which puzzle even government prosecutors, could apply most inappropriately to an army in the field.

The position of Justices Brennan and Marshall, and of the Ninth Circuit, drew upon the Fourth Amendment paradigm provided in *Berlin Democratic Club v. Rumsfeld*,²⁰ a case decided after Watergate and the Church Committee hearings on intelligence activities directed at U.S. citizens. *Berlin Democratic Club* held that a warrant must be obtained from a U.S. judge before U.S. Army officials could wiretap American citizens in Berlin, even if the surveillance was authorized under the law of the Federal Republic of Germany. The Fourth Amendment protected U.S. citizens abroad against their own Government's intrusion, even though there was no U.S. magistrate or judge in Europe available to authorize a search, and foreign legal procedures were complied with. The Ninth Circuit panel in *Verdugo-Urquidez* extended *Berlin Democratic Club* one step further, on the reasoning that if U.S. citizens and nonresident aliens must be treated alike for American trial procedures conducted in courts in the United States, why should there be a difference in their protection from searches abroad?²¹

This was pushing the chain one link too far. The Supreme Court had never indicated its approval of *Berlin Democratic Club*—even for U.S. citizens. Indeed, the Supreme Court has applied the Constitution overseas only in limited contexts to protect U.S. citizens. For example, in *Reid v. Covert*,²² a plurality guaranteed the right of trial by jury for the wives of U.S. soldiers stationed in Germany, in the face of army court martials and death sentences for murder. The Court has previously indicated sharp limits on the projection of the Constitution abroad to protect targets of executive action. For example, enemy aliens imprisoned abroad by U.S. Army authorities were not permitted to challenge their imprisonment in U.S. courts through habeas corpus.²³

A "waters' edge" rule for the Fourth Amendment, except for citizens and resident aliens, stems from the plurality's sense that U.S. action abroad must be governed by necessity, a sense more familiar to war than to peace. If the United States takes part in a joint action with the Peruvian Government to burn a coca farm, would damage to innocent property be subject to recovery under the Fifth Amendment as an uncompensated taking? Would an American-Peruvian military operation seizing airplanes and destroying landing strips of a suspected smuggling operation be subject to complaint under the Fourth Amendment? While many of the same principles are common to the law of war, martial law and the law of civilian society—e.g., proportionality

²⁰ 410 F.Supp. 144 (D.D.C. 1976).

²¹ *Berlin Democratic Club* may have inspired the Ninth Circuit's additional step; the *Berlin Democratic Club* court dismissed the claim of an Austrian citizen who complained of U.S. electronic surveillance, but also concluded that "when a non-resident alien is brought from abroad to appear for and be the subject of a domestic criminal prosecution, there are different expectations of treatment than when a non-resident alien is simply affected by United States officials abroad." *Id.* at 152. See also *United States v. Toscanino*, 500 F.2d 267, 279–80 (2d Cir. 1974).

²² 354 U.S. 1 (1954).

²³ See *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

and avoiding harm to innocent third parties—the rules are framed with far more latitude in the law of war and martial law, and the procedure for their application involves the actors' own best judgment, without the interposed decision of a magistracy.²⁴

The Supreme Court also surely had its eye on the pending case against General Manuel Antonio Noriega,²⁵ in which the defense might argue that the Fourth Amendment applied to any search conducted against Noriega's property as soon as he was in U.S. custody.

What is most disturbing in the plurality's opinion is the ahistorical suggestion that the constitutional structure of the United States was meant to have as its beneficiaries only U.S. citizens and resident aliens. While this is true of political rights, it is manifestly not true of rights that exist under a general law of nations. For example, James Madison spoke in the Virginia ratifying convention about the importance of creating foreign diversity jurisdiction in federal courts so that foreign creditors could recover legitimate debts in transactions with Americans.²⁶ The first Judiciary Act also provided that aliens could sue in federal court for any tort under the law of nations.²⁷ A basic right against abusive interference with property and person was not outside the Founders' concerns, even for aliens.

Aliens have been subject at times to surly treatment under the Constitution, for example, under the aegis of Congress's plenary power to regulate naturalization.²⁸ But a bright-line guarantee for the application of constitutionalized criminal investigative procedures has been the alien's presence on U.S. soil. The plurality in *Verdugo-Urquidez* would disturb this territorial safeguard and create a category of persons who are within U.S. borders yet unable to claim full constitutional protections in criminal investigations.²⁹

²⁴ The Court of Appeals for the District of Columbia Circuit struggled with the middle ground between the world of civilian law and the perceptions of a Hobbesian *ausland* in *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500 (D.C. Cir. 1984) (en banc), summarized in 79 AJIL 449 (1985), vacated and remanded in light of subsequent legislation, 471 U.S. 1113 (1985). In *Ramirez* a cattle ranch in Honduras was occupied by U.S. Army troops as a camp to train Salvadoran soldiers following Congress's ban on the dispatch of additional American advisers to El Salvador. The land was owned by a U.S. citizen, as sole shareholder of several Puerto Rican corporations and their Honduran corporate subsidiaries. Six judges of the District of Columbia Circuit found there was a justiciable cause of action under the Fifth Amendment for injunctive or declaratory relief; the Fifth Amendment rule against government appropriations of property without just compensation applied to property abroad. The four dissenting judges argued that the federal courts should not interpose themselves in overseas military exercises, and that the case for injunctive relief was variously barred as a nonjusticiable political question, by principles of equitable discretion, or by a Honduran act of state, with the remaining possibility of a damages recovery under the Tucker Act in the Court of Claims.

²⁵ *United States v. Noriega*, 88-0079-CR (S.D. Fla. filed Feb. 4, 1988) (trial pending).

²⁶ See 3 ELLIOT'S DEBATES 583 (1836) (speech of James Madison); 3 *id.* at 575 (speech of Edmund Randolph); Friendly, *The Historic Basis of the Diversity Jurisdiction*, 41 HARV. L. REV. 483, 495-98 (1928).

²⁷ Judiciary Act of 1789, §9, 1 Stat. 77, codified at 28 U.S.C. §1350 (1982).

²⁸ See *The Chinese Exclusion Cases*, 130 U.S. 581 (1889); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893).

²⁹ In a noncriminal context, the Fourth Amendment may apply differently to aliens and to citizens, because of the Government's interests in protecting national security. *Cf.* *Foreign*

The idea of a constitutional class system gained a toehold in the litigation over excludable aliens in the Mariel Cuban and Haitian refugee emigrations—people who were “constructively” outside the United States for constitutional purposes. The plurality would expand this category to include foreign defendants deliberately brought to the United States for trial,³⁰ and even, perhaps, illegal aliens.³¹

The logistical problems of obtaining domestic warrants for an extraterritorial search may often be prohibitive, as the Government argued in its brief. If so, would not a better rule be a rule of reason? One could have held that where the target of a search is detained in the United States for prosecution, and the dominant purpose of the search is to obtain evidence for use in the criminal prosecution, the Fourth Amendment requires a government search of the defendant's property abroad to be “reasonable,” to be evaluated upon a totality of the circumstances, with none of the *per se* rules of domestic Fourth Amendment jurisprudence, and with evidence to be excluded only where conduct is grossly unreasonable. A good faith attempt to comply with the search procedures of foreign law could constitute one factor in the evaluation of “reasonableness.” Indeed, upon the facts found by the district court, the agents' conduct in this case would have satisfied a standard of reasonableness and was certainly not grossly unreasonable.³²

Intelligence Surveillance Act, 50 U.S.C. §1801 (1982) (different standards for electronic surveillance of foreign nationals and U.S. citizens). But in *Verdugo-Urquidez*, the purpose of the search was to gather evidence for criminal prosecution.

³⁰ Since the plurality so efficiently excluded nonresident aliens from the “people” protected by the Fourth Amendment for extraterritorial searches, it is not clear how they could manipulate constitutional text to allow these noncitizens any Fourth Amendment rights for searches and seizures conducted *within* the United States.

³¹ In *Verdugo-Urquidez*, the Court awkwardly disowns its recent opinion in *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984), where, as the Chief Justice put it, “a majority of Justices assumed that the Fourth Amendment applied to illegal aliens in the United States.” 110 S.Ct. at 1064. The statements in *Lopez-Mendoza* should not be considered “dispositive of how the Court would rule on a Fourth Amendment claim by illegal aliens in the United States if such a claim were squarely before us,” instructs the Chief Justice of a changed *Verdugo-Urquidez* Court. *Id.* at 1065. *Lopez-Mendoza* held that the exclusionary rule would not be applied to civil deportation proceedings, but stated: “We do not condone any violations of the Fourth Amendment that may have occurred in the arrest of [illegal aliens] Lopez or Sandoval. . . . Our conclusions concerning the exclusionary rule's value [in deportation proceedings] might change if there developed good reason to believe that the Fourth Amendment violations by INS officers were widespread.” 468 U.S. at 1050.

³² On the basis of the practice of many drug dealers in maintaining records of their transactions, there was likely probable cause for the searches. The seizure of some files without examination in the early morning hours and the failure to leave an inventory might disqualify under the rules of domestic searches, but the U.S. agents did not control the decision to conclude the search abruptly. Mexican law seems to require a warrant for physical searches. *See* CONST. Art. 16, *supra* note 7. But the search was conducted on a weekend, when Mexican judicial assistance might not have been available, and a prompt search was likely essential to prevent Verdugo-Urquidez's associates from destroying evidence once word of his arrest filtered back. As the trial judge complained, the DEA agents were imprudent in failing to seek any advice from the United States Attorney, the Department of Justice or DEA headquarters on the search, including advice on whether Mexican law dispenses with warrants in “exigent circumstances”; but absent unusual facts, the U.S. agents might in good faith have relied on the legal determination of the Mexican police officials.

The theory of the *Verdugo-Urquidez* plurality raises the same misgivings as the old "silver platter" cases from pre-*Mapp* days; if one wishes to use Article III courts to impose criminal sanctions, does respect for the character of the judicial process not demand some minimum standard for the methods used to gather evidence? The poor reputation of the exclusionary rule over the last two decades and the civilized character of the search in *Verdugo-Urquidez* probably dictated that the Court would not apply the exclusionary rule in this case. But one worries that the Court's confinement of the Fourth Amendment could give rise to less-attractive fact patterns. Law enforcement agents, like other humans, can stumble, even act blindly. The Court should also think hard about its own relationship to action that may violate basic guarantees of foreign law or customary international law.³³ It is one thing to hold that the courts should not seek to interject themselves in international disputes; it is quite different to propose that the courts should ignore all issues of foreign and international legality when they are asked to apply U.S. penal sanctions to individuals abroad.

It would certainly be misguided for the Executive to conclude that once abroad, anything goes. A sensible Department of Justice will recognize the need for careful administrative controls on the conduct of foreign searches. Prosecutions in federal courts are always subject to the nonconstitutional "supervisory power" of the federal judiciary, if official behavior goes beyond the pale. There are the uncharted waters of the Alien Tort Claims Act, which allows an alien to sue an American citizen for any tort under the law of nations. And as Justice Kennedy cautioned, "All would agree . . . that the dictates of the Due Process Clause of the Fifth Amendment protect the defendant."³⁴ We may be in a second era of selective incorporation, and any conduct that troubles the conscience is likely to inspire a judicial remedy.

RUTH WEDGWOOD
Yale Law School

Extraterritorial jurisdiction—U.S. securities laws—applicability of antifraud provisions to wholly foreign transaction.

MCG, INC. v. GREAT WESTERN ENERGY CORP. 896 F.2d 170.
U.S. Court of Appeals, 5th Cir., March 16, 1990.

This case involved the applicability of the antifraud provisions of the U.S. securities laws to a purchase of securities outside the United States to which the registration requirements of the securities laws were inapplicable. The trial court and court of appeals focused on the finding of fact that the U.S. buyers, who were not eligible to take part in the foreign offering, made the purchase through an offshore affiliate without the seller's knowledge, to

³³ See Universal Declaration of Human Rights, GA Res. 217A (III), UN Doc. A/810, at 71 (1948), Art. 12 ("No one shall be subject to arbitrary interference with his privacy, . . . home or correspondence Everyone has the right to the protection of the law against such interference or attacks").

³⁴ 110 S.Ct. at 1068 (Kennedy, J., concurring).

avoid the measures taken by the seller to render the registration requirements inapplicable. In dismissing for lack of subject matter jurisdiction, the court of appeals (per Politz, J.) found that this critical fact distinguished the case from all prior cases addressing the "extraterritorial" application of the U.S. securities laws.¹

The case was decided just prior to the promulgation by the U.S. Securities and Exchange Commission (SEC) of Regulation S, which provides specific guidance to U.S. and foreign issuers of securities abroad as to the circumstances under which registration will not be required under section 5 of the Securities Act of 1933, as amended (15 U.S.C. §77e).² An important proviso expressed by the SEC in connection with its adoption of Regulation S was that the regulation "relates solely to the applicability of the registration requirements of section 5 of the Securities Act, and does not limit the scope or extraterritorial application of the antifraud or other provisions of the federal securities laws."³ Thus, the SEC distinguished the extent of the extraterritorial application of the registration requirements, which it was willing to delineate, from the extraterritorial application of the antifraud provisions, which it has not been willing to delineate. *MCG, Inc. v. Great Western Energy Corp.* poses a limited challenge to this distinction.⁴

¹ 896 F.2d 170, 175.

² Offshore Offers and Sales, Securities Act Release No. 6863, [Current Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶84,524 (Apr. 24, 1990) [hereinafter Regulation S Release]. Regulation S was first published for public comment on June 10, 1988. Securities Act Release No. 6779, [1987-88 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶84,242 (June 10, 1988). It was repropounded in revised form on July 11, 1989. Securities Act Release No. 6838, [1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶84,426 (July 11, 1989). Regulation S is an exercise in limited administrative action to resolve a specific concern (and significant practical problem) raised by the possible "extraterritorial" application of the public-offering registration provisions of the Securities Act. Previously, Securities Act Release No. 4708 (July 9, 1964), 29 Fed. Reg. 9828 (codified in 17 C.F.R. §231.4708), and several SEC "no-action" letters had been used to construct a practice on which Regulation S, in turn, is based. See "no-action" letters cited in Regulation S Release, *supra*, nn. 15-18. This administrative guidance and practice has been built up over the years in light of Congress's failure to address the extent of extraterritorial application of the U.S. securities laws.

³ Regulation S Release, *supra* note 2, at 80,665. The release goes on to assert that "[i]t is generally accepted that different considerations apply to the extraterritorial application of the antifraud provisions than to the registration provisions of the Securities Act." *Id.* (citing Consolidated Gold Fields PLC v. Minorco, S.A., 871 F.2d 252, 262-63 (2d Cir.), *cert. dismissed*, 110 S.Ct. 29 (1989); Bersch v. Drexel Firestone Inc., 519 F.2d 974, 986 (2d Cir.), *cert. denied*, 423 U.S. 1018 (1975) ("It is elementary that the antifraud provisions of the federal securities laws apply to many transactions which are neither within the registration requirements nor on organized American markets")). This position is supported by the RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES [hereinafter RESTATEMENT (THIRD)] §416 comment a: "an interest in punishing fraudulent or manipulative conduct is entitled to greater weight than are routine administrative requirements" in determining the reasonableness of an exercise of jurisdiction. While this distinction may make sense in order to avoid providing a "roadmap to fraud," the legislative basis for the distinction is not apparent.

⁴ For example, the opinion includes the following quotable language: "Having gone to such lengths to structure a transaction not burdened by the securities laws, plaintiffs cannot expect to wrap themselves in their protective mantle when the deal sours." 896 F.2d at 175 (footnote omitted).

The case arose from the 1984 initial public offering on the London Stock Exchange of an aggregate of five million shares of common stock of Great Western Resources, Inc. (Great Western), a Texas corporation. MCG, Inc., and the other U.S. plaintiffs (MCG), alleged that Great Western and its English merchant bank, Brown, Shipley & Co., had fraudulently induced them to purchase \$600,000 worth of Great Western shares. The offering on the London Stock Exchange was not registered under section 5 of the Securities Act; to avoid the applicability of the registration requirements, Great Western had imposed certain restrictions typically designed to prevent sales to citizens or residents of the United States. Purchasers were required to certify their non-U.S. citizenship and residency, and the prospectus and legends on the stock certificates themselves listed the restrictions.

The court of appeals described the disparity in the parties' respective accounts of how MCG came to purchase the Great Western shares. This disparity, as it related to defendants' conduct in the United States, was crucial to the decisions of the trial court and the court of appeals to dismiss the case for lack of subject matter jurisdiction. MCG's president, Rodney Lee Dockery, asserted that he was contacted by the president of Great Western and by a representative of its English merchant bank, encouraged to purchase the shares, sent prospectuses and telexes and repeatedly telephoned, all while he was in the United States. According to Dockery, he was told by defendants that his U.S. corporations were ineligible to purchase the shares and that he should purchase through an offshore company. This he did, establishing a Hong Kong shell corporation, owned by MCG entities.⁵ Great Western and its English merchant bank told a different story. They stated that they had never solicited MCG's president, but that he had initiated contact regarding the offering and established the Hong Kong purchaser without their knowledge. In other words, defendants contended that they had merely sold shares to a Hong Kong corporation in connection with their English offering.

The facts regarding the relationship of the parties and activities to the United States are critical to a determination of subject matter jurisdiction or prescriptive jurisdiction. However, courts generally determine motions to dismiss for lack of such jurisdiction prior to trial on the merits and a full determination of the facts. Therefore, in several cases of challenge by the defendant to the court's subject matter or prescriptive jurisdiction in international securities fraud cases, the court has considered the facts in the light most favorable to the plaintiff for purposes solely of this initial determination, subject to continuing review of the court's jurisdiction based on changes in perception of the facts.⁶ In *MCG, Inc. v. Great Western Energy Corp.*,

⁵ The trial court found that the plaintiffs had organized the Hong Kong shell company, despite the fact that Dockery was unable to produce evidence of ownership of that company by MCG. *Id.* at 173.

⁶ *E.g.*, *Zoelsch v. Arthur Andersen & Co.*, 824 F.2d 27, 33 (D.C. Cir. 1987) ("On review of defendant's motion to dismiss under Fed.R.Civ.P. 12(b) and for summary judgment, we assume the truth of the allegations in plaintiff's complaint and liberally construe the possible theories of

plaintiffs did not benefit from this type of favorable consideration, presumably because the court considered the challenge by defendants to be a factual challenge, requiring consideration of matters outside the pleadings.⁷

The trial court at first denied the defendants' motion to dismiss for lack of subject matter jurisdiction, basing its finding of subject matter jurisdiction on the facts initially presented by the plaintiffs.⁸ However, at a subsequent hearing on personal jurisdiction over Brown, Shipley & Co., it appeared that Dockery lacked records of the many contacts he allegedly had, from the United States, with Great Western and its merchant bank. At the conclusion of this hearing, defendants' attorneys again raised the issue of subject matter jurisdiction. After reconsidering the issue, the trial court found that plaintiffs had organized the Hong Kong shell company without defendants' knowledge and that the named plaintiffs had never owned any Great Western stock. On the basis of this version of the facts, the trial court dismissed for lack of subject matter jurisdiction, concluding that the plaintiffs could not seek the protection of the U.S. securities laws, having taken "every measure" to avoid them.⁹

The competing version of the facts that plaintiffs sought to convey involves a purchase of shares in a U.S. company by a U.S. purchaser, solicited in the United States but effected, at defendants' request, through a Hong

liability asserted there"); *Leasco Data Processing Equipment Corp. v. Maxwell*, 468 F.2d 1326, 1330 (1972) (citing *Steele v. Bulova Watch Co.*, 344 U.S. 280 (1952)).

⁷ E.g., *Menchaca v. Chrysler Credit Corp.*, 613 F.2d 507 (5th Cir.), *cert. denied*, 449 U.S. 953 (1980); MOORE'S FEDERAL PRACTICE §12.07, at 12-47 (1989).

⁸ The extraterritorial application of the U.S. securities laws was approached as a question of subject matter jurisdiction in earlier cases. This approach involves a determination of whether there exist sufficient U.S. contacts to bring the conduct within the definition of interstate commerce contained in §3(a)(17) (15 U.S.C. §78c(a)(17)) of the Securities Exchange Act of 1934, as amended. The definition of interstate commerce, in turn, is generally coextensive with Congress's power under the Commerce Clause of the Constitution. U.S. CONST. Art. 1, §8, cl. 3. The RESTATEMENT (THIRD), *supra* note 3, §416 Reporters' Note 1, describes a shift from the subject matter jurisdiction analysis to an analysis that seeks to determine whether there are enough contacts with the United States to lead to a conclusion that Congress intended that U.S. law be applicable. The court of appeals cited *Zoelsch v. Arthur Andersen & Co.*, 824 F.2d 27, 30 (D.C. Cir. 1987), for the proposition that the jurisdictional provisions of the U.S. securities laws furnish no guidance to courts as to their extraterritorial reach.

⁹ 896 F.2d at 173. One possible extension of this concept, which the SEC would probably have difficulty accepting, is that it may be viewed as providing purchasers with the competence effectively to "waive" the application of the antifraud provisions in offshore transactions, by working with (or even against, as in the present case) the seller to avoid the application of the registration requirements. Section 14 of the Securities Act (15 U.S.C. §77n) would normally operate to render void any explicit waiver by a purchaser of the protections of the Securities Act. Section 29(a) (15 U.S.C. §77cc(a)) of the Securities Exchange Act of 1934, as amended, would operate similarly with respect to that Act. However, the Supreme Court in *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 517 (1974), held that this policy against waivers of the protections of the Securities Exchange Act might give way in the international context to the goal of fostering international commerce. *Scherk* could provide a basis for an argument that knowing waivers to facilitate participation in offshore transactions, which are presumably subject to the protections of other legal systems, should be permitted.

Kong corporate conduit on the London Stock Exchange. This version bears a strong resemblance to the facts of *Leasco Data Processing Equipment Corp. v. Maxwell*,¹⁰ in which a U.S. purchaser, at least partially solicited in the United States, purchased shares in London through a Netherlands Antilles conduit. The major distinction between plaintiffs' version of the facts in the case at hand and those of *Leasco* is that the seller in *Leasco* was an English company, while in *MCG* the seller was a Texas company. In *Leasco*, one of the leading cases on the jurisdictional reach of the antifraud provisions of the securities laws, Judge Friendly stated that if all the alleged misrepresentations had occurred in England, jurisdiction would be doubtful despite the alleged harm done to a publicly held U.S. corporate plaintiff. Since *Leasco* involved both significant U.S. conduct and U.S. effects, Judge Friendly found the antifraud provisions of the U.S. securities laws applicable.

After developing the factual base described above, the court of appeals in *MCG* sought to locate its decision within the body of case law that has developed under the antifraud provisions of the U.S. securities laws. It began by describing the two main bases for finding the securities laws applicable: (1) conduct within the United States when the effects are felt outside the United States,¹¹ and (2) effects within the United States when the conduct takes place outside the United States.¹² Obviously, if plaintiffs' version of the facts had been accepted, both domestic conduct and domestic effects would have been found.

On the basis of both the district and the appeals courts' refusal to consider *MCG* an indirect purchaser of Great Western securities, there were no effects in the United States.¹³ Even when the alleged beneficial ownership by *MCG* of the Hong Kong purchaser is considered, there would be no intentional or foreseeable U.S. effects if the defendants' argument that they did

¹⁰ 468 F.2d 1326 (2d Cir. 1972). Indeed, plaintiffs had argued that the case at hand was controlled by *Leasco*.

¹¹ 896 F.2d at 174 (citing *Leasco Data Processing Equipment Corp. v. Maxwell*, 468 F.2d 1326 (2d Cir. 1972); *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974 (2d Cir.), cert. denied sub nom. *Bersch v. Arthur Andersen & Co.*, 423 U.S. 1018 (1975); *11T v. Vencap, Ltd.*, 519 F.2d 1001 (2d Cir. 1975); *SEC v. Kasser*, 548 F.2d 109 (3d Cir.), cert. denied sub nom. *Churchill Forest Indus. v. SEC*, 431 U.S. 938 (1977); *Grunenthal GmbH v. Hotz*, 712 F.2d 421 (9th Cir. 1983); *Continental Grain v. Pacific Oilseeds, Inc.*, 592 F.2d 409 (8th Cir. 1979); and *RESTATEMENT (THIRD)*, supra note 3, §416(1)).

¹² *Id.* (citing *Schoenbaum v. Firstbrook*, 405 F.2d 200 (2d Cir.), modified, 405 F.2d 215 (2d Cir. 1968) (en banc), cert. denied sub nom. *Manley v. Schoenbaum*, 395 U.S. 906 (1969); and *RESTATEMENT (THIRD)*, supra note 3, §416(2)).

¹³ This finding distinguishes this case from *Leasco*, where the court considered (but did not find dispositive without domestic conduct) the indirect U.S. effects, through a Netherlands Antilles conduit corporation, of the foreign conduct. *Leasco*, 468 F.2d at 1337-38 ("But even if *Leasco N.V.* is the beneficial owner, it would be elevating form over substance to hold that this entails a conclusion that the purchases did not have a sufficient effect in the United States . . ."). In the case at hand, if the court had accepted Dockery's statements, without supporting records, that *MCG* was the owner of the Hong Kong shell company, it could have found at least some U.S. effects under *Leasco*. In *Leasco*, these indirect domestic effects caused from abroad would not, standing alone, have been a sufficient basis for jurisdiction. However, when combined with significant U.S. conduct, jurisdiction became available. *Id.* at 1334-35.

not know of the Hong Kong purchaser's U.S. ownership is accepted.¹⁴ The court of appeals concluded that "[b]ecause Great Western was not registered on any American exchange, and because no American individual or corporate entity can be said to have invested in the London offering, the *Schoenbaum* 'effects' test is not applicable."¹⁵

The court of appeals turned next to jurisdiction based on conduct within the United States. As the trial court and court of appeals rejected plaintiffs' assertions that defendants had engaged in conduct in the United States, domestic conduct could not support jurisdiction. This conclusion stands in sharp contrast to the one reached in *Leasco*, where the court basically accepted the plaintiff's assertions of fact at face value for purposes of determining prescriptive or subject matter jurisdiction, and used the domestic conduct alleged, in combination with domestic effects, to serve as a basis for jurisdiction.

Thus, *MCG, Inc. v. Great Western Energy Corp.* could have been decided differently if plaintiffs had not been put to their proof on the issue of U.S. contacts earlier than normal in these types of cases, and been found wanting. The appeals court's affirmance of the district court's dismissal can be understood in light of the factual gaps in plaintiffs' case. However, from the standpoint of the Regulation S principle of separation of the registration requirements of section 5 of the Securities Act from the antifraud provisions for purposes of determining prescriptive or subject matter jurisdiction, this case poses a challenge. The court linked the plaintiffs' circumvention of Great Western's offshore public offering restrictions—and thus the applicability of the registration requirements—with the applicability of the antifraud provisions. Whether the basis for this linkage was plaintiffs' alleged "subterfuge,"¹⁶ or the mere fact of plaintiffs' action to avoid the restrictions on Great Western's offering, is unclear.

JOEL P. TRACHTMAN

The Fletcher School of Law and Diplomacy

Jurisdiction of state courts—forum non conveniens—foreign torts—comity

DOW CHEMICAL CO. v. CASTRO ALFARO. 786 S.W.2d 674.
Supreme Court of Texas, March 28, 1990.

Construing section 71.031 of the Texas Civil Practice and Remedies Code, the Texas Supreme Court, in a 5-4 decision, held that the Texas state

¹⁴ The RESTATEMENT (THIRD), *supra* note 3, §402(2)(a), calls for consideration, in determining the reasonableness of exercise of jurisdiction to prescribe, of "the extent to which the activity takes place within the territory, or has *substantial, direct, and foreseeable* effect upon or in the territory" (emphasis added).

¹⁵ 896 F.2d at 174. *Schoenbaum* had emphasized a foreign corporation's listing on a U.S. securities market as indicating an "effect" on the integrity of the U.S. capital markets. 405 F.2d 200 (2d Cir. 1968).

¹⁶ *MCG, Inc. v. Great Western Energy Corp.*, No. CA 3-87-1852-T (N.D. Tex. 1988) (order granting motion to dismiss).

trial court lacked the authority to dismiss a personal injury or wrongful death claim on the ground of *forum non conveniens*.¹ Section 71.031 provides that foreigners may enforce in Texas certain actions arising from occurrences abroad. This provision served as the basis for subject matter jurisdiction, and the question before the court was whether it also precluded a *forum non conveniens* analysis. Although the case was decided on a relatively narrow issue of statutory interpretation, it raises important issues regarding the propriety of permitting courts in one forum to hear and decide cases that have significant factual connections to another forum.

Plaintiffs, Costa Rican residents and employees of Standard Fruit Co. (a U.S. subsidiary of Dole Fresh Fruit Co.), together with their wives, brought suit against Dow Chemical Co. and Shell Oil Co. in Texas in 1984.² They

¹ Section 71.031 of the Texas Civil Practice and Remedies Code provides in pertinent part as follows:

(a) An action for damages for the death or personal injury of a citizen of this state, of the United States, or of a foreign country may be enforced in the courts of this state, although the wrongful act, neglect, or default causing the death or injury takes place in a foreign state or country, if:

(1) a law of the foreign state or country or of this state gives a right to maintain an action for damages for the death or injury;

(2) the action is begun in this state within the time provided by the laws of this state for beginning the action; and

(3) in the case of a citizen of a foreign country, the country has equal treaty rights with the United States on behalf of its citizens.

(b) All matters pertaining to procedure in the prosecution or maintenance of the action in the courts of this state are governed by the law of this state.

(c) The court shall apply the rules of substantive law that are appropriate under the facts of the case.

TEX. CIV. PRAC. & REM. CODE ANN. §71.031 (Vernon 1986) [hereinafter section 71.031]. The Texas Supreme Court found that the third prong of subsection (a) of this provision is satisfied by the Treaty of Friendship, Commerce, and Navigation, July 10, 1851, United States-Costa Rica, Art. VII, para. 2, 10 Stat. 916, 920, TS. No. 62, providing for reciprocal protection and national treatment of citizens and "free and open access to the courts of justice in the said countries." In arguing that interpreting this provision to foreclose *forum non conveniens* would not result in the flood of litigation predicted by defendants, plaintiffs' counsel stated that most countries, including India (the home of the *Bhopal* plaintiffs), do not provide such "equal treaty rights." Supplemental Brief of Respondents in Response to New Amici Curiae and other Post-Argument Briefs at 7. Counsel for Dow pointed out, however, that at least one plaintiff's lawyer involved in the *Bhopal* suit had argued that the third prong is satisfied so long as there is no express treaty limitation on access to courts by nationals of the foreign country. Petitioner's Supplemental Brief at 8-9.

² Other lawsuits have been brought in other jurisdictions, on the same grounds, by these or other plaintiffs, against these defendants or against Standard Fruit. In *Sibaja v. Dow Chem. Co.*, 757 F.2d 1215 (11th Cir.), cert. denied, 474 U.S. 948 (1985), the court upheld the dismissal on the grounds of federal *forum non conveniens*, against a challenge by plaintiffs on the basis that the trial court should have applied state (Florida) *forum non conveniens*. Federal *forum non conveniens* was established in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947), and later refined in *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981). In 1948, federal *forum non conveniens*—for transfer among federal courts, rather than to a state court or a foreign court—was codified at 28 U.S.C. §1404(a).

claimed that they had suffered personal injury, including sterility, due to exposure to dibromochloropropane (DBCP) manufactured by Dow and Shell, and sued on products liability, strict liability and breach of warranty theories.³

Almost three years after the suit was filed, Dow and Shell contested the trial court's subject matter jurisdiction, arguing in the alternative for a dismissal on grounds of *forum non conveniens*. The trial court found jurisdiction under section 71.031, but dismissed on grounds of *forum non conveniens*. The Texas Court of Appeals for the First District of Houston reversed the dismissal,⁴ and the Supreme Court of Texas affirmed the appellate judgment in an opinion written by Justice Ray.

The main issue decided by the Supreme Court of Texas was whether the language of section 71.031 was intended to foreclose the application of the *forum non conveniens* doctrine in death or personal injury actions brought in Texas. The statute states simply that "[a]n action for damages for the death or personal injury of a citizen of this state, of the United States, or of a foreign country may be enforced in the courts of this state . . ." (emphasis added). The interpretive question was whether this language barred the operation of the *forum non conveniens* doctrine, or whether the use of "may" in place of "shall" preserved the discretion of the trial court to dismiss on the basis of *forum non conveniens*.⁵

The majority opinion rejected the defendants' and dissent's argument that section 71.031 was not intended to foreclose the *forum non conveniens* defense in Texas. Justice Gonzalez, in dissent, had argued that the Texas legislature could not have intended to foreclose *forum non conveniens* because the doctrine "did not arrive upon the judicial landscape of this state until

Aguilar v. Dow Chem. Co., No. 86-4753 JGD (C.D. Cal. 1986), was also removed from state court to federal court and subsequently dismissed on the basis of *forum non conveniens*. In Cabalceta v. Standard Fruit Co., 883 F.2d 1553 (11th Cir. 1989), the court, dismissing on the basis of *forum non conveniens*, noted that plaintiffs had struggled for several years to have their claims litigated in a state court in the United States.

³ The Environmental Protection Agency had ordered general suspension of registrations for use of DBCP on November 3, 1977. 42 Fed. Reg. 57,543 (1977). According to Justice Doggett's concurring opinion, plaintiffs claimed that both before and after the EPA's suspension of these registrations, Shell and Dow shipped several hundred gallons of pesticide containing DBCP to Costa Rica for use by Standard Fruit. Dow and Shell claimed that they made their last delivery of DBCP to Standard Fruit in Costa Rica in 1978 and 1970, respectively. *Alfaro v. Dow Chem.*, 751 S.W.2d 208 (Tex. App.—Houston [1st Dist.] 1988) (writ granted).

⁴ *Alfaro v. Dow Chem.*, 751 S.W.2d 208 (Tex. App.—Houston [1st Dist.] 1988) (writ granted). See Note, *A Foreign Plaintiff Has an Absolute Right to Maintain a Personal Injury Cause of Action in Texas Without Being Subject to Forum Non Conveniens Dismissal*, 20 TEX. TECH. L. REV. 995 (1989).

⁵ The majority opinion did not address the argument made by Dow and Shell, and endorsed by Justice Hecht's dissent, that the use of the phrase "may be enforced" instead of more mandatory language such as "shall be enforced" in section 71.031 indicated an intent to preserve the discretion of the courts to decline to hear a case on grounds such as *forum non conveniens*. However, plaintiffs' brief had argued that mandatory language would be inconsistent with the expression of a right, as opposed to a duty, to sue in Texas. Brief of Respondents on Application for Writ of Error at 6.

after the predecessors to section 71.031 were enacted.”⁶ In rejecting this argument, the majority opinion traced the history and reception in Texas of *forum non conveniens*, finding that the concept, though not the term, had arrived in Texas significantly before 1913, when the first predecessor to section 71.031 was enacted. The purpose of this historical review was to determine whether the legislature could have intended to foreclose the application of *forum non conveniens* under the circumstances specified in section 71.031.

The Texas Supreme Court’s next inquiry was to determine whether this indeed had been the legislature’s intent. The majority opinion and Justice Doggett’s concurring opinion, on the one hand, and the dissenting opinions of Justices Gonzalez, Hecht and Phillips, on the other hand, also disagreed over the precedential value of a 1932 Texas court of appeals decision and of the Texas Supreme Court’s refusal to grant a writ of error therein. This decision, *Allen v. Bass*,⁷ stated that the predecessor to section 71.031, despite the otherwise available discretion of the court to dismiss transitory actions, “opens the courts of this state to citizens of a neighboring state and gives them an absolute right to maintain a transitory action of the present nature and to try their cases in the courts of this state.”⁸ The majority opinion found that its interpretation of section 71.031 was controlled by *Allen v. Bass*. Thus, not only was *forum non conveniens* in existence (and therefore capable of being restricted) at the time the predecessor to section 71.031 was enacted, but the statute had previously been interpreted to have been intended to restrict the operation of *forum non conveniens*. In his dissent, Justice Gonzalez argued that *Allen v. Bass* did not control, because it was a comity decision, rather than a *forum non conveniens* decision. This position is consistent with Justice Gonzalez’s argument that *forum non conveniens* did not arrive in the United States until *Gulf Oil Corp. v. Gilbert* (330 U.S. 501 (1947)), at least 15 years after *Allen v. Bass*.⁹ In addition, Justice Gonzalez pointed out that in a 1962 case, *Flaiz v. Moore*,¹⁰ the Texas Supreme Court had specifically reserved on whether the predecessor to section 71.031 deprived the court of any discretion to dismiss on *forum non conveniens* grounds.¹¹

This facially neutral exercise in statutory construction and application of precedent served as the basis for the court’s decision. The court avoided a policy-based discussion of the relative merits of *forum non conveniens*. How-

⁶ 786 S.W.2d 674, 691 (Gonzalez, J., dissenting).

⁷ 47 S.W.2d 426 (Tex. Civ. App.—El Paso 1932) (writ ref’d).

⁸ *Id.* at 427. A “transitory action” is a lawsuit that may be brought in more than one place.

⁹ *Allen v. Bass* states that “the principal, if not the only, question presented here for review, is as to the right of appellant, having had personal service in this state on each defendant, to have his cause of action tried in the courts of this state.” *Id.* at 426. Comity is generally applied to determine which sovereign’s law applies, rather than whether a cause of action is appropriately decided by a particular court. Comity deals with deference to another sovereign, while *forum non conveniens* deals with convenience, from both a public and a private standpoint. For a comparison of the doctrines, see Stewart, *Forum Non Conveniens: A Doctrine in Search of a Role*, 74 CALIF. L. REV. 1259 (1986).

¹⁰ 359 S.W.2d 872 (Tex. 1962).

¹¹ 786 S.W.2d at 693 (Gonzalez, J., dissenting).

ever, Justice Doggett's concurring opinion included a vigorous criticism of the doctrine generally, and of its application to this case in particular. He severely criticized the use of *forum non conveniens* to deny foreign plaintiffs a U.S. forum for causes of action based on harm occurring abroad. Justice Doggett's concurrence is informed by a rising concern that the United States serves as a base for the development, manufacture and distribution abroad of hazardous materials without providing a U.S. remedy to foreign plaintiffs who may be harmed thereby, and by the recent use of *forum non conveniens* in the *Bhopal* case to deny the Indian plaintiffs a U.S. forum.¹² *Forum non conveniens*, according to Justice Doggett, is generally unjustified as a matter of law and public policy, as it has "nothing to do with fairness and convenience and everything to do with immunizing multinational corporations from accountability for their alleged torts causing injury abroad."¹³ The doctrine has the "contorted result" of forcing foreign plaintiffs to argue that the United States is the more convenient forum, while the U.S. defendant argues that the foreign forum is more convenient.¹⁴ This anomaly stands in sharp distinction to the traditional concerns of multinationals about potential unfair treatment at the hands of courts in less-developed countries.

In addition to criticizing *forum non conveniens*, Justice Doggett showed how a *forum non conveniens* analysis could determine that it is appropriate to hear this case in Texas. He reviewed the private and public interest concerns established in *Gulf Oil Corp. v. Gilbert* for consideration in *forum non conveniens* analysis.¹⁵ He then argued that the traditional private interest concerns of *forum non conveniens* have been made obsolete by advances in travel and communications. With respect to the public interest factors, Justice Doggett pointed out that Texas had a substantial interest in the case. Shell is headquartered in Houston. Dow is headquartered in Midland, Michigan, but conducts extensive chemical operations from Houston and Freeport, Texas. Further, "[i]t is the height of deception to suggest that docket backlogs in our state's urban centers are caused by so-called 'foreign litigation.'"¹⁶ Jus-

¹² *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India* in December, 1984, 634 F.Supp. 842 (S.D.N.Y. 1986), *aff'd and modified*, 809 F.2d 195 (2d Cir. 1987), summarized in 81 AJIL 415 (1987). This well-known case, dismissed on the ground of *forum non conveniens*, has attracted a good deal of comment. See, e.g., Note, *An Economic Approach to Forum Non Conveniens Dismissals Requested by U.S. Multinational Corporations—The Bhopal Case*, 22 GEO. WASH. J. INT'L L. & ECON. 215 (1988); Jespersen, *The Bhopal Decision: A Forum Non Conveniens Perspective*, 18 LINCOLN L. REV. 73 (1988); Nanda, *For Whom the Bell Tolls in the Aftermath of the Bhopal Tragedy: Some Reflections on Forum Non Conveniens and Alternative Methods of Resolving the Bhopal Dispute*, 15 DEN. J. INT'L L. & POL'Y 235 (1987); Note, *The Bhopal Incident: How the Courts Have Faced Complex International Litigation*, 5 B.U. INT'L L.J. 445 (1987); Note, *Jurisdiction: Foreign Plaintiffs, Forum Non Conveniens, and Litigation Against Multinational Corporations*, 28 HARV. INT'L L.J. 202 (1987); Note, *International Mass Tort Litigation: Forum Non Conveniens and the Adequate Alternative Forum in Light of the Bhopal Disaster*, 16 GA. J. INT'L & COMP. L. 109 (1986); and Note, *The Razor's Edge: The Doctrine of Forum non Conveniens and the Union Carbide Methyl Isocyanate Gas Disaster at Bhopal, India*, 10 N.C. J. INT'L L. & COM. REG. 743 (1985).

¹³ 786 S.W.2d at 680-81 (Doggett, J., concurring).

¹⁴ *Id.* at 7 (citing Note, *Foreign Plaintiffs and Forum Non Conveniens: Going Beyond Reyno*, 64 TEX. L. REV. 193, 215 nn.144-46 (1985)).

¹⁵ 330 U.S. at 508-09.

¹⁶ 786 S.W.2d at 686 (Doggett, J., concurring).

tice Doggett found this assertion to be empirically unsubstantiated. Finally, he argued that comity can best be achieved by providing a remedy in the United States for foreign plaintiffs seeking to sue U.S. manufacturers of hazardous materials. This would help provide a check on the conduct abroad of multinational corporations.

In dissent, Justices Cook, Gonzalez, Hecht and Phillips disagreed with the court's conclusion that section 71.031 abolishes *forum non conveniens* for wrongful death and personal injury cases in Texas. They would have remanded to the trial court for application of *forum non conveniens* to the case. Considerations of crowded courts and unfairness to Texan defendants (although the operation of section 71.031 is not limited to Texan defendants) play a large role in the policy arguments in favor of the doctrine. Justice Gonzalez warned that "if the legislature fails to reinstate this doctrine, Texas will become an irresistible forum for all mass disaster lawsuits."¹⁷ Justice Hightower, in his concurrence with the majority decision, agreed with the proposition that the Texas legislature is capable of, and responsible for, deciding whether the doctrine of *forum non conveniens* should be available in wrongful death and personal injury suits in Texas.

JOEL P. TRACHTMAN

The Fletcher School of Law and Diplomacy

DECISIONS OF FOREIGN COURTS

France—jurisdiction of the Council of State to pass on conformity of a French statute with a prior treaty—compatibility of French statute on elections to the European Parliament with the Treaty Establishing the European Community

IN RE NICOLO. 1990 Recueil Dalloz-Sirey, Jurisprudence 135, 63 La Semaine Juridique II, No. 21,371 (1989), 25 Revue Trimestrielle de Droit Européen 786 (1989).

Conseil d'Etat (Assemblée), October 20, 1989.

This decision of the French Council of State—sitting in its most authoritative formation, the Assemblée du contentieux, composed of its Vice President and eleven other judges—marks a departure from the time-honored rule that the highest administrative tribunal in France lacks the power to declare a subsequent statute inapplicable because of a conflict with a prior treaty. Of course, this turnabout has prompted numerous commentaries in the press and from French scholars.¹

The dispute involved a reasonably uncontroversial issue: the compatibility with the Treaty of Rome of the French law that extended the right of partici-

¹⁷ 786 S.W.2d at 690 (Gonzalez, J., dissenting).

¹ See, e.g., the notes by Isaac, *Traité et loi postérieure: le revirement du Conseil d'Etat*, 25 REVUE TRIMESTRIELLE DE DROIT EUROPÉEN [REV. TRIM.] 787 (1989); Calvet, *Le Conseil d'Etat et l'article 55 de la Constitution: une solitude résolue*, 64 Semaine Juridique [J.C.P.] I, No. 3429 (1990); Kovar, *Le Conseil d'Etat et le droit communautaire: de l'état de guerre à la paix armée*, 1990 Recueil Dalloz-Sirey, Chroniques [D.S. Chron.] 57; Sabourin, *Le Jardin à la française du Conseil d'Etat*, 1990 Recueil Dalloz-Sirey, Jurisprudence [D.S. Jur.] 136.

pation in the elections to the European Parliament to inhabitants of the French departments and territories overseas.

Since 1979, the delegates to the European Parliament have been chosen by popular suffrage. This method of election was introduced by a convention between the member states in the form of an Act attached to a decision of the Council of the European Communities,² taken pursuant to a resolution of the European Council³ and approved by the member states "in accordance with their respective constitutional requirements."⁴ It superseded the original provisions of Article 138 of the EEC Treaty governing that matter. France approved the Act by statute No. 77-680 of June 30, 1977,⁵ following a decision of the Constitutional Council holding that such action would not be violative of the French Constitution.⁶ The decision was implemented by law No. 77-729 of July 7, 1977, on the election of representatives to the Assembly of the European Communities.⁷ Article 4 of that statute provides that the territory of the Republic forms a single electoral circumscription, thus including the French overseas departments and territories. This inclusion in the electorate of inhabitants of areas outside the European continent was challenged by complainant as violative of the Treaty of Rome, with the consequence that he asked the Council of State to invalidate the election of 1989. The highest French administrative court was thus confronted with the question whether it possessed the power to deny effect to a French statute because it violated a prior treaty.

While the Constitutional Council is empowered to declare a statute unconstitutional and therefore invalid *before* its promulgation,⁸ it is, at the present, still accepted that *after* promulgation the courts, whether exercising jurisdiction in civil or criminal cases or in administrative controversies, may not refuse to apply a statute because of its unconstitutionality.⁹ Nevertheless, the Court of Cassation, in a pioneering judgment of 1975, held that Article 55 of the French Constitution of 1958 accorded supremacy to treaties ratified by France and therefore required French courts to refuse the application of a statute if it conflicted with a prior treaty still in effect.¹⁰ That

² Council Decision No. 76/787/ESC, EEC, Euratom, Sept. 20, 1976, 19 O.J. EUR. COMM. (No. L 278) 1 (1976).

³ European Council conclusions adopted at meeting in Rome, Dec. 1 and 2, 1975, published in BULL. EUR. COMM., No. 11, 1975, point 1104.

⁴ Council Decision, *supra* note 2, proviso 3.

⁵ 1977 Recueil Dalloz-Sirey, Législation [D.S.L.] 259.

⁶ Decision of the Constitutional Council, Dec. 30, 1976, reprinted in 93 REVUE DE DROIT PUBLIC ET DE SCIENCE POLITIQUE [RDP] 173 (1977), and extensively discussed by Favoreu & Philip, *Chronique constitutionnelle française*, *id.* at 129-80.

⁷ 1977 D.S.L. at 271.

⁸ CONST. Arts. 61 and 62, 41 Bulletin législatif Dalloz 661, 667 (1958).

⁹ See Chevalier, *L'Exception d'inconstitutionnalité, l'Etat de droit et la construction de la Communauté européenne*, 1989 D.S. Chron. 255, commenting on the proposal of President Badinter of the Constitutional Council to authorize review of the constitutionality of a statute also after its promulgation.

¹⁰ *Administration des Douanes c. Société "Cafés Jacques Vabre,"* Judgment of May 24, 1975, Cass. ch. mixte, 1975 Bulletin des Arrêts de la Cour de cassation, chambres civiles [Bull. Civ.] IV, No. 4, 1975 D.S. Jur. 497 (with submissions of Attorney General Touffait), 1975 J.C.P. II,

remarkable holding, prompted by the superb advocacy of this approach by Attorney General Touffait (who subsequently served as a member of the Court of Justice of the European Communities),¹¹ was reaffirmed in a series of later cases.¹² Likewise, the Constitutional Council (which, in addition to its function of adjudicating the constitutionality of a statute prior to its promulgation in the cases specified in the Constitution,¹³ also adjudicates contests pertaining to the election of the President or members of Parliament¹⁴) recently affirmed, sitting as election court, that it had jurisdiction to pass on the compatibility of the French election law with a treaty to which France is a party, in particular the European Convention on Human Rights.¹⁵

The only high tribunal that until now had refused to follow that trend was the Council of State, which felt that the separation of powers doctrine barred it from questioning the validity of a statute properly promulgated.¹⁶ The

No. 18,180 *bis* (with submissions of Mr. Touffait), [1975] 2 Gazette du Palais 470 (with submissions of Mr. Touffait), translated in English in 16 Common Mkt. L.R. 336 (1975) (with submissions of Mr. Touffait, at 343).

¹¹ See the references *supra* note 10.

¹² See the references given in the submissions of the commissioner of the Government, Patrick Frydman, e.g., *Mme. Dumoussard c. Syndicat des Artisans Mécaniciens de l'Automobile*, Judgment of June 24, 1986, Cass. com., 1986 Bull. Civ. IV, No. 134; *Société anonyme Auchan c. M. Rudin*, Judgment of May 5, 1987, Cass. com., 1987 Bull. Civ. IV, No. 109; *Administration des Douanes c. Société Jea-Fra et Patrex*, Judgment of Dec. 5, 1983, Cass. crim., 1983 Bulletin des Arrêts de la Cour de cassation, chambre criminelle, No. 325, 1984 D.S. Jur. 217, 218; *Klaus Barbie*, Judgment of June 3, 1988, Cass. crim., 62 J.C.P. II, No. 21,149 (1988).

¹³ CONST. Arts. 61 and 62.

¹⁴ *Id.*, Arts. 58 and 59.

¹⁵ *Assemblée nationale, Val-d'Oise, 5e circ.*, 4 REVUE FRANÇAISE DE DROIT ADMINISTRATIF 916 (1988), commented on by Genevois, *Le Juge de l'élection, le traité et la loi*, *id.* at 908. It should be noted that the Constitutional Council does not pass on the conformity of a statute with a treaty when deciding its constitutionality before promulgation under Articles 61 and 62. Conseil constitutionnel, Decision No. 75-74, Jan. 15, 1975 (*Foyer et autres*), dealing with the constitutionality of the law on voluntary interruption of pregnancy, 1975 D.S. Jur. 529, 49 J.C.P. II, No. 18,030 (1975), 91 RDP 203 (1975). The reason for this distinction is the view that Article 55 of the Constitution mandates the superiority of a treaty over a prior statute and that the incompatibility of a statute with a treaty does not result in its unconstitutionality. The persuasiveness of this distinction has been discussed by many commentators. See, e.g., Genevois, *supra*, at 912; Genevois, *Le Droit international et le droit communautaire*, in CONSEIL CONSTITUTIONNEL ET CONSEIL D'ÉTAT, COLLOQUE DES 21 ET 22 JANVIER 1988, at 191, 213 (1988).

¹⁶ See the cases cited by the commissioner of the Government in his submissions to the Council of State (Assembly of the Adjudicatory Section) in the *Nicolo* case, *infra* note 17, e.g., *Syndicat général des Fabricants de semoules de France*, Judgment of Mar. 1, 1968, Conseil d'Etat (Section), 1968 Recueil des Décisions du Conseil d'Etat [Lebon] 149, 4 REV. TRIM. 388 (1968) (with submissions of the commissioner of the Government, Mrs. Questiaux); *Sieurs Heid et autres*, Judgment of Apr. 19, 1968, Conseil d'Etat, 1968 Lebon 243 (*Evian Accords*); *Union démocratique du travail*, Judgment of Oct. 22, 1979, Conseil d'Etat (Assemblée), 1979 Lebon 384, 96 RDP 531 (1980) (with submissions of the commissioner of the Government, Mrs. Hagelsteen); *Elections des représentants à l'Assemblée des Communautés européennes*, Judgment of Oct. 22, 1979, Conseil d'Etat (Assemblée), 1979 Lebon 385, 96 RDP 541 (1980) (with submissions of the commissioner of the Government, Mr. Morisot); *Roujansky et autres*, Judgment of Nov. 23, 1984, Conseil d'Etat (Assemblée), 1984 Lebon 383, 1985 L'Actualité Juridique de Droit Administratif 216 (with submissions of the commissioner of the Government, Mr. Labetoulle).

Nicolo case, however, furnished it with the opportunity of reexamining its views and, on the strength of the persuasive arguments of the commissioner of the Government, Patrick Frydman,¹⁷ of following the path of the two other high judicial bodies.

The Council of State did not arrogate to itself the broad power of reviewing the constitutionality of promulgated statutes, but limited itself strictly to reviewing their consistency with prior treaties. On the other hand, it did not restrict the scrutiny to conformity with the Treaties establishing the European Communities, but extended it to all treaties in force to which France is a party, thus varying from the rules prevailing in the Federal Republic of Germany and Italy.¹⁸ It is also noteworthy that the Council of State did not submit the issue to the Court of Justice of the European Communities under Article 177, but decided it without a preliminary question proceeding, emphasizing that the result on the merits was dictated by the "clear" provisions of Article 227(1) of the Treaty of Rome.

STEFAN A. RIESENFELD
Board of Editors

Zimbabwe—human rights—inhuman or degrading punishment—incorporation of international standards in domestic law

JUVENILE v. STATE. Judgment No. 64/89, Crim. App. No. 156/88.
Supreme Court of Zimbabwe, March 22 and June 19, 1989.

This case concerns a criminal appeal in which the question presented was whether imposition of a sentence of whipping or corporal punishment upon juveniles conflicts with the prohibition against "inhuman or degrading punishment" contained in section 15(1) of the Zimbabwe Constitution. Three of the Court's five members concluded that the punishment did run afoul of this constitutional prohibition.¹

The juvenile in the case, who was 17 when the offense was committed; was convicted, together with three adults, of assault with intent to do grievous bodily harm. The adults were sentenced to relatively short prison terms, while the juvenile was sentenced "to receive a moderate correction of four cuts with a light cane which was to be administered in private by a prison officer."²

The relevant Zimbabwe statutes specified that the punishment ordered in the case be administered with a rattan cane, three feet long and not more than three-eighths of an inch in diameter (slightly smaller than the cane used for adults). A blanket or other form of protection is placed over the of-

¹⁷ The submissions of Mr. Frydman are reported in 63 J.C.P. II, No. 21,371 (1989), 25 REV. TRIM. 771 (1989).

¹⁸ See La Pergola & Del Duca, *Community Law, International Law and the Italian Constitution*, 79 AJIL 598 (1985).

¹ The Court's order setting aside the sentence of caning was unanimous, but two judges limited their concurrence to the particular facts of the case.

² No. 64/89, slip op. at 3.

fender's back; a small square of thin calico is dipped in water, wrung out, and tied over the prisoner's buttocks; the strokes are then administered on the buttocks from the side. As noted in the leading opinion by Chief Justice Dumbutshena: "The Regulations are silent on the degree of force to be used by the prison officer. The force used depends to some extent on the character and personality of the person administering the strokes."³

The Court's decision in the present case follows a 1988 judgment⁴ holding that judicially mandated corporal punishment inflicted on an adult violated section 15(1) of the Constitution. In that case, the Court relied on the features inherent in whipping,⁵ as well as contemporary trends in penology and the practice of other countries. While the judgment in the present case is therefore not surprising, it is notable for its reliance on international norms to support its analysis of the "inhuman and degrading" nature of the punishment.

After noting that, in Zimbabwe, the constitutionality of whipping can be challenged judicially, the Chief Justice pointed out the following "added advantage":

[T]he courts of this country are free to import into the interpretation of section 15(1) [of the Constitution] interpretations of similar provisions in International and Regional Human Rights Instruments such as, among others, the International Bill of Human Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms, and the Inter-American Convention on Human Rights. In the end International Human Rights norms will become part of our domestic human rights law. In this way our domestic human rights jurisdiction is enriched.⁶

Among the cases cited by the Chief Justice were *Tyrer v. United Kingdom*,⁷ *Campbell and Cosans v. United Kingdom*,⁸ *Warwick v. United Kingdom*,⁹ *Trop v. Dulles*,¹⁰ and several South African cases.

³ *Id.* at 7-8.

⁴ *State v. Ncube*, [1988] 2 S. AFR. L. REP. 702 (Z. Sup. Ct.).

⁵ Whipping was described as

somewhat reminiscent of flogging at the whipping post, a barbaric occurrence particularly prevalent a century or so past. It is a punishment, not only inherently brutal and cruel, . . . but one which strips the recipient of all dignity and self-respect. It is relentless in its severity and is contrary to the traditional humanity practised by almost the whole of the civilised world, being incompatible with the evolving standards of decency.

It also was noted that the procedure was "easily subject to abuse." *Id.* at 722, *quoted in slip op.* at 2.

⁶ *Slip op.* at 9.

⁷ 26 Eur. Ct. H.R. (ser. A) (1978), 2 EUR. HUM. RTS. REP. 1 (1979-80) (holding that birching as a punishment in the Isle of Man violated the European Convention on Human Rights prohibition against degrading treatment or punishment).

⁸ 48 Eur. Ct. H.R. (ser. A) (1982), 4 EUR. HUM. RTS. REP. 293 (1982) (corporal punishment in schools in Scotland did not constitute inhuman or degrading punishment).

⁹ Eur. Comm'n Hum. Rts., Report of July 18, 1986 (unreported) (single cane stroke on hand as means of corporal punishment in school found to be "degrading" and in violation of European Convention on Human Rights).

¹⁰ 356 U.S. 86 (1958) (citing the Court's reference to "evolving standards of decency").

Each of the four other judges filed a concurring opinion. Justice Gubbay, the author of the leading opinion in the *Ncube* case, stated in dictum that he would go further than the European Court of Human Rights and hold that all judicially ordered whipping is inherently brutal and cruel. He also cited the absolute prohibition against corporal punishment of juveniles contained in the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules).¹¹ Justice Korsah associated himself with the views of the Chief Justice and Justice Gubbay.

The two remaining judges, Justices McNally and Manyarara, concurred in the result, but rejected the Chief Justice's opinion that corporal punishment (whether judicially mandated or in schools) necessarily constitutes "inhuman or degrading punishment." McNally discussed in detail the relevant judgments of the European Court and Commission of Human Rights, citing them in support of his view that corporal punishment may be permissible in some circumstances. Neither of the "dissenters" objected to the Court's reference to international, and particularly European, human rights norms as aids to the present decision.

While this case is directly relevant only to judicially ordered corporal punishment, greater interest lies in the reference by both majority and dissenting judges to international human rights norms. The Court's use of such norms to inform Zimbabwean law is consistent with similar suggestions made by American scholars,¹² and it furnishes new evidence of the continued vitality of the Universal Declaration of Human Rights and other international human rights instruments.¹³

HURST HANNUM

The Fletcher School of Law and Diplomacy

¹¹ GA Res. 40/33, 40 UN GAOR Supp. (No. 53) at 204, UN Doc. A/40/53 (1985).

¹² See, e.g., Christenson, *Using Human Rights Law to Inform Due Process and Equal Protection Analyses*, 52 U. CIN. L. REV. 3 (1983); Lillich, *The Constitution and International Human Rights*, 83 AJIL 851 (1989).

¹³ The Enforcement of Human Rights Committee of the International Law Association has recently undertaken a global survey, to be completed in 1992, of the use of the Universal Declaration of Human Rights in domestic law.

BOOK REVIEWS AND NOTES

EDITED BY DETLEV VAGTS

From Apology to Utopia: The Structure of International Legal Argument. By Martti Koskenniemi. Helsinki: Lakimiesliiton Kustannus, Finnish Lawyers' Publishing Company, 1989. Pp. xxvi, 550. Index. FIM 275.

Recently, there has been a surge of interest in the theory of international law, less about rules and what counts as law, than about doctrine and the way lawyers argue. With this book, Martti Koskenniemi, of the Finnish Foreign Ministry, joins Anthony Carty, David Kennedy and Friedrich Kratochwil as leaders of this movement, at least in the English-language scholarship.¹ Koskenniemi is a particular admirer of Kennedy (pp. vi, xxi n.7), whose work provides Koskenniemi's central theme: international legal arguments serve either as apologies for the primacy of states' interests or as utopian claims on behalf of common interests or the world community. More generally, Koskenniemi's methodological and ideological stance resembles Kennedy's. Nevertheless, Koskenniemi's prodigious research and relentless analytic disposition take him well beyond Kennedy's published efforts.

Koskenniemi begins with the argument that, in the course of professionalization, "post-enlightenment lawyers" separated social, political and moral theory from technical international legal doctrine (p. xiii). By leaving theory to others, modern lawyers accept irrelevance—to avoid controversy. "But doctrine constantly reproduces problems which seem capable of resolution only if one takes a theoretical position" (p. xv). Because theory cannot be discussed in a "specifically juristic way" (*id.*), technical competence offers no help and the lawyer's very identity is imperiled.

Koskenniemi thinks that controversy is inevitable because the assumptions constituting arguments are irrevocably normative. His objective is to have lawyers overcome their irrelevance by opening themselves to social theory as moral discourse. The method he proposes for realizing this objective is "regressive analysis" (p. xvii), a working backwards from particular legal arguments to their underlying oppositional structure, and finally to the point that their conceptual differentiation collapses and competing arguments appropriate each other's content. Regressive analysis penetrates to the "deep-structure" of international legal discourse. Such language acknowledges Koskenniemi's debt to structuralism, and especially structural linguistics (p. xix).

¹ See prominently A. CARTY, *THE DECAY OF INTERNATIONAL LAW? A REAPPRAISAL OF THE LIMITS OF LEGAL IMAGINATION IN INTERNATIONAL AFFAIRS* (1986), reviewed at 81 AJIL 451 (1987); D. KENNEDY, *INTERNATIONAL LEGAL STRUCTURES* (1987), reviewed at 83 AJIL 630 (1989); F. KRATOCHWIL, *RULES, NORMS AND DECISIONS: ON THE CONDITIONS OF PRACTICAL AND LEGAL REASONING IN INTERNATIONAL RELATIONS AND DOMESTIC AFFAIRS* (1989), reviewed in this issue at p. 775.

Regrettably, Koskenniemi also calls his method "deconstructive" (p. xvii). The term owes its currency to French philosopher and critic Jacques Derrida. As Koskenniemi admits, Derrida had considerably more than methodology in mind. For Derrida, deconstruction reveals the deep structures of Western metaphysics to be groundless. Foundational claims notwithstanding, all such structures secure their identity by differentiation from yet other structures, which, for the same reason, are themselves no less contingent. The methodological result can only be infinite regress or circularity; the philosophical result (many would say), an unbounded relativism leading at best to clever wordplay, or at worst to utter nihilism.

Evidently, Koskenniemi believes that deconstruction as a method can be detached from the philosophical project for which Derrida devised it. Koskenniemi concedes that his "kind of deconstruction," no less than Derrida's, "may be taken to imply that ultimately all discourse will disperse into an unending play of conceptual oppositions in which there is ultimately no basis to prefer conflicting ideas *vis-à-vis* each other" (p. 479, footnote deleted). Koskenniemi cannot accept this implication because his project is to find the deepest structure of international legal argument, not to repudiate the constitutive assumptions that make such argument possible.

Koskenniemi created this problem for himself by needlessly invoking deconstruction. For many scholars, doing so amounts to a declaration of allegiance to, or at least affinity for, poststructuralism. What does such a declaration gain Koskenniemi? Poststructuralism is after all a critical response to structuralism, and Koskenniemi is simply mistaken to claim that they share a "hostility to thinking of human experience as something produced by an 'essence' or 'nature' residing outside experience itself" (p. xvii n.1). Structuralists like Claude Lévi-Strauss and Noam Chomsky postulate innate properties of mind that organize diverse human experiences into universal patterns. If Koskenniemi wishes to distance himself from the postulation of essences while taking advantage of a structuralist method, calling that method deconstructive takes him closer to radical relativism than he wishes.

Koskenniemi serves himself better when he associates his enterprise with Michel Foucault's archaeologies of knowledge (p. xviii n.2). While Foucault is conventionally called a poststructuralist, his method is not Derrida's. It is critical in its effort to expose regimes of truth as systems of power (paraphrasing Koskenniemi's quotation of Foucault, p. xx n.6). This is also the purpose of critique in the Frankfurt School's critical theory and the Critical Legal Studies movement. Koskenniemi claims that the very search for a "hidden code," as he calls the deepest structure of international legal argument, "bears a *critical potential*" (p. xxii, his emphasis, footnote deleted). Throughout the book, Koskenniemi speaks of his undertaking as critical. A regressive analysis lends itself to critical purposes because it, like Foucault's, is a method of exposure.

The point of exposing ourselves to the implications of our taken-for-granted practices, and their supposed objectivity, is to offer guidance in making something better of the world (usually; Foucault seems to have been ambivalent on this). In Koskenniemi's words, "criticism of objectivism nei-

ther entails anarchy nor cynical nihilism as a necessary consequence. The critical project implies both an institutional and a normative ideal" (p. 487). The institutional ideal is open, uncoerced discussion of alternatives, a community given to unending conversation about important issues. Behind this is the normative ideal of "authentic commitment," an "ethic of responsibility" (p. 488).

For scholars to construe their often disputatious reactions to each other's contributions to knowledge as an ongoing conversation is a flattering self-characterization. It is no wonder they responded so warmly when philosopher Richard Rorty proposed it. However well it suits the academy, lawyers cannot afford the luxury of protracted discussion. The point of law is to close off discussion by providing reliable guidelines for behavior, immediate answers to questions and serviceable solutions to problems. Koskenniemi would have lawyers complement their technical competence with the conversational skills of theoretical scholars, without considering the possibility that the latter might detract from the former.

The connection between the institutional ideal of open conversation and the normative ideal of authentic commitment is Jürgen Habermas's belief that only in a perfectly open conversation—an ideal speech situation, he would say—could we know our real interests and their proper relation to the interests of others. Only in such a situation is agreement possible. This is a Kantian position. If Kant taught an ethic of responsibility in which we should try to see beyond ourselves, he also acknowledged our inability to do so perfectly in a contingent world. Moral certainty and complete agreement are impossible; personal qualities of commitment and integrity must guide us.

From this position, Koskenniemi draws prescriptive consequences for the international lawyer. "Rather than be normative in the whole (and be vulnerable to the objections of apologism-utopianism) he should be normative in the small" (p. 496). The lawyer should "isolate the issues which are significant in conflict, assess them with an impartial mind and offer a solution which seems best to fulfil the demands of the critical programme" (pp. 496–97). There are difficulties with these recommendations. First, the injunction to think small controverts Koskenniemi's stated goal of having lawyers overcome their technical preoccupations by becoming theoretically aware. Theories are always statements about relations in general. In the absence of a larger picture, such as theory provides, how does one know what issues are significant? How does one recognize impartiality?

Second, Koskenniemi devotes fewer than ten of his hundreds of pages to the critical program. Following Roberto Unger, he distinguishes between routines and "the institutional and imaginative constraints within which routines work and which routine helps to reproduce" (p. 491). To participate in routine concerns invites apologism; to dwell on the removal of constraints is utopian. The critical lawyer maintains an interest in transforming contexts without forgetting that contexts cannot be divorced from the routines embedded in them. The means for doing this is practical reason. "Engaging in practical reasoning the lawyer engages himself in what is a transforming routine *par excellence*" (p. 497). Lawyers may respond, "Practical reasoning is

what I do. I am a decent, reflective person. How come my daily routine isn't transformative? Why does Koskenniemi spend five hundred pages picking on me?"

Perhaps the last of the queries is unfair to Koskenniemi. Despite his stated intention of broadening the intellectual and moral horizons of technical international lawyers, his critical concerns are more inclusive. The problem is not that legal technicians have no theoretical context within which to couch their daily routines. Liberalism or, more precisely, "the liberal theory of politics," provides just such a context, but as a given, not subject to examination, criticism or transformation.

To set up his argument about the oppositional structure of legal argument, Koskenniemi identifies concreteness and normativity as conflicting requirements of law and then associates these requirements with incompatible assumptions anchoring the liberal theory of politics. Law must reflect "the concrete wills and interests of individuals," yet the "normative order" binds these individuals against their wishes (p. 6). The result is a division of labor between those who make, and those who apply, the law. Clearly, this is a positivist theory of law, arguably a liberal theory of law and government, but hardly a general characterization of liberalism's political tenets. Koskenniemi's conclusion that the division of legal labors cannot be maintained consistently is, at least in technical terms, neither news to lawyers nor a sufficient reason to doubt that "any meaningful distinction between international law, politics and morality can be made" (p. 8).

After this unconvincing beginning, Koskenniemi adopts a larger and more telling conception of liberalism in order to characterize the historic relation between liberal thought and international legal doctrine. "The fundamental problem of the liberal vision is how to cope with what seem like mutually opposing demands for individual freedom and social order. The liberal attempt to tackle with this conflict is by means of reconciliation, or paradox: to preserve freedom, order must be created to restrict it" (p. 52, footnote deleted). The liberal balancing act never succeeds for long. Liberals slip into apologies for either individual preferences or states' interests, depending on the actors, or utopian dreams of harmony. When either side challenges the other, both attempt to regain their balance by adding the other's argument to its own, with theoretical incoherence and prescriptive inconsistency the inevitable outcome.

The two long chapters on doctrine persuasively substantiate Koskenniemi's claim that internal contradictions in liberal theory and practice explain the progressive irrelevance of international legal doctrine. These chapters submit a remarkable array of doctrinal materials to unblinking scrutiny. Koskenniemi's conclusion is irresistible. At the bottom of all discussion is the problem of justice: justice is either purely subjective or necessarily imposed. Either alternative threatens the edifice of modern doctrine and the liberal theory behind it.

Here Koskenniemi could profitably have proceeded with a more extensive rendition of his program, perhaps suggesting a *theoretical* alternative to liberalism specifically tailored to the international lawyer's technical compe-

tence and argumentative needs. Instead, he applies his critical capacities to a series of overlapping doctrinal foci—sovereignty, sources, custom and world order. We read the same story over and over again, its raw material recycled, its argument unvarying, its rhetorical rhythms too familiar, its conclusion foretold. At first awesome, Koskenniemi's extraordinary breadth of reading and analytic skill finally become tiresome.

By the end, we feel that Koskenniemi is himself wearing out. In considering arguments about world order, his voice takes on a querulous edge. The term "totalitarianism" appears without warning, to characterize first "the structures of economic domination of the present international system" (p. 432), and then the utopian position that community should prevail over autonomous units (pp. 433 and 448). Why the apologetic position of "unfettered egoism" (p. 448) is any less totalitarian in implication is hard to say; Hannah Arendt's diagnosis of the possibility of evil in the banal performance of routines suggests that it is. After Jeane Kirkpatrick's successful, if controversial, appropriation of the term "totalitarianism" for ideological purposes much at odds with Koskenniemi's, why he would want to use it at all is another question. Yet the term occurs a last time in Koskenniemi's only substantive claim on behalf of his critical program. Practical reason, aiming for authentic commitment, "positively *excludes imperialism and totalitarianism*" (p. 497, his emphasis). *Positively?*

NICHOLAS ONUF
American University

Rules, Norms, and Decisions: On the conditions of practical and legal reasoning in international relations and domestic affairs. By Friedrich V. Kratochwil. Cambridge: Cambridge University Press, 1989. Pp. x, 317. Index. \$49.50.

This is a book about international relations, sociology, logic, jurisprudence, rhetoric, game theory, language, politics and, oh yes, international law. Professor Kratochwil's effort defies easy categorization. It is also impervious to critical treatment, at least by this writer. This review will therefore confine itself to those aspects of *Rules, Norms, and Decisions* that might be of interest to international lawyers, and leave the rest to more competent scholars.

The stated purpose of this study is to explore "the role of norms in international life" (p. 1). But, in reality, more was intended, not the least of which was reconciling two competing models of international relations and law. Kratochwil hoped to challenge "our reliance on the unquestioned dichotomy between a 'domestic order' and . . . international 'anarchy' " as ways of characterizing state relations (p. 2). The idea that international relations reflects an unperfected "domestic order" is nothing more, Kratochwil suggests, than a restatement of Grotius's communitarian principle. On the other hand, the notion that international life is anarchical can be traced back to Hobbes (p. 250). The fundamental premise of this book is that neither model

satisfactorily explains the international order. The fact that states do observe rules tends to discount the theory that all is anarchy. At the same time, states have not progressed so far as to constitute an "international society," not even a primitive one.

If the premise of the book seems straightforward enough, its exposition is exhaustingly tortuous for a lay reader. Although Kratochwil sets forth the assumptions underlying his methodology, and attempts also to define precisely the concepts he employs, the result is still unsatisfactory. The chief problem is in defining law, and the legal character of rules. This process of definition consumes almost all of the volume. The author first suggests that "law is a choice-process characterized by the principled nature of the *norm-use* in arriving at a decision through reasoning" (p. 18). The next step is to acknowledge that "the legal character of rules and norms can be established when we are able to show that these norms are *used* in a distinct fashion in making decisions and in communicating the basis of those choices to a wider audience" (p. 42). In short, the "problem-solving character of rules [is] their generic feature" (p. 95). Kratochwil also argues that law is a particular style of reasoning with rules. But it is only in the last few pages that the author advances his contention that international law provides the rules for international relations (p. 251).

As might have been revealed in these passages, the approach adopted by the author is unredeemably abstract. This book simply assumes too much from a reader not versed in international relations theory, the genre to which it properly belongs. In fact, international law (as such) is mentioned only to illustrate more theoretical conclusions about international order. Not enough exposition or description is given to the international law issues that are raised. Infuriatingly elliptical references are made to topics as diverse as federal jurisdiction over international law questions (pp. 176-77), innocent passage (p. 145), self-executing treaties (pp. 176-78), the common heritage principle (p. 115) and self-determination (pp. 161-62). One can only presume that scholars of international relations will be even more bewildered by these references.

Kratochwil does make some salient observations about two matters of profound concern to international lawyers. The first is the contradictory role of custom in governing state behavior, a paradox first observed (it is suggested) by Samuel Pufendorf. The author skillfully considers the dichotomy between hard and soft law, while weighing the requirement of *opinio juris* with the contrary phenomenon of unilateral actions (pp. 200-05). The second theme concerns the legitimacy of international judicial institutions, most notably the International Court of Justice. Although Kratochwil critiques the ICJ's judgments from a curiously rhetorical perspective (pp. 243-47), his point is well taken that creating more institutions, or strengthening existing ones, does not necessarily cure deficiencies in the international system. Indeed, it appears as an article of faith in this book that the key element in promoting the observance of norms of state behavior is a stable power regime.

This book attempts much, and credit should be given for its eclectic and multidisciplinary methodology, as well as its emphasis on theory. This reviewer is troubled by the excessive argumentation, the apparent lack of connection between chapters, and the author's resort to jargon. We desperately need books that bridge the gap between international law and international relations. Far from reconciling our two disciplines by developing a unified theory of state behavior, this volume shows how far our studies have drifted apart.

DAVID J. BEDERMAN
Of the District of Columbia Bar

Pravotvorcheskaia deiatel'nost' mezhdunarodnykh organizatsii (The Law-Creating Activity of International Organizations). By N. B. Krylov. Moscow: "Nauka," 1988. Pp. 176. 1 ruble, 90 kopeks.

Decades ago, Gregory I. Tunkin introduced into Soviet international law theory the argument that international law was created by states in "concurrence of their wills." He was rejecting the long-held position that law was a reflection of the will of a ruling class, making impossible any concurrence between capitalist and socialist systems. Stalin's gloomy perspective of irreconcilable class conflict terminating inevitably in war had already been revised by Khrushchev in his revival of Lenin's prescription of peaceful coexistence between opposing social and political systems. Tunkin seized the opportunity to devise his theory. N. B. Krylov, one of Tunkin's disciples, builds upon Tunkin's thesis, incorporating Gorbachev's "new thinking" in international relations. In his thoroughly documented monograph, Krylov provides detail on doctrine and practice as they are emerging in the USSR in implementation of Gorbachev's policy.

Krylov concludes that diplomats participating in conferences and international organizations cannot be said to represent irreconcilable wills when negotiating. Rather, they bring their various wills into concurrence in creating norms. He points out that the process of concurring is difficult because several subsystems exist—those of contrasting socialist and capitalist states. Yet agreement is reached. A new integral system of law is created, which Krylov explains in Marxist terms: thesis, antithesis and synthesis. A less philosophical mind might conclude that conflict is recognized, the need to resolve it leads to compromise, and a new norm results.

The contribution of socialist states to the synthesis is assessed by Krylov. Using the example of disarmament negotiations in the United Nations, he notes that the Soviet side introduced 80 out of 230 proposals, hoping to meet Western opposition. Variations were made in the proposals, but Krylov argues that the basic goal of Soviet foreign policy never changed. His country's aim was to achieve general and total disarmament. Citing his colleague A. P. Movchan, he argues that socialist states have contributed much to interna-

tional lawmaking. They cannot be ignored as they seek to develop international law along lines of "social progress, democracy and peace."

Ideological conflict has not been excised from the text in spite of its conciliatory language: the "imperialist" states are castigated for attempting to continue the Cold War during the Third Conference on the Law of the Sea. Although Krylov expects Western influence to remain strong in creating norms, he thinks the record proves that eventually a norm emerges that can be said to express the will of the international organization or conference that has developed it. Further, he sees the role of the organization as more than serving as an aid in the synthesis of contrasting wills. He sees the organization as an active integrating force stimulating accord.

As an illustration, he chooses the General Assembly. Members discuss issues, and this discussion leads to the formulation of recommendations; individual articles are then agreed upon, and finally codification and the development of law emerge. Krylov credits the Secretary-General's initiative in placing problems to be discussed before the General Assembly with stimulating the formation of norms. The International Law Commission is also praised as a developer, even though its drafts must be confirmed by the General Assembly. He criticizes the Sixth Committee for passivity, noting that only the Genocide Convention was initiated within it, on the basis of a draft prepared by the Secretariat and commented upon by ECOSOC.

Krylov's survey touches upon law-creating activity in UNESCO, the FAO, ICAO and other agencies and international conferences, notably that on the law of the sea. Throughout his survey he is concerned with "inter-system" conflict. He expects conflict to be dissipated only if the role of the United Nations is enhanced. He argues for establishing a mechanism within the United Nations to monitor compliance with norms, saying that the first step should be to strengthen the Security Council. The Council should call sessions not only to meet crises, but also to satisfy the Charter's provision that it meet regularly just to survey the international situation. He would invite heads of states and governments to attend, and would convene the sessions not only at UN headquarters, but also at capitals of the permanent members. He would revitalize the Military Staff Committee to provide expert advice and observation in crisis situations like that of the Persian Gulf. As to General Assembly resolutions, he wishes that spur-of-the-moment concerns were not reflected in them but, rather, interests of the whole world.

As the citations indicate, much of the study adheres to statements made by Gorbachev. Its contribution is the detail. A contemporary reader may regret that events are passing some of it by. How much longer will the primary conflict be between capitalist and socialist camps? How much longer must international law be defined in terms of "concurrence of wills," based, as this notion is, upon the Marxist concept that law represents the will of a ruling class? Only time will tell whether this will be among the last monographs to develop Marxist thought as it might relate to the formation of international law in a world marked by class struggle.

JOHN N. HAZARD
Board of Editors

Peremptory Norms (jus cogens) in International Law: Historical Development, Criteria, Present Status. By Lauri Hannikainen. Helsinki: Lakimiesliiton Kustannus, Finnish Lawyers' Publishing Company, 1988. Pp. xxxii, 781. Index. \$118.

This book by a comparatively young Finnish scholar indeed has gigantic dimensions: over eight hundred pages! The bibliography covers 48 pages and contains 991 items: books and articles in several languages, predominantly English, but also German, with other languages occurring rather sporadically. There is no list of source materials. Treaties, cases and UN resolutions are found in footnotes. The index, only four pages, seems rather spare.

The author embarked upon one of the most difficult problems of international law. It had been argued for a long time, by numerous scholars, that the very notion of *jus cogens* is essentially alien to international law, all its norms belonging to *jus dispositivum*. This attitude, however, became obsolete when the International Law Commission introduced the *jus cogens* notion into its draft articles on the law of treaties. *Jus cogens* acquired nearly general recognition after being inserted into the Vienna Convention on the Law of Treaties, adopted in 1969 (Article 53 as to invalidity and, corollary to it, Article 64 as to termination of treaties). The notion was later introduced into other treaties of a codificatory character, especially the 1986 Convention on Treaties between States and International Organizations or between International Organizations. However, there were still several dissenters when the 1969 Convention was drafted, among both participants in the Vienna Conference (France) and publicists (Schwarzenberger).

Hannikainen has no doubt that there *are*, in international law, rules of a peremptory character, referred to by scholars as *jus cogens* norms (introduction, pp. 1–22). To have that status, however, they must comply with four criteria, which the author derives from Article 53 of the 1969 Vienna Convention, namely: they must be norms of *general* international law; they must be accepted by the international community of states *as a whole*; they must not be capable of derogation; and there must be no possibility of modifying them in any other way than by new peremptory norms. To these four criteria from the Vienna Convention, the author adds yet a fifth: the peremptory obligations deriving from such norms are owed to the international community of states. The *jus cogens* norms constitute a distinct supreme category within the whole body of international law rules.

The main portion of the book is divided into three parts. Part I ("Historical Development of International Jus Cogens," pp. 23–204) consists of four chapters. Chapter 1 covers the long period from the Peace of Westphalia (1648) to the end of World War I (1918). The author traces the origins of the *jus cogens* concept in natural law doctrine between 1648 and the Congress of Vienna (1814–1815), but he finds no concrete norms having that character, perhaps with the exception of the prohibition of piracy. In the following century, peremptory character could be attributed to a few more principles, namely, freedom of the high seas, prohibition of the slave trade and, finally,



a few basic rules of the law of warfare. In the doctrine of that period, the author distinguishes no less than five different views on the very existence of *jus cogens* in international law.

In chapter 2, Hannikainen finds that in the interwar period the body of *jus cogens* norms was somewhat enlarged, most especially by the inclusion of the prohibition of wars of aggression as propounded in the Paris Pact of 1928 (to this reviewer, the scope of that treaty could be construed to be yet broader). Between 1945 and 1969, that broadening proceeded even further, especially in such acts as the Charter of the Nuremberg Tribunal and the Genocide Convention of 1948. The belief that international law does include norms of a peremptory character also spread in the doctrine, evidenced by the Lagonissi Conference convened in 1966 by the Carnegie Endowment at which nearly all the participants, with very few exceptions, were of that opinion (the present writer had the privilege of attending that interesting conference).

Chapter 3 deals with the *travaux préparatoires* to the Convention on the Law of Treaties, first within the International Law Commission, then at the 1968–1969 Vienna Conference. The concept of *jus cogens* was gaining more and more support, so that when the provision introducing the notion of *jus cogens* (in the final text, Article 53 of the Convention) was put to the vote, only eight states voted against it. The text introduced the main criteria of establishing the peremptory character of a norm but refrained from naming any examples of norms having that character.

The period after the conclusion of the Vienna Convention (from 1969 onwards), dealt with by the author in chapter 4, brought several new proofs, both in treaties and in international practice (e.g., the case of the U.S. hostages in Iran before the International Court of Justice), that the *jus cogens* concept had spread even more. In the doctrine, one can find only a few dissenters from what has nearly become a generally accepted opinion.

In part II, "Preconditions of the Existence of Peremptory Norms in Present-Day International Law" (pp. 205–314), the author expounds the views previously listed in the introduction as to what criteria must be fulfilled by a norm for it to acquire peremptory (or *imperative*) character.

Among his learned and, on the whole, convincing views pertaining to those questions, the most interesting are those that try to explain that "general" means less than "universal" (*nearly* all, but not necessarily all), and that the "international community of States as a whole" must comprise the overwhelming majority of states, but again not necessarily all states. It is important to note that this particular conception, put forward at the Vienna Conference by the Chairman of its Drafting Committee, seems to have been the main reason that the *jus cogens* formula met with a few dissenting votes, namely, from states afraid that such an interpretation could easily lead toward enabling the majority, however overwhelming, to impose its views on the minority.

As for possible sources of establishing norms of a peremptory character, the author convincingly states that either a treaty or, in some cases, a custom

can be taken into account, whereas "general principles of law," or resolutions of international organizations, can play but a subsidiary role.

The above ideas are contained in chapter 5; chapter 6 deals with the "Capability of the International Community of States to React to Violations of Peremptory Norms." The author's findings in this respect are not very encouraging; they reflect, however, the present status of the international community, which is hardly able to *compel* its members to comply with obligations under international law that do not correspond to their political interests. There is some point in the opinion of Hannikainen that the formulation of Articles 65 and 66 of the 1969 Convention is not adequate since it limits the possibility of invoking the invalidity of a treaty to states parties to it; to the author, the obligations concerned are owed by states to the international community, and some kind of *actio popularis* should thus have been taken into account.

The third part, "Which Norms are Peremptory in Present-Day International Law?," is by far the longest (chapters 7–12, pp. 315–727) and, let it be stated frankly, raises more doubts and questions than the two former ones. However, the author was prudent enough not to state categorically that his catalog was exhaustive, as the very title of chapter 7, introducing part 3, speaks about the "selection" of categories of norms to be examined.

Hannikainen thinks there is enough evidence to classify five categories of norms as peremptory; they concern (1) the prohibition of aggressive use of armed force between states, (2) respect for the self-determination of peoples, (3) respect for basic human rights, (4) respect for basic rules guaranteeing the international status, order and viability of sea, air and space outside national jurisdiction, and (5) respect for the basic norms of the international law of armed conflict.

It would hardly be possible—indeed, it would be futile—within the scope of the present review, to make a detailed survey of the author's scholarly, many-sided presentation of ideas, especially since he devoted so much energy to collecting as much material as possible for his argument.

Therefore, this reviewer prefers to limit himself to another issue, namely, are there indeed no peremptory norms outside the scope of the five categories described by Hannikainen? In particular, *all* the *main* principles of the UN Charter, not merely the prohibition of the aggressive use or threat of force, and self-determination of peoples, would seem to have peremptory character—especially the *pacta sunt servanda* principle, the obligation to settle all disputes by peaceful means, and the prohibition of intervention into the domestic affairs of a state. This opinion was propounded by many speakers at both the Lagonissi and the Vienna Conferences. Article 103 of the Charter stresses explicitly that obligations of states under the Charter enjoy precedence over all other commitments, which certainly endows those principles with a rank superior to that of any other norms, a rank precisely of peremptory character. Besides the Charter, there seems to be enough evidence that the principle of the inviolability of diplomats has enjoyed an imperative character for many centuries (indeed, millennial). Consequently,

to this reviewer's mind, the list of peremptory norms should be increased by the addition, at the very least, of these two categories.

However, in spite of this reservation, the value of Hannikainen's efforts cannot be doubted. Each chapter is based upon a thorough knowledge of extensive source material and works of authors who have dealt with the subject in a great many countries. Hannikainen is able to classify and analyze a great bulk of material without ever getting lost in it, and to reach clear conclusions of his own. His is a book of great merit, in its scope certainly the biggest and the best documented. It should be part of every serious international law library.

STANISLAW E. NAHLIK
Jagellonean University, Kraków

Die Grenzen des völkerrechtlichen Gewaltverbots. By Dietrich Schindler and Kay Hailbronner. Heidelberg: C. F. Müller Juristischer Verlag, 1986. Pp. 169.

The present volume contains the proceedings of a meeting of the German Society of International Law on the limitations of the prohibition of the use of force in international law. Following a standard format, it features two reports—in this case by Professors Schindler (University of Zurich) and Hailbronner (University of Constance)—and the subsequent plenary discussion of them.

Although the proceedings predate the ICJ decision in the *Nicaragua* case, this relatively short book provides a highly pertinent, because remarkably thorough, exposition of the international legal issues surrounding the transboundary use of force by states. The book captures a broad spectrum of opinion among German-speaking international lawyers¹ and thus inevitably invites comparison to the debates in the United States on the use of force.² What emerges from such a comparison is that the difference in the contextual location of commentators—the superpower versus medium to small-power status of their countries—is very much a factor shaping perceptions on the scope of states' rights to use force.

The two reporters start from opposite doctrinal positions but arrive at much the same conclusions. Schindler posits the Charter prohibition of the use of force as a clear datum. In outlining what he calls the "dominant view" of Article 2(4), he reiterates the standard argument that, apart from the narrow Charter exceptions—primarily, states' individual and collective right to self-defense—any transboundary use of force, including armed reprisal, is illegal. He then proceeds to examine whether failure of the UN collective security system, novel threats to states' security, or new claims regarding the legitimacy of the use of force—such as in support of wars of

¹ Members of the German Society of International Law are mostly international lawyers from the Federal Republic of Germany, Austria and Switzerland.

² See, e.g., *Appraisals of the ICJ's Decision: Nicaragua v. United States (Merits)*, 81 AJIL 77 (1987).

national liberation—might have affected the basic validity or scope of the prohibition in Article 2(4). His answer is negative.

As to whether the ineffectiveness of the UN collective security system might imply the revival of pre-Charter rights to the use of force, he denies the existence of a fundamental change in circumstances: “[I]n 1945 there was no doubt that the UN security system would be only partially effective” (p. 19). He also rejects the notion that the Charter prohibition of the use of force could have lapsed through desuetude or that, lacking effectiveness, it never became a valid international norm, by pointing to the tendency by states to justify their transboundary use of force in terms of clearly established exceptions to Article 2(4) and thereby to confirm implicitly its validity. At the same time, he rules out the use of force against *de facto* regimes or across armistice lines as impermissible.

The stringency of Schindler’s view of Article 2(4) is partially offset by his position on what constitutes a legitimate exercise of self-defense. For example, in discussing the legality of armed action against foreign-based guerrilla groups, he comes close to endorsing the “pattern of events” justification of self-defense (p. 36). He acknowledges that “indirect aggression amounting to an armed attack” could trigger a state’s right to self-defense, although he concludes—much as the ICJ would a few months later—that U.S. military or paramilitary action against Nicaragua did not meet this threshold test. On the other hand, he deems impermissible the use of force to protect nationals abroad, and *a fortiori* “humanitarian intervention,” because attacks on nationals, or equivalent deprivations of human rights involving non-nationals in the case of humanitarian intervention, do not amount to “armed attack” under Article 51 (p. 21).

Hailbronner, by contrast, starts from the basic premise that the notion of an unambiguously comprehensive prohibition on the use of force—excepting only self-defense against armed attack—has never found the undivided support of states. The outer contours of the obligation laid down in Article 2(4), so he maintains, have always been contested. Given this originally gray area of the law, the transboundary use of force for limited “non-aggressive” purposes, i.e., to protect and realize fundamental international rights, remains permissible unless it stands repudiated in the light of post-1945 state practice and international community expectations (p. 64). However, Hailbronner adds the important caveat that any “traditionally” asserted rights to the use of force can be deemed to have survived only if in the practice of states representing “a substantial part of the international community” these rights have been consistently invoked as compatible with the UN Charter. By contrast, any claim to a novel use of force would be measured against the more stringent evidentiary standard applicable to any assertion of a new customary norm of international law (p. 65).

In applying this test to the practice of states, Hailbronner is led to rule out forcible “self-help” in the protection of vital national interests (although he suggests that in exceptional circumstances nonmilitary action might qualify as “armed attack” (p. 76)). He concludes that the use of force cannot be justified either for humanitarian reasons or for purposes of maintaining the

status quo of a superpower's "sphere of influence" or "critical defense zone,"³ and that armed reprisals are impermissible. However, he argues that the use of force in defense of nationals abroad is permissible, but only as an exception to Article 2(4), and not as an exercise of a more broadly conceived right to self-defense. In short, he ends up strongly supporting a narrow reading of the scope of states' rights to use force internationally.

Although a large majority of the discussants apparently agree with the two reporters' basic conclusions, the plenary debates also reveal significant ambivalence toward their findings. Hailbronner himself appears troubled by some of his conclusions—for example, when he acknowledges that Articles 2(4) and 51 do not provide a basis for effectively countering transnational terrorism and subversion (p. 84). Professor Simma makes the unpersuasive suggestion that the use of force to protect nationals abroad be considered illegal, though morally justified (p. 123). However, a few participants, such as Professor Klein, warn unequivocally of the counterproductive effect of placing too rigorous limitations on the right to use force.

Not unexpectedly, the discussants' theoretical outlook on the process of modification of customary international law plays an important role. How decisive that role can be becomes evident in the discussion of the normative relevance of the common discrepancy between states' use of force and subsequently offered legal "explanations" thereof. In reviewing instances of state practice involving the use of force other than in narrowly defined circumstances of self-defense, both reporters assign overriding significance to the fact that states, instead of clearly asserting an exception to a strictly conceived prohibition of the use of force, "verbally camouflage" their conduct. Their conclusion that, consequently, such conduct *eo ipse* evinces a lack of *opinio juris* and thus cannot present a legal challenge to the norm in issue, finds a largely receptive audience; it is, of course, also consistent with the ICJ's reasoning in the *Nicaragua* case.⁴

But such a line of argument raises the fundamental question whether—as Professor Bernhardt quickly points out—the analysis proceeds from an accurate perspective on what constitutes "legally significant state practice" (p. 143). The evolution of customary international law typically involves a process of communication in which signals of authority and control may vary considerably as to intensity or clarity. A claimant state's actual conduct (or, for that matter, the absence of a meaningful rejection of the claim by other states) thus cannot a priori be disregarded as legally insignificant merely because of contraindicative verbal communications from the state(s) concerned.

A related issue of fundamental concern raised in and by the proceedings and one that again underlines the overwhelming importance of the theoretical starting point, is the legal assessment of individual instances of state practice clearly supportive of a limited use of force when such use is inconsistent

³ On this point, see Reisman, *Old Wine in New Bottles: The Reagan and Brezhnev Doctrines in Contemporary International Law and Practice*, 13 YALE J. INT'L L. 171 (1988).

⁴ See *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, Merits, 1986 ICJ REP. 14, 109, para. 207 (Judgment of June 27).

with a narrow reading of the prohibitive norm. It is readily conceded that the threshold of evidence regarding customary law may vary with the significance of the norm for the international community. Some have suggested that certain fundamental international norms retain their validity even in the face of inconsistent state practice.⁵ Others have singled out state conduct amounting to human rights violations as practice that impermissibly derogates from existing customary human rights norms.⁶ However, unlike human rights, which might be said to reflect fundamental values, the non-use of force in international relations is merely an "instrumentalist" value: its significance is subordinate to the pursuit of other goals. Indeed, force remains an essential part of the law, as Professor Reisman appropriately reminds us.⁷

Therefore, if, as Hailbronner himself points out, there is evidence that from the very start the exact scope of the Charter prohibition of the use of force was unsettled, states' use of force for purposes incompatible with a narrowly understood self-defense exception should be highly relevant to any assessment of the scope of the customary norm of prohibition today. In these circumstances, raising the evidentiary threshold regarding "inconsistent" state practice, as Hailbronner does, or ascribing *jus cogens* quality to the prohibition of all transboundary use of force as others do, has the appearance of a device of convenience for disregarding potentially uncomfortable legal phenomena, unless, of course, use of such restrictive criteria is justified in terms of both sound community policy and state practice. However, neither the two reports nor the many discussants' supportive interventions are persuasive on this account. Indeed, the proceedings as a whole clearly show that the case for such a restrictive evaluative approach to state practice is very difficult to make. Thus, rather than being an open-and-shut case, the question whether—apart from the uncontested core concept of internationally illegal use of force—certain other transboundary uses of force are already covered by prohibitive norms, and, if so, whether these norms are relatively immune to change through international practice, remains wide open.

As a consequence, the reader may find some of the conclusions disappointing. However, the present book and the proceedings it contains raise all the hard questions about states' transboundary use of force and provide a graphic illustration of how important the process of analysis or, more specifically, the reviewer's theoretical frame of inquiry is to any finding on the customary international law on the use of force. In this sense, the present volume provides a highly valuable perspective on an issue of enduring controversy among scholars and practitioners alike.

GÜNTHER HANDL
Wayne State University

⁵ See, e.g., Schachter, *The Nature and Process of Legal Development in International Society*, in *THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW: ESSAYS IN LEGAL PHILOSOPHY, DOCTRINE AND THEORY* 745, 792 (R. Macdonald & D. Johnston eds. 1983).

⁶ See, e.g., Bernhardt, *Custom and Treaty in the Law of the Sea*, 205 *RECUEIL DES COURS* 247 (1987 V).

⁷ Reisman, *supra* note 3, at 198.

The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. By J. Herman Burgers and Hans Danelius. Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1988. Pp. xii, 271. Dfl.155; \$84.50; £44.95.

This book is an essential resource for those for whom it was primarily written: "people who will have to work with the Convention [against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment] in the exercise of their functions, such as diplomats, magistrates, law enforcement officials, military officers and lawyers" (p. v). It was written with the knowledge, expertise and authority of two of the key participants in drafting the Convention: Hans Danelius, at the time the legal chief of the Swedish Ministry of Foreign Affairs, was the principal author of the text that Sweden offered and that was accepted as the working document in the drafting process, throughout which he was active as Sweden's representative; and Herman Burgers, of the Netherlands delegation to the UN Commission on Human Rights, was chairman/rapporteur of the working group set up by the Commission to draft the Convention during the last three (decisive) sessions of the working group.

There are four chapters. The first confines itself to a four-page summary of the contents of the Convention, which will help someone coming "cold" to the treaty. Chapter 2 provides information on the background of international efforts to combat torture. These include action by intergovernmental organizations, especially the United Nations, in the field of standard setting (the 1975 Declaration against Torture, the 1979 Code of Conduct for Law Enforcement Officials, the 1982 Principles of Medical Ethics, and what was to become the 1988 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment) and implementation (notably, the establishment by the UN Commission on Human Rights of a special rapporteur on the problem of torture). The authors are particularly generous in their acknowledgment of the important role played by nongovernmental organizations. These, by campaigning against the evil of torture, induced some governments to initiate action by the United Nations, and they also pressed for particular initiatives. Some were active in the Commission's Convention-drafting group as well. While the authors give prominence to the role of Amnesty International (pp. 13, 19, 24-26), initiatives of the International Commission of Jurists and the International Association of Penal Law also emerge as significant.¹

Chapters 3 and 4 contain the book's main contribution. Chapter 3 gives a year-by-year account of the drafting process, from 1978 when the Commission began considering the Swedish draft, through 1984 when the General Assembly adopted the final text. Since the Commission's working group did most of the drafting, without making any summary records of its deliberations, the authors draw substantially on unpublished materials and their own

¹ The reviewer, who until recently headed Amnesty International's legal office, represented that organization during most of the drafting process.

recollections. They thereby provide an invaluable account of the main aspects of the evolution of the text, which does not suffer unduly from the inherent problem that such records cannot be comprehensive.

They then, in chapter 4, provide an article-by-article commentary on the Convention, drawing partly on the materials described in chapter 3 and partly on other sources required for a contextual understanding of the legal significance of each article. The careful reader will need to consult the relevant parts of chapter 3, as a supplement to the commentary on each article, for a proper understanding of the text. An index would have been helpful.

Most of the last 100 pages consists of appendixes reproducing the Convention and the various working texts considered during the drafting process, as well as the international instruments necessary to an understanding of the international legal response to the practice of torture.

Given the moderate length of the main text and the absence of any index or other indication that the publishers did much more than arrange for the text to be printed and bound, the price of the book seems excessive. One hopes that it will not put the work beyond the reach of too many of those for whom its important content is intended and deserves to be accessible.

NIGEL S. RODLEY
University of Essex

International Dimensions of Humanitarian Law. United Nations Educational, Scientific and Cultural Organization. Geneva: Henry Dunant Institute; Paris: UNESCO; Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1988. Pp. xxii, 328. Index. Dfl.100; \$45; £32.50.

Problems of International Justice. Edited by Steven Luper-Foy. Boulder, London: Westview Press, 1988. Pp. xi, 314. Index. \$39.50, cloth; \$18.95, paper.

Indigenous Populations, Ethnic Minorities and Human Rights. By Wolfgang S. Heinz. Berlin: Quorum Verlag, 1988. Pp. xi, 224.

These three recent books deserve a place in libraries devoted to humanitarian concepts in international law. The first, *International Dimensions of Humanitarian Law*, was commissioned by UNESCO from the Henry Dunant Institute as the result of a General Conference of UNESCO in 1978. That conference recommended that, in cooperation with the International Committee of the Red Cross, the Henry Dunant Institute and the International Institute of Humanitarian Law, a program be developed for teaching international humanitarian law. The present manual contains 18 essays, an introduction and a conclusion, all written by distinguished scholars and practitioners of international law. Part I describes the development of humanitarian ideas within different schools of thought and cultural traditions, such as in Western cultures, in Africa, Asia and Latin America, in socialist states and in Islamic cultures. Part II provides an overview of the development of

international humanitarian law. Part III deals with the law of armed conflicts of an international and a noninternational character. Part IV reviews the legal means of putting into effect international humanitarian law and the development of the recognition of responsibility for breaches of this law.

The second book, *Problems of International Justice*, edited by Steven Luper-Foy, contains essays on the theory of justice and its application to individuals and their relationship to the state. What makes the book particularly relevant in the context of present-day events is that it deals with the dilemmas of deterrence and disarmament, as well as the most critical and practical international problems, such as terrorism, inequality among nations, world hunger, justice and the global environment. Each essay was written by a well-recognized expert in the field of political science and philosophy.

The third book, *Indigenous Populations, Ethnic Minorities and Human Rights*, by Wolfgang S. Heinz, is a study of human rights problems faced by members of indigenous populations and ethnic minorities. Heinz defines indigenous populations and ethnic minorities, pointing out that within governmental organizations and international law these terms are considered to be separate and distinct. He then describes the treatment of indigenous populations and ethnic minorities in the pre-1919 era, during the League of Nations period (1919–1945) and in the era of the United Nations. The next chapters explore major causes of human rights violations, illustrated by a case study of the Kalingas and Bontocs in the Philippines. Another major chapter deals with the emergence and development of human rights organizations working on the protection of indigenous populations and ethnic minorities—antislavery organizations, Amnesty International, the World Council of Churches and the World Council of Indigenous Peoples. The book contains an extensive bibliography and reprints of selected documents dealing with human rights conventions and related draft instruments.

CHARLES L. KENT

*Of the District of Columbia and New York Bars
Barrister-at-Law, Lincoln's Inn*

La Convention européenne des Droits de l'Homme. By Gérard Cohen-Jonathan. Presses Universitaires d'Aix-Marseille. Paris: Economica, 1989. Pp. 616. Index.

The European Convention on Human Rights entered into force on September 3, 1950. It is endowed with an effective supervisory mechanism, whose main actors are the European Commission and the European Court of Human Rights. Since the Court handed down its first judgment in 1960, more than two hundred judgments have been delivered. In addition, innumerable cases have been dealt with by the Commission, which acts as a screening authority to identify applications that deserve closer scrutiny. This jurisprudence of the two main bodies, whose work is completed by the activ-

ity of the Committee of Ministers, has created an impressive legal edifice to which access is not easy. Cohen-Jonathan's study therefore serves a most useful purpose. It gives a complete picture of the legal framework of the Convention. Part I examines institutional aspects, and part II is devoted to substantive law.

Cohen-Jonathan has written a masterpiece of legal art. The book deals comprehensively with all issues arising under the Convention. Sometimes, even further ramifications relating the Convention to other international instruments, in particular the International Covenant on Civil and Political Rights, are explored. An important chapter is devoted to the implementation of the Convention at the national level. First and foremost, however, the author explains the meaning and practical impact of the Convention in light of the jurisprudence of the two main treaty bodies. Their decisions are not simply presented as the law as it stands; Cohen-Jonathan does not hesitate to criticize certain orientations that he believes need further reflection and possibly correction. For instance, he voices disagreement with the judgments in the cases of *Glaserapp* and *Kosiek* (pp. 191, 192 and 198), both concerning political extremists who had been dismissed from public service in the Federal Republic of Germany. The judges refrained from examining the charges brought by the applicants, on the ground that access to public service was not a right guaranteed by the Convention, as could be seen from a comparison with Article 25 of the International Covenant on Civil and Political Rights. The author holds that the approach of the Commission, which reviewed the cases from the viewpoint of freedom of expression, would have been more in keeping with the overall jurisprudence of the Court.

Cohen-Jonathan does not look only to the past, but takes up quite a number of issues that had not yet become relevant when he completed his manuscript. Thus, he discusses whether reservations are admissible when a state makes a declaration accepting individual applications under Article 25 (pp. 93 and 94); he also delves into the intricate question of the impact of EEC membership on responsibility under the Convention (pp. 74 and 76). Careful consideration is given to the necessary overhaul of the system, which risks becoming a victim of its own success (pp. 233-40).

The only regrettable weakness is the lack of a separate chapter on general issues such as the nature of obligations under the Convention, the rights of corporate bodies and the third-party effect of the Convention. To be sure, the author does not overlook these problems, but he deals with them in examining the different requirements of admissibility of applications. This, however, is more a question of taste falling under the maxim *de gustibus non est disputandum*.

The book gives a clear and precise overview of the entire system of the European Convention on Human Rights. It will therefore promote better understanding of the Convention and enhance its practical impact on the member states of the Council of Europe.

CHRISTIAN TOMUSCHAT
Bonn

The Concept and Present Status of the International Protection of Human Rights: Forty Years After the Universal Declaration. By B. G. Ramcharan. Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1989. Pp. xi, 611. Index. Dfl.295; \$159.50; £94.50.

Beginning in 1976, Bertie Ramcharan served as the Special Assistant to the Director of the United Nations Human Rights Division under Marc Schreiber and then Theo van Boven; he continued as Special Assistant to Kurt Herndl, the Assistant Secretary-General for Human Rights until 1987. Ramcharan has discontinued his direct involvement in the human rights program; he now serves as Chief of the Drafting Office in the Office of the UN Secretary-General. This book represents Ramcharan's survey of human rights protection as of his departure.

It is evident that Ramcharan was trying to present a comprehensive picture of UN human rights activities. He begins with an overview, reviews many significant elements of UN practice, and ends with a look at future activities. The book would be valuable to the most sophisticated student of UN human rights practice.

The heart of the volume is a set of short essays, interspersed with UN documents, focusing on the critical issues the United Nations has had to face during the twelve years Ramcharan was most involved. Some of the UN documents have been available in public form, but the book contains many significant documents never previously issued. It was already known, for example, that the United Nations had thought about sending observers to trials of international concern,¹ but Ramcharan includes an internal UN memorandum setting forth some of the factors the United Nations might consider before sending such observers.

Similarly, there is an undated aide-mémoire from Theo van Boven to the Secretary-General advocating that UN field offices accept and transmit human rights complaints (known in UN parlance as communications) to relevant UN officials who might be able to respond (pp. 144-48). The aide-mémoire is followed by a heartless, self-protective memorandum of October 1969 from the UN Assistant Secretary-General, Office of Public Information, instructing UN Information Centres to discontinue the practice of receiving such human rights complaints. The two documents are reprinted without comment by the author. It is clear, however, from the strong arguments presented in the van Boven aide-mémoire, that this issue should be resolved so as to allow the United Nations to protect human rights more effectively.

The representatives of governments and nongovernmental organizations were for many years quite reticent in UN bodies about criticizing human rights violations in particular countries. At least through 1974, the practice developed of discussing almost all situations without mentioning the name of the country. During the period 1974 through 1976, a significant change occurred and further liberalization continued through 1983 to the present. During the late 1970s nongovernmental organizations and governments began to criticize human rights violators by name and without procedural

¹ Weissbrodt, *International Trial Observers*, 18 STAN. J. INT'L L. 27, 33-34 (1982).

objections.² Ramcharan discusses these developments (pp. 104–06) and then reproduces an undated note, prepared by the staff of the UN Human Rights Centre, to presiding officers of the Commission on Human Rights confirming that “the Commission has, over the years, allowed non-governmental organizations to include in their statements information to the effect that human rights are not being fully respected in particular countries” (pp. 107–08). The book also contains a practice note of 1978 concerning the circulation of written statements prepared by nongovernmental organizations (pp. 113–14).

In addition, the book reproduces parts of published documents reflecting important elements of UN practice. For example, the Government of Chile in the late 1970s complained that it was being subjected to special procedures that focused more UN attention on human rights violations in that country than in other countries. The book reproduces (pp. 70–75) the response of the UN Special Rapporteur on the Situation of Human Rights in Chile in his report of 1979, which justified the special procedures. The response helped to provide a legal basis for the efforts of the UN Commission on Human Rights to establish working groups, special rapporteurs, special representatives and experts to monitor human rights violations in Afghanistan (1984–present), Bolivia (1981–1982), Chile (1975–1990), Cuba (1988), Democratic Kampuchea (1980–1983), El Salvador (1981–present), Poland (1982), Equatorial Guinea (1979, 1980, 1984), Guatemala (1983–1987), Iran (1984–present), Romania (1989–present) and South Africa (1967–present).

Human rights scholars and advocates will find the book useful as they mine its pages for nuggets of information not previously published or potentially lost in the mass of UN documentation. As with any mine, however, not all the material is valuable. Some of the UN documents, particularly toward the end of the volume, are not especially memorable. Perhaps, the shift represents the changes wrought in the UN human rights program as it passed from the leadership of Theo van Boven to the stewardship of Kurt Herndl.

DAVID WEISSBRODT
University of Minnesota

La Protección internacional de los derechos humanos. Su desarrollo progresivo.

By Pedro Nikken. Instituto Interamericano de Derechos Humanos. Madrid: Editorial Civitas, 1987. Pp. 321.

Los Derechos humanos en América. By Carlos García Bauer. Guatemala: Editorial Tipográfica Nacional, 1987. Pp. 416.

These two works, written by distinguished Latin American human rights specialists, are valuable additions to the growing human rights literature in Spanish. Their scope and styles, however, differ significantly.

² Kamminga & Rodley, *Direct Intervention at the UN: NGO Participation in the Commission on Human Rights and Its Sub-Commission*, in *GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE* 186, 194–96 (H. Hannum ed. 1984).

The book by the Venezuelan professor and judge of the Inter-American Court of Human Rights Pedro Nikken is an excellently documented, exhaustive work that addresses most of the important human rights questions. Nikken adopts a cautiously optimistic view about the expansion of international mechanisms for the protection of human rights. His canvas for analysis is the notion of progressivity: throughout the book, he traces the undeniable evolution in the human rights field toward the realization of human dignity. Particularly insightful are Nikken's discussions of the definition of rights protected (pp. 116-36), and the legal force of the human rights declarations (chapter VI). While this reviewer would have perhaps preferred to see the author defend some definite positions on controversial matters (such as the relationship between human rights and nonintervention, at pp. 61-65), the book is far from being only descriptive. Nikken discusses important theoretical issues in human rights law, and examines different sides of the arguments in a fair, serious and evenhanded way. His use of case law and precedent is equally persuasive and often creative, as, for example, his citation of the Court's discussion of customary law in the *Nicaragua* case to support his point that violations of human rights by governments do not affect the legal status of those rights under customary law (p. 276). This is an excellent work that amply fulfills its mission.

Los Derechos humanos en América, by the Guatemalan diplomat and professor Carlos García Bauer, is a rather different type of work. Unlike Nikken's book, it is devoted solely to the protection of human rights in the Americas. It is in five parts. The first traces efforts to protect human rights in the Americas at the national level. This chapter includes a couple of pages on the new member of the OAS, Canada. The second part discusses the evolution of human rights protection at the international level. The author's inclination here is both to acknowledge the universality of human rights and to caution against admitting new rights indiscriminately. Parts 3 (protection in the Americas, including the contribution of the Inter-American Commission on Human Rights) and 4 (an analysis of the American Convention) are perhaps the most useful, on account of the extensive documentation included. Part 5 consists of a documentary appendix. García Bauer's book is almost exclusively descriptive and, while devoid of originality or boldness of argument, it should be valuable to specialists.

These two works, while different, share an important thrust: the fundamental place of human rights in the inter-American system. The mass of historical, political and diplomatic precedent on the protection of human rights on this continent, included in both books, should help dispel doubts about the primacy of human rights (and not of nonintervention and similar government-oriented principles) in the inter-American system.

Without question, the most important events of the second half of the 20th century have been the pro-democracy and pro-human rights revolutions in Latin America, Central Europe and elsewhere. Neither the power of government tanks nor the rhetoric of Western skeptics has been able to stop individuals, regardless of history, culture and tradition, from seeking free-

dom and resisting tyranny. The two works under review bear witness to this dramatic shift.

FERNANDO R. TESÓN

Arizona State University and Hastings College of Law

Tribunales chilenos y derecho internacional de derechos humanos: La recepción del derecho internacional de derechos humanos en el derecho interno chileno. By John A. Detzner. Santiago: Comisión Chilena de Derechos Humanos, 1988. Pp. xxvii, 182.

This book by John A. Detzner is a timely and well-researched study on the difficult issue of how Chilean courts have dealt with the international law of human rights in the many relevant cases submitted for their adjudication. The publication was sponsored by the Chilean Commission on Human Rights and the Programme on Human Rights of the Academy of Christian Humanism, entities that have had an active role in the promotion of human rights in Chile.

The discussion of this complex question leads the author to consider the relationship between international law and the Chilean domestic legal order in general, as well as the relationship of the international law of human rights with that domestic order in particular. It is in this context that Detzner's research becomes particularly valuable, providing useful insight into judicial precedents, the opinions of writers and the practice of various governmental agencies.

Although the book is based on adequate scholarly research, its purpose really is to prepare a legal brief to help those interested in making successful pleadings before the courts on the enforcement of international human rights rules. In this other dimension, the work contains interesting material on the development of appropriate legal arguments.

However, within this very purpose lies some inconsistency of argument. In fact, the legal brief does not always appear to follow closely the conclusions reached by means of the research. The central argument of the book is that in refusing to apply the international law of human rights, Chilean courts have violated both international and domestic law and broken with a long-standing judicial tradition on the role of international law (pp. 7-8). That in some instances there might have been a violation of international law is a well-founded argument, at least to the extent that the obligations in question were clearly set out, which unfortunately has not always been the case.

Less clear is the issue of a violation of domestic law, in part because the applicable rules of the Constitution and other sources are not precise as far as international law is concerned, and in part because some of the technical obstacles to the implementation of the latter can be found quite explicitly in the law itself. One particular obstacle is the requirement that treaties be published before they can be enforced domestically. This requirement was formally introduced in 1974 in the light of prior opinions of the Legal Adviser to the Ministry of Foreign Affairs and the view of some international

law scholars.¹ While other authors (pp. 57–58), including this reviewer, are of the opinion that procedures such as promulgation and publication are not strictly necessary for the implementation of conventional international law in Chile, one cannot ignore the weight that those legal requirements have always had in the courts.

The third main issue raised by Detzner is that, in so proceeding, Chilean courts have broken with their tradition of recognizing the superiority of international law and effectively implementing it. True, there are a number of judicial precedents in which the courts have relied on international law, either because domestic law expressly refers to international law or because a treaty has been ratified and brought into force domestically. There are also important cases in which the automatic incorporation of rules of customary international law has been recognized by the courts and applied accordingly.² Chilean international law writers generally agree that this is the right approach to the application of international law.³

It does not follow, however, that a judicial tradition has been established since there are also cases where the courts have upheld domestic law above international law.⁴ Courts are not always inclined to apply international law properly. This is not, of course, a peculiarity of the Chilean legal system; in reading Henkin's discussion of the U.S. Constitution⁵ or Quoc Dinh's studies on the French legal system,⁶ it is not difficult to realize that this problem is shared by most legal systems.

The author himself recognizes this situation at the outset. In selectively citing a well-known study of 1962 to the effect that Chilean decisions on questions of international law are few and occasionally contradictory,⁷

¹ Decree Law No. 247, Dec. 31, 1973, *Diario Oficial* [D.O.] (Jan. 17, 1974). See, in particular, Opinion No. 2 of the Legal Adviser of the Ministry of Foreign Affairs, Edmundo Vargas, Jan. 5, 1968, 1968 MEMORIA DEL MINISTERIO DE RELACIONES EXTERIORES 346–48; and see further, on the academic input that led to the drafting of that Decree Law, J. Irigoin, *La Incidencia del órgano legislativo chileno en la conclusión de acuerdos internacionales* 93 (thesis, Law School of the University of Chile, 1976).

² See, for example, the leading case, *Lauritzen con Fisco*, 52 REVISTA DE DERECHO Y JURISPRUDENCIA, pt. 2, §1, at 478 (1955); and the discussion by Detzner at pp. 26–30.

³ See generally Benadava, *Las Relaciones entre el derecho internacional y el derecho interno ante los tribunales chilenos*, 59 REVISTA DE DERECHO, JURISPRUDENCIA Y CIENCIAS SOCIALES 1 (1962); Irigoin, *supra* note 1; Orrego Vicuña, *La Incorporación del ordenamiento jurídico subregional al derecho interno. Análisis de la práctica chilena*, 7 DERECHO DE LA INTEGRACIÓN 42 (1970).

⁴ See, in particular, the Supreme Court decision in *Duncan Fox y Cia. con Dirección General de Impuestos Internos*, 30 REVISTA DE DERECHO Y JURISPRUDENCIA, pt. 2, §1, at 100 (1933), cited by Benadava, *supra* note 3, at 26. A number of decisions have refused to apply international law as equated to domestic law when the pertinent treaties have not complied with the requirements for domestic entry into force; see cases cited in Benadava, *supra*, at 20–22.

⁵ L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* (1972); Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555 (1984).

⁶ Quoc Dinh, *Le Conseil Constitutionnel français et les règles du droit public international*, 80 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 1001 (1976).

⁷ Benadava, *supra* note 3, at 1. This author wrote in conjunction with the phrase quoted by Detzner that it cannot be said that Chilean courts have developed a "constant line of decisions" (*jurisprudencia constante*), a statement that was omitted from the citation.

Detzner adds that the situation has not changed much during the following 25 years, providing various illustrations (pp. 2–9).

When a rule of international law conflicts with the Constitution, courts will generally approach the question with added caution, Chilean courts being no exception. Detzner rightly criticizes a decision of the Constitutional Tribunal on the question of the political rights of the former Foreign Minister, Clodomiro Almeyda, under restrictive clauses then in force (pp. 6–8). In this case, the Tribunal ruled that those constitutional clauses prevailed over the Covenant on Civil and Political Rights.⁸ There is no question that from the viewpoint of international law, such an argument would not stand; but from the point-of view of a constitutional court, the Constitution would probably be upheld unless its very clauses provided for the supremacy of the international rule. This case was a missed opportunity to clarify the whole issue of the relationship of international law with domestic law under the Chilean legal system.

The author touches in passing the question of the independence of the courts from the Executive (p. 153). The issue has been much debated in Chile and it also has a direct bearing on the application of international law, since the courts have in many cases relied on the Executive's view on problems of international relations. This, again, is not a peculiarity of Chile.

On occasion this situation has led to a negative conclusion about the enforcement of international law, the law of human rights being a case in point as can clearly be seen from Detzner's book. On other occasions, however, it has led to a positive conclusion, international law being applied by the courts at the express written request of the Ministry of Foreign Affairs. The case of *Gulf Oil Co. v. Bolivia*,⁹ in which the Supreme Court overruled an attachment ordered by the District Court of Antofagasta, and the recent case involving the German settlement *Colonia Dignidad*,¹⁰ in which the high Court ordered enforcement of diplomatic immunities under the Vienna Convention, are illustrative of this other attitude. Such intervention by the Foreign Ministry raises issues comparable to those of executive certificates in Great Britain and the United States.¹¹

The book ends with an interesting discussion of the various legal strategies that could be pursued to ensure the implementation of the international law of human rights. Some suggestions are rather indirect—such as relying on equity, natural law or submissions to the Constitutional Tribunal (pp. 141–47)—and to the extent that they are indirect, it will be difficult to have

⁸ Decision of the Constitutional Tribunal, Dec. 21, 1987, §3, paras. 25–30, *El Mercurio*, Dec. 23, 1987, at C11.

⁹ *Gulf Oil Co. con Gobierno de Bolivia*, Dec. 10, 1969, 66 *REVISTA DE DERECHO, JURISPRUDENCIA Y CIENCIAS SOCIALES*, pt. 2, §1, at 311 (1969); English text in 10 *ILM* 1 (1971).

¹⁰ Supreme Court Decisions of July 19, and July 21, 1988, and clarification by Decision of Aug. 2, 1988, upholding diplomatic and consular immunities; texts in *FALLOS DEL MES*, No. 356, July 1988, at 390–94 (Civ. Sec. Decision No. 10).

¹¹ See Collier, *The United Kingdom*, in *INDIVIDUAL RIGHTS AND THE STATE IN FOREIGN AFFAIRS* 602, 628–30 (E. Lauterpacht & J. G. Collier eds. 1977); Leigh, *United States of America*, in *id.* at 639, 671–78.

them accepted by the courts, although thoughts in this regard can be found in some opinions of dissenting judges.¹² Some other suggestions are difficult to implement, such as requesting an advisory opinion from the International Court of Justice (pp. 147-49).

There is, however, one approach, which the author develops in conjunction with the opinion of writers, that offers the most promise. Article 5 of the 1980 Constitution restricts the exercise of sovereignty to the extent required by the fulfillment of "fundamental rights emerging from human nature." On the basis of this provision, Detzner concludes that the international law of human rights always prevails over domestic law and that there can be no true conflict (pp. 126-31 and 139-40). This reviewer shares that view.

Although the matter was debatable in light of the wording of the above provision, a constitutional amendment, which came into force in August 1989, clarified the issue by adding a second paragraph to Article 5: "It is the duty of the organs of the State to observe and promote such rights, guaranteed by this Constitution, as well as by the treaties ratified by Chile and which are in force."¹³ This amendment was approved in the context of a political dialogue between the Government and the opposition aimed at expediting the transition to democracy, and it originated in a proposal by the Chilean Bar Association.¹⁴ Comparable provisions are found in the Constitutions of Peru, Guatemala and Nicaragua.

This amendment has the effect of incorporating the conventional law of human rights, to which Chile is a party, into the domestic legal order. To this extent, it accommodates the concern evidenced throughout the book. A constitutional mandate of this kind addressed to state organs is likely to be observed with particular care. It should also be noted that Chile has recently ratified various conventions on human rights and has completed the procedures for the domestic entry into force of the Covenant on Civil and Political Rights and other related treaties.

It follows from the above that treaties on human rights have now, in Chile, a ranking above statutes and at least equal to the Constitution. The material content of the rights guaranteed by the Constitution has been considerably enlarged by this interlinking with international law. This enlargement, in turn, will result in broader protection under the special procedures provided for in the Constitution. It may even be argued that domestic legislation contrary to the international law of human rights not only will not prevail, but might have been tacitly repealed by the Constitution, or at any rate will have to be revised accordingly. In addition, customary international law and general principles of law can always be enforced by the courts automatically; and to the extent that these rules are embodied in treaties on human rights, they are now also included in the constitutional mandate. It is on the basis of

¹² See, for example, the dissenting opinions of Justice Carlos Cerda in González Ferrada, Fernando Rodrigo, *Recurso de Amparo*, Rol 1.837-84, Nov. 22, 1984, as cited at pp. 30-33.

¹³ Constitutional amendments introduced by law No. 18.825, D.O. (Aug. 17, 1989).

¹⁴ Colegio de Abogados, *Séptimo Congreso Nacional de Abogados de Chile* (July 17-20, 1986), *BOLETÍN INFORMATIVO*, No. 3, August 1986, at 7; and see Detzner's discussion at pp. 73-74.

these developments that the judicial tradition invoked by Detzner might now become established.

Detzner's work has broken new ground in the field as far as Chile is concerned and has thus made a valuable contribution to the literature and policy. A stricter legal analysis and, in some cases, a more rigorous method of citation would have strengthened the book without detracting from the policy objective of facilitating the much-needed implementation of the international law of human rights in Chile and elsewhere.

FRANCISCO ORREGO VICUÑA

The Law School of the University of Chile

The European Community and GATT. Edited by Meinhard Hilf, Francis G. Jacobs and Ernst-Ulrich Petersmann. Deventer: Kluwer, 1986. Pp. xvii, 398. Index. Dfl.225; £67.50; \$97.

International Trade Regulation: GATT, the United States and the European Community (2d ed.). By Edmond McGovern. Exeter: Globefield Press, 1986. Pp. xlv, 629. Index. £38; \$60.

These two works, the first a collection of articles dedicated to the memory of Professor Jan Tumlir, the late Director of Economic Research and Analysis in the GATT Secretariat, and the second a substantial revision of a 1982 treatise on GATT and international trade law, are welcome additions to the burgeoning trade law literature. Together they combine the comprehensive scope and foundation of John Jackson's 1969 classic trade law treatise with the European perspectives and revisions necessary for adequate U.S. appreciation of European positions in the current Uruguay Round negotiations. In short, the approaches differ in their ordering of priorities: in Europe, the emphasis has been on economics and law; in the United States, law governs economic regulation, laissez-faire being more easily assumed.

The Hilf/Jacobs/Petersmann book is a collection of papers presented at conferences in Bielefeld and London in 1984. It is the fourth volume in the Kluwer series "Studies in Transnational Economic Law" and contains another elegant commentary by Tumlir, *GATT Rules and Community Law—A Comparison of Economic and Legal Functions*, which helps to put the critical differences in the U.S. and EC approaches in an understandable framework. It sets the parameters for the contributions that follow, concluding with a plea for recommitment to the "rule of law," a case for the self-interested surrender of traditional notions of sovereignty (embodied in a reassertion of the most-favored-nation principle) in order that the world trade system may survive.

With the exception of contributions by Professor Edmond McGovern, *Dispute Settlement in the GATT—Adjudication or Negotiation?*, by Robert Hudec, *The Legal Status of GATT in the Domestic Law of the United States*, and by the EC Commission's chief textile negotiator during the MFA III negotiations, *The Multifibre Arrangement as a Special Regime under GATT*, the articles deal with various aspects of GATT application in the European Communi-

ties. Petersmann focuses on the conflicts between the two systems, criticizing the European Court's denial of direct effect to the GATT and putting forward a most interesting analysis of *GATT Law and the Protection of Human Rights*. He is joined by Hilf, whose essay is entitled *The Application of GATT within the Member States of the European Community, with Special Reference to the Federal Republic of Germany*. In defending the European Court's rulings on the direct effect of GATT, former Director-General of the EC Commission's Legal Service C. D. Ehlermann explains the dilemma of a system in which there does not exist legislative discretion to determine whether an agreement shall be self-executing. He also remarks on the Commission's reluctance to "do non-Member countries' business for them."

Professor M. Maresceau, in *The GATT in the Case Law of the European Court of Justice*, concludes that the impact of the international agreement on the Community has not been substantial. He suggests, without much hope of its execution, that a GATT Court of Justice should be established, one solution to the piecemeal, unbalanced judicialization of the GATT. Finally, Ulrich Everling, former Justice of the European Court, offers an insightful exposition, *The Law of the External Economic Relations of the European Community*.

In addition to GATT and EEC Treaty provisions, Council Regulation (EEC) No. 2461/84 on the Strengthening of the Common Commercial Policy with regard to Protection against Illicit Commercial Practices is included in the appendix. Also provided is a chronological list of GATT Article XXIII dispute settlement proceedings from 1948-1985.

McGovern's revised second edition is essential background for the more topical volume just described. Praised as "original" by GATT Director-General Arthur Dunkel in his introduction, it is in this reviewer's opinion comparable in its theoretical exploration, scope and accessibility (from the European perspective) to Jackson's 1969 treatise. The schema is threefold: (1) foundations, (2) general rules, and (3) commodities and sectors. While GATT rules and the increasing "judicialization" of trade disputes through domestic courts are of primary concern, McGovern devotes considerable attention to the application, and avoidance, of the international regime by the United States and Europe, though not to the exclusion of developing countries. Completed just before the Uruguay Round began, the book remains a timely text because of its encyclopedic examination of the structure and policies and differing philosophies of international trade regulation. McGovern has succeeded in bridging the usual gap between U.S. and EC trade policies by giving integrated, rather than merely descriptive, comparisons.

The exhaustive Table of Cases, current through February 1986, is very useful, as are the general and chapter bibliographies. The GATT text and a Table of the Legal Status of Multilateral Trade Negotiations Agreements as of February 1986, are additional features that recommend this work not only to policy makers and scholars already steeped in the specialized material, but also to those looking for a textbook in this increasingly important field.

MARY FRANCES DOMINICK
Columbia Law School

Corporations In and Under International Law. By Ignaz Seidl-Hohenveldern. Hersch Lauterpacht Memorial Lectures. Cambridge: Grotius Publications Limited, 1987. Pp. xviii, 138. Index. \$45; £25.

Small Nations, Giant Firms. By Louis W. Goodman. New York and London: Holmes & Meier, 1987. Pp. xiii, 181. Index. \$39.50, cloth; \$19.75, paper.

At a time when Third World parastatal enterprises are being privatized, state-run economies liberalized and free market industries globalized to the extent of losing any clearly identifiable nationality, an update on the status of corporations as they relate to international law and international responsibility is a welcome anchor for the expanding literature on international trade and investment.

Not until the end of the 19th century was the notion abandoned that only states could enjoy international legal personality. The 20th century has witnessed the evolving role of the corporation as an artificial legal person under international law, together with the changing status of *jure imperii* vis-à-vis *jure gestionis* acts of a nation-state. This metamorphosis of commerce-related legal status remains a subject of unwaning interest in the increasingly complex interactions of global economics and international commercial transactions.

In *Corporations In and Under International Law*, Ignaz Seidl-Hohenveldern sets out to explain, through recent case law and thorough and thoughtful analysis, the extent to which the rules of public international law have adjusted to account for changing commercial relationships and the phenomenon of corporate personality. The work covers both private and state-owned corporations, and devotes its attention to legal personality, diplomatic protection, issues and aspects of control, exercise of extraterritoriality, nationalization, lifting the corporate veil, the severance doctrine, and legal and state responsibility.

It also discusses the interstate enterprise, which, while possessing no international legal personality, may act in the sphere of international law if engaged in some *jure imperii* activity entrusted to it by an entity that does have the status of person. The author is careful to make the point that entrusting the fulfillment of international obligations to an interstate enterprise does not transfer international responsibility (pp. 103-04, 117, 120-21).

Seidl-Hohenveldern offers in addition a major treatment of a subject not often encompassed in this context: international organizations—their legal personality and powers under both international and domestic law; the powers, responsibilities and relations of member states; and the responsibilities of, and recognition by, third states.

While the material for this treatise was first presented as two lectures in honor of Sir Hersch Lauterpacht at Cambridge University in 1984, it has been expanded upon for this volume and has lost none of its timeliness. The author's analysis of the case law relating to private and state-owned corporations, international organizations and ordinary interstate enterprises succeeds in demonstrating the direct and indirect interaction of rules of public international law and domestic law and the development of new legal rela-

tionships. He concludes (p. 123) that international law has utilized the concept of artificial legal personality, developed in domestic law, to serve its own ends.

The strengths of Seidl-Hohenveldern's work are his scholarly thoroughness in approach and process of analysis, the direct relevance of his treatment of the subject matter to current international law and economic concerns, and the timely nature of the subject of corporations and nation-states engaged in global commercial activities.

In the second work reviewed here, *Small Nations, Giant Firms*, Louis Goodman addresses the imbalance of interests between corporate decisions based on core activities of a multinational, located largely in the home country or in industrialized or highly investor-friendly developing host states, and decisions involving marginal areas of a firm's operations, mostly in Third World countries. He demonstrates how capital allocation decisions affected by marginality can have grave consequences for small nations, and attempts to come up with solutions for minimizing the imbalance.

Chapter 1 provides an overview of the field research that undergirds the book. The research was carried out mainly at the *siège* and subsidiary levels of six U.S.-based companies doing business in the target countries, with the focus on the capital expenditure decision processes and the interaction of both levels of management. Chapter 2 presents eight hypotheses on "the determinants of foreign investment decision making in the TNCs" and how these tested out in the interviews. Chapter 3 elaborates on the test/interview results to clarify how managers evaluate business environments in developing nations in which they have investments. Chapter 4 analyzes differences between decision processes affecting marginal parts of the corporate entity and those affecting principal operations. Chapter 5 pursues the question of marginality, underscoring multinationals' managerial concerns about the efficient use of executive time in marginal areas. Chapter 6 emphasizes the consequences of the scarcity of managerial time and its effect on marginality, and proposes steps for both the giant firm and the marginal host to reduce the negative consequences of the resulting imbalance.

Small Nations, Giant Firms is immensely weakened by the fact that it is based on a field study and interviews conducted in four Latin American countries in 1973. This is an enormous drawback in the world of dramatically changing economic realities. Third World countries bent on discouraging foreign investors in the mid-1970s are now actively, even desperately, seeking them. Decision 24 and other restrictive policies that pervade the text have since been rescinded (after publication), further altering the investment posture of the countries covered by the author. And, of course, at the time of the field research, the gigantic burden of Third World indebtedness had not yet become the preoccupation of the world's financial institutions, with the accompanying structural adjustment programs and related debt relief strategies that altered investment patterns and projects of multinational firms investing in these regions.

While the author aspires to attribute applicability of his findings to other parts of the developing world, many of the observations are difficult to

extend to, say, either Africa or Asia. In *Small Nations, Giant Firms*, Goodman contrasts Brazil with three Andean countries—Colombia, Peru and Chile. Brazil, at the time of the interviews, had just been characterized by *Business Latin America* as “the Latin American darling of the international business community” (p. 28). The newly formed Andean Common Market (ANCOM) was at the same time sending restrictive signals to actual and potential foreign investors. Not only does the fact that ANCOM was a fledgling community at that time make it dangerous to extrapolate generally applicable trends, but by the time the book was published, fourteen years after the interviews, one of the three countries selected for the ANCOM case, Chile, had long since left it.

Though members of 43 firms were reportedly interviewed, only 6 of those firms were selected as case studies for the observations posited by the author. While anecdotal material is used, its wider pertinence is not always evident. The Continental Can Co., for example, is profiled in detail (pp. 10–12) as “in many ways typical,” yet the description does not seem in any way generic but, rather, unique to that firm.

A key point made in the introduction, excerpted from an interview with the manager of a well-known multinational, stands as perhaps the most significant observation of the work. That is that the value of executive time can be more critical in assessing the viability of a Third World investment than actual monetarily measurable profits. The author's treatment of the dynamics of marginal decision making in chapter 4 is of particular interest in this regard. Here the finding emerges that the efficient use of executive time is the primary concern in marginal decisions, while revenue implications are crucial in core decisions. The author emphasizes the implications of this finding for sociological and microeconomic decision making, since emphasis elsewhere traditionally focuses on core decision-making theory.

For any firm contemplating a direct investment in Brazil or the three Andean countries chosen to represent ANCOM, this book may furnish useful background material and case-specific insights. As a contribution to the development or analysis of international law principles per se, its utility is limited.

CYNTHIA DAY WALLACE

*Center for Strategic and International Studies
Washington, D.C.*

Conflict and Resolution in US-EC Trade Relations at the Opening of the Uruguay Round. Compiled and edited by Seymour J. Rubin and Mark L. Jones. New York, London, Rome: Oceana Publications, Inc., 1989. Pp. xxviii, 531. \$60.

In April 1987, the Oceana Group and the American Society of International Law cosponsored a colloquium on the day before the Society's Annual Meeting in Boston. The theme was “European Community–United States Trade and Other Economic Relations in the Context of the Uruguay

Round." This book, edited by the organizers of the colloquium, contains the remarks of the well-chosen group of experts and government officials who spoke there.

The Uruguay Round of multilateral trade negotiations was launched, with the United States taking the lead, at the Punta del Este conference of trade ministers in September 1986. However, as in past negotiating rounds, talks did not begin in earnest until the U.S. administration obtained a grant of negotiating authority, in the Omnibus Trade and Competitiveness Act of 1988.¹ As of April 1987, Congress was in the process of passing two different omnibus trade bills, each of which included (in addition to negotiating authority) numerous other provisions that were clear veto bait; it would not be clear until spring 1988 whether there was a law at the end of the tunnel. These colloquium remarks present a panorama of the negotiations, focusing on the United States and the European Community, in spring 1987 as the outlines of the issues in the round were just beginning to emerge.

The first part of the proceedings includes views from seven perspectives. The United States, the Community and the developing countries (Singapore) are represented by the veteran negotiators Harvey Bale, Paul Luyten and Tommy Koh, respectively; these are followed by remarks by William Kelly on the GATT perspective, by Philip Trezise on the role of the transatlantic partnership in trade and by Jeffrey Schott on trade-monetary issues in the GATT. Speakers in the second section, on institutions, include Kenneth Simmonds on the EC institutional framework for negotiations, William Kelly on the GATT Secretariat and Gary Horlick on GATT dispute settlement. The third section includes a contribution by Doreen Brown on trade policy and consumers, and remarks by Robert Cassidy, Jr., and Marco C. E. J. Bronckers on attitudes in the United States and the Community toward trade law and the GATT. Finally, the fourth section looks at issues for the United States and the Community in the Uruguay Round: agriculture (Marsha Echols and Graham Avery), services (Jacques Reinstein and Paul Luyten), intellectual property (Joseph Greenwald and Mogens Peter Carl), trade-related investment measures (Clarke Ellis and Mr. Carl), and the impact of U.S.-EC industrial-sector trade disputes on the agenda of the Uruguay Round (S. Bruce Wilson and Mr. Carl).

In the two years since the colloquium, there has been a comprehensive midterm review by trade ministers, begun in Montreal in December 1988, and concluded in Geneva in April 1989.² Many proposals have been advanced by all sides—yet basic attitudes remain strikingly consistent. As of December 1989, EC and U.S. positions on services, for instance, are to a great extent an elaborated version of the themes sketched out briefly here. However, in other areas, such as dispute settlement, the midterm review agreements have progressed beyond these remarks. This collection will be useful to historians tracking the Uruguay Round over time, but was not intended as a picture of where the round is now.

¹ Pub. L. No. 100-418, 102 Stat. 1107 (1988).

² 28 ILM 1023 (1989).

The colloquium remarks are generally quite brief (under 10 pages of typescript). Together with the editors' preface, they total 216 pages. They have been supplemented by 241 pages of public-domain material, which most of those interested in this topic already own: the Punta del Este Declaration,³ GATT Articles XXII and XXIII, the Tokyo Round Understanding on dispute settlement and large chunks of the Omnibus Trade and Competitiveness Act of 1988.

AMELIA PORGES

Of the District of Columbia Bar

Navigational Restrictions Within the New LOS Context: Geographical Implications for the United States. By Lewis M. Alexander. Peace Dale, R.I.: Offshore Consultants, Inc., 1986. Pp. xii, 396.

This study, a report prepared for the U.S. Department of Defense now publicly available from the consultant, considers how the new regime on navigation and overflight under the 1982 UN Convention on the Law of the Sea affects the interests of the United States and its major allies (considered as such are the EEC member states, Japan, Canada and Australia). The regime covers both civil and military vessels and aircraft.

In the first section, the author describes the gradual extension of coastal state jurisdiction (scope and geographical extent) and the relevant provisions of the Law of the Sea Convention. Uncertainties regarding some of those provisions receive particular attention. Present claims by coastal states that seem to be in excess of the Convention's provisions are briefly reviewed. Much useful information is contained in various tables, but their accuracy is not always easy to assess. Table 10-B, which lists dependent territories that, if independent, would qualify for archipelagic state status, incorrectly omits some parts of archipelagos such as the southern Netherlands Antilles.

In the second section, Alexander provides an inventory of narrow international waterways, with particular emphasis on international straits. The waterways are classified according to the various regimes for them in the Law of the Sea Convention. This classification raises a number of questions relating to the interpretation of certain of the Convention's provisions. For example, the phrase "straits used for *international* navigation" leaves unclear when a strait qualifies as an international strait, since it does not specify how intensively the strait need be used by non-coastal state ships. The author suggests that any strait connecting two parts of the high seas/exclusive economic zone (EEZ) with one another, or the high seas/EEZ with the territorial sea of a foreign state is, by definition, useful for international navigation and should be considered an international strait. Table 12-A contains basic information on 265 international straits. This list is not complete; in particular, some straits between small islands were not included (e.g., the strait

³ 25 ILM 1623 (1986).

between Curaçao and Bonaire). The criteria used for selection remain somewhat unclear.

The discussion of the regime for archipelagic sea lanes passage leaves some important issues unaddressed, e.g., the precise role of the International Maritime Organization (or some other international organization?), the designation of air routes (should they be over the sea lanes?), and the significance of the reference in Article 53(3) to the *right* of navigation, in contrast to the *freedom* of navigation as referred to in Article 38(2), dealing with transit passage.

The third section describes the ocean navigation routes of particular importance for the United States and its major allies ("lifelines"). On the basis of this description, section IV identifies and analyzes eight "transit regions" in the oceans where there are concentrations of narrow international waterways and offshore jurisdictional zones and, consequently, where restrictions to the freedom of navigation and overflight appear most likely to occur.

The first four sections of the study contain a wealth of information that is not readily available elsewhere, and they therefore constitute an important research tool for anyone dealing with navigation and overflight issues under the new law of the sea.

In the final section, some possible future developments are discussed, including their potential impacts on U.S. interests—without, however, suggesting any specific responses by the United States to developments that threaten its interests. The author identifies three options for developments in state practice. First, the system of "regulatory uncertainty" may continue largely as it is now. Alternatively, states may move in the direction of eliminating present-day inconsistencies with the Law of the Sea Convention, with a consequent trend toward "global consistency." The third option involves "national inconsistencies," meaning that a considerable number of coastal states may come to adopt (and in many cases enforce) rules and regulations concerning navigation and overflight at variance with the Convention. The author expects the third option to materialize in the next decade, albeit in a somewhat limited way. He discusses the particular concerns that coastal states might have (such as environmental concerns), prompting them to establish rules and regulations affecting navigation and overflight in excess of the provisions of the Law of the Sea Convention; the specific types of non-conforming rules and regulations that might be anticipated as a result of coastal state concerns; and, finally, the potential impact of such "illegal" rules and regulations on the interests of the United States and its major allies.

This is perhaps the most interesting section of the study. It is, of course, partly speculative. A number of factors influencing these developments may change and, in fact, some already have since the completion of the study (e.g., East-West relations). Still, Alexander's argument is generally convincing and constitutes stimulating reading.

ALFRED H. A. SOONS
University of Utrecht

Outer Space: Problems of Law and Policy. By Glenn H. Reynolds and Robert P. Merges. Boulder, San Francisco and London: Westview Press, 1989. Pp. xvi, 349. Index. \$52.50.

Space-related activities are proliferating. Lawyers and students of public policy have been active in describing and analyzing the worldwide and domestic approaches best suited to the exploration, use and exploitation of space and its natural resources.

In the past, a few international lawyers have produced broadly encompassing assessments. More recently, there have been shorter publications dealing with one or several aspects of the larger whole. In this evolution the internationally oriented authors have given some attention to the law of private commercial activities as it has affected international developments. In doing so, they have been obliged to rely on insights appearing in the law journals since there has not yet emerged a broad professionally oriented assessment of domestic laws and policies.

It is evident that lawyers, in particular those practicing in the United States, must be able to deal with both the international and the domestic issues resulting from humankind's presence in space. And, aside from the school of hard knocks, where might the country's future lawyers be better instructed in these matters than in law school programs?

Courses on space law, taking into account both international and domestic considerations, have entered the curriculum of American law schools. To encourage this development, Professors Reynolds and Merges have collected a very useful body of teaching materials. Policy makers, practitioners and scholars will also benefit from it.

In keeping with the ecumenical nature of their subject, the editors present excerpts from writings in business, economics, ethics, history, law, physics, philosophy, political economy, political science and public policy. Important treaties are published in their entirety and others in part. Emphasizing the U.S. experience, the editors provide important federal statutes, governmental reports and congressional hearings. Relevant regulations of the Departments of State, Commerce and Transportation, as well as of the Federal Communications Commission, the National Aeronautics and Space Administration and the National Oceanic and Atmospheric Administration (NOAA) are incorporated. Cases reciting principles of general application are briefly noted. Comparisons with the law and public policy issues regarding the ocean, airspace and Antarctica are included.

The editors examine the five United Nations-produced space agreements. One chapter deals briefly with the 1972 Anti-Ballistic Missile Treaty. Reference is also made to the Limited Test Ban Agreement. There are chapters on space communications, on space-related international trade issues and on the law of private commercial activities in outer space. In chapter 8, under the heading of administrative law, reference is made to the 1984 Commercial Space Launch Act and to the 1984 Land Remote Sensing Commercialization Act. This leads to an assessment of the Department of Transportation's licensing regulations on launches and of NOAA's licensing regulations

on remote sensing. The book refers to the literature on human life in space. The concluding chapter examines the processes for structuring development in space.

Chapter 8, which focuses on domestic matters, deals with such essential concerns as jurisdiction, tort law including liability to persons and for damage to cargo, insurance and indemnification, contracts, intellectual property and protection of trade secrets, and includes an assessment of extraterrestrial contamination. These subjects are examined from a federal perspective. A future effort should also look at the roles of the states, as they may exercise their powers as well.

The editors provide the reader with 37 fairly extensive excerpts from governmental reports and the writings of lawyers, public officials and scholars. The editors have added to the dialogue by supplying their own "Notes," as well as running commentary and short essays. Although no substantial effort was made to set out opposing views as a means to enhance the critical thinking of the targeted student, some conflicting and controversial outlooks were identified. On occasion the editors have undertaken to challenge the premises, logic and conclusions of those quoted.

The editors demonstrate an awareness of the fast-evolving developments in the negotiation of international agreements. They were able to persuade the publisher to introduce commentary on the results of the 1988 World Administrative Radio Conference even after the book went to press. Similarly, when the book is used, it will likely be necessary for the instructor to provide supplements on this, as well as other, matters developed in the book.

The editors call attention to the fierce competition between advanced and developing countries respecting the use of the orbit/spectrum resource, as well as their remaining differences on such matters as direct television broadcasts, remote sensing and the possible future application of the sharing-of-benefits principle contained in Article 11 of the 1979 Moon Agreement. The opposing outlooks of some of the equatorial countries and of the space-resource states concerning the claims set out in the 1976 Bogotá Declaration are also provided. The challenges involved in arriving at common perspectives on issues such as these lend themselves to policy analysis. It would have been helpful if one or more of these issues had been examined in depth. This process might have demonstrated transitions from conflict to competition, and possibly to cooperation.

When the book is reprinted, dates should be assigned to important documents appearing at p. 102 (the Moon Agreement), p. 191 (Remote Sensing Principles), p. 219 (Memorandum of Law of the Legal Adviser, Department of State), p. 232 (Petition Seeking Presidential Action before the U.S. Trade Representative), p. 268 (Comments on Proposed Regulations Governing Third-Party Liability Insurance for Commercial Space Launch Activities; Docket No. 43098) and p. 310 (the private effort to identify First Principles for the Governance of Outer Space Societies). Following chapter 1, entitled "Some History and Background," the reader is provided with "Further Readings." It would have been helpful if the same approach had been taken in the ensuing chapters. But these are minor matters easily modified.

Scientific and technological innovation will undoubtedly take humankind beyond the present restraints on manned and unmanned launches and operations. There is a strong likelihood that space stations will become a reality, as will futurists' dreams of permanent space habitations. The editors have correctly concluded that opportunities are so vast that international cooperation, including international joint ventures drawing upon areas of special national expertise, will be required. Since these probabilities are large, it is not too soon to examine all challenges and to prepare for them. This book offers an excellent starting point for professional growth. It also signals the need for expertise to match future opportunities.

CARL Q. CHRISTOL

University of Southern California, Emeritus

The Sovereignty Dispute over the Falkland (Malvinas) Islands. By Lowell S. Gustafson. New York and Oxford: Oxford University Press, 1988. Pp. xiii, 268. Index. \$36.

Professor Gustafson has written a very useful book, one that should be required reading for all those interested in serious research on the ill-fated Malvinas (Falkland) dispute between Argentina and the United Kingdom. The book leaves almost no historical or political aspect of the dispute unexamined. With an impressive display of research and documentation, Gustafson aptly addresses matters of economics, of domestic politics, and of pride and prestige, as well as the psychology of people in power in both Argentina and the United Kingdom.

The book has an introduction and seven chapters. The first chapter is a relatively brief, but thorough, account of the confused events related to the occupation of the islands through the centuries. Gustafson concludes that Argentina has a superior historical title, yet anticipates his later determination that Argentina has no right to regain title from Britain by force. He reiterates this position in his discussion of the interplay between self-determination and the use of force as applied to this particular dispute (pp. 74–80). As many scholars and diplomatic observers have done before him, then, Gustafson sensibly argues for both the plausibility of the Argentine territorial claim and the unlawfulness of the war unleashed by the Argentine military dictators in April 1982. The author wisely limits the historical inquiry to this one chapter, realizing, correctly, that the most relevant arguments for solving this dispute are contemporary—those related to the implementation of the right of self-determination and the law of decolonization.

Chapters 2 and 3 discuss the applicability of the principle of self-determination to the conflict. Gustafson discusses all the available evidence for and against the claim that the islanders are a “self,” i.e., a “people” entitled to “determine itself.” While Gustafson’s theoretical discussion of the principle is not extensive, he aptly shows the logical puzzles raised by the very concept of self-determination as understood in the history of decolonization. But the real motivation behind popular support in Britain for Prime Minister

Thatcher's reaction against the Argentine invasion is made clear at pages 52-54: Britain (and its allies) could not tolerate abandoning the islanders to the fascist junta that had imprisoned, tortured and murdered thousands of Argentines. Thus, in the eyes of the British, the principle of self-determination took on a double meaning in 1982: the alleged right of the islanders to opt to remain with the British Crown, and their right to resist the imposition on them, by force, of a dictatorial regime. Of course, one wonders about the consistency of the British Government on this issue, in light of its remarkable lack of reluctance to put millions of people (not just two thousand) in Hong Kong under the authority of the Government that crushed the dissidents in Beijing in the summer of 1989.

Gustafson's examination of self-determination is very good: evenhanded, thorough and ultimately compelling. The precedents of Goa and West Irian are also cited as possible support for the use of force by Argentina. Gustafson's conclusion is that both Argentina and the islanders have valid conflicting claims to the territory. If one criticism could be made of an otherwise competent treatment, it is the absence of definite procedural or substantive suggestions on how to settle the dispute in light of all the evidence amassed in the book.

Chapter 4 examines at great length the "oil-dimension" of the Malvinas conflict. Gustafson accurately traces the various surveys conducted in the area that underscored the possibility of important oil deposits, and the wavering of both governments. The author here suggests a provocative thesis: had Argentina continued the policy of unilateral oil development, it would have taken *de facto* sovereignty over the Malvinas waters, and that, in turn, could have marked a new "critical date" from which title would largely flow to Argentina. Instead, Argentina used force, which only succeeded in strengthening both the British commitment to the islands and European and North American support for the United Kingdom (pp. 116-17). This bold, yet unfortunately nontestable, hypothesis needs to be taken seriously in terms of actual possibilities and as a lesson for governments thinking about using force for their irredentist claims.

Unlike most previous analysts of the Malvinas war, Gustafson emphasizes the external (chapter 5), as well as the internal (chapter 6), causes of the war. Among the first, the unbelievable miscalculations of the Argentine regime play, of course, a crucial role. Those miscalculations were mostly related to the belief that the United Kingdom would not react, that the United States would be at least neutral and that the Soviet Union would veto adverse resolutions in the United Nations Security Council. Of course, none of that happened. In the last chapter, devoted to the effect and future of the conflict, Gustafson's conclusions seem to suggest that the war showed that the concept of sovereignty has much more currency than most would have thought.

Perhaps the correct explanation for the war needs to build a bit more upon the undoubtedly plausible suggestions of Gustafson. Perhaps there is a strong link between internal oppression and external aggression. There is no doubt that the military rulers in Argentina had reached, by April 1982, an

extreme form of self-delusion. They were persuaded that they could get away with aggression, just as they thought they had gotten away with repression. If it is permitted to propose counterfactuals, I would suggest that the war would never have taken place between the United Kingdom and a democratic Argentine government. In short, the real cause of the war was neither purely internal nor purely external: the war resulted, instead, from the seldom-noticed link between political legitimacy and international conduct.

The above remarks in no way detract from the merit of Gustafson's thorough, serious, well-researched and well-written scholarly effort. A final thought: this is the right time, in this reviewer's view, for Argentina and the United Kingdom to submit the Malvinas dispute to international adjudication (perhaps to the International Court of Justice). As Gustafson's study sufficiently shows, Argentina has a strong legal case. And the United Kingdom would have an opportunity to demonstrate, internally and externally, its support for the international rule of law, including the sincerity of its concern for the rights of the islanders.

FERNANDO R. TESÓN

Arizona State University and Hastings College of Law

Chernobyl: Law and Communication. Transboundary Nuclear Air Pollution—The Legal Materials. Edited by Philippe Sands. A publication of the Annenberg Washington Program in Communications Policy Studies of Northwestern University and the Research Centre for International Law, University of Cambridge. Cambridge: Grotius Publications Limited, 1988. Pp. xxxiii, 312. Index. £38; \$75.

This is a book that delivers more than its title promises. It is about not only Chernobyl, but also the more general problem of transboundary environmental harm. It addresses the fundamental transformations that modern communication technology has wrought in international society but focuses upon identifying, evaluating and placing in context the legal instruments relevant to cases of transfrontier pollution. It is a collection of documents but goes beyond the usual compilations by providing a general introduction to the field of transboundary nuclear pollution, as well as a specific introductory note for each instrument. Thus, the book is more than a collection of documents relating to Chernobyl. It is an important and useful addition to the literature of international environmental law.

The book grew out of a conference organized by the Annenberg Washington Program on "Global Disasters and International Information Flows." Its purpose was "to bring together in a single volume some of the more important materials needed to assess the issues and law arising out of the Chernobyl accident, as well as the likely developments." The impact of developments in the field of communications is discussed in a foreword entitled "Chernobyl and the New Age of Communications," by Newton N. Minow, Director of the Annenberg Washington Program. Minow emphasizes the far-reaching effects of new communication technologies upon international

life: "as satellite photographs of Chernobyl demonstrate so dramatically, government control over the flow of information is decreasing." He points out that the same developments have made possible "a new type of diplomacy, a direct personal appeal—via the mass media—to a worldwide public," as in the case of Gorbachev's television appearances in the West. Minow concludes with the sobering observation that while increased communication may be helping to turn the world into a "global village," "problems in villages are sometimes caused by proximity." Communication technology should not be expected to solve all problems, he says, but should rather be used "to better understand each other."

The volume was edited by Philippe Sands, a British barrister and research associate of the Research Centre for International Law of Cambridge University. The term "editor" can cover a wide spectrum of involvement in a book's production, however, ranging from assembling completed manuscripts to writing portions of the text and providing an imaginative structure for the work as a whole. Sands's contribution to the volume under review is along the latter lines. It begins with an introduction of some 50 pages, which "seeks to identify the principal legal issues arising out of the Chernobyl accident, relate the texts and other materials to these issues, and draw some tentative conclusions as to the current state of the law." This useful overview helps to place in context the 24 documents that follow.

In the introduction, Sands provides background information on the Chernobyl accident and subsequent developments at the International Atomic Energy Agency (IAEA). He then proceeds to examine a broad range of legal issues grouped under the rubrics of prevention, liability, information and assistance. The questions addressed can be summarized as follows: Does international law impose upon states any obligation (1) to prevent the transboundary release of radioactive material; (2) to repair any damage resulting from such a release; (3) to inform other states of an actual or potential transborder release of radioactive material; or (4) to provide assistance to states affected by such a release (p. 5)?

With regard to the first question, Sands concludes, after reviewing decisions, treaties, UN resolutions and declarations, and reports of nongovernmental organizations, that "international law imposes upon States an obligation not to increase levels of radioactivity in neighbouring States to a level capable of causing harm to persons, property and the environment" (p. 15).¹ The idea that the environment, per se, is protected from harmful radiation is especially important, although explicit support for such protection is scant.²

¹ In support of this proposition, Sands refers in particular to the *Trail Smelter* arbitration, UN General Assembly Resolution 1629 (XVI), Principle 21 of the 1972 Stockholm Declaration on the Human Environment, the 1979 Convention on Long-Range Transboundary Air Pollution, the Charter of Economic Rights and Duties of States and the International Law Association's Montreal Rules on Transboundary Pollution.

² Of the sources Sands relies upon, only Article 30 of the Charter of Economic Rights and Duties of States specifically mentions the environment, and even there, it is "the environment of other States" that is protected. Taken literally, this would exclude the global commons unless "environment" were given a very expansive meaning.

Sands does not stop there but goes on to examine the meaning of "harm" and the applicable standard of care in cases of transboundary radioactivity. Defining harm is necessary to provide a threshold for legitimate compensation claims. Sands notes several possible models for an international standard but observes that at the time of the Chernobyl disaster no such standard existed. The other troublesome standard is the degree of care that is applicable to the obligation to avoid causing harmful transboundary radioactivity: fault, strict liability or absolute liability (to his credit, the author distinguishes between the two latter standards³). Here Sands is cautious. While declining to "explore the role of fault in relation to State responsibility generally" in the confines of the introduction, he concludes as follows with regard to transboundary radiation harm:

Whilst it cannot . . . be stated with certainty that, in the absence of an express treaty provision, States have an "absolute" or even strict obligation to prevent transboundary nuclear harm, such a conclusion receives considerable support from the authorities. It is also an acceptable conclusion on policy grounds: nuclear harm is likely to be particularly serious and an "absolute" duty acts as an incentive to States to take special precautions when engaging in nuclear activities. (p. 22)

The second broad question addressed in the introduction concerns liability or the duty to repair damage. After noting that development of the law of liability for transboundary pollution harm has been sluggish at best, Sands reviews such authorities as exist—including conventions, decisions of national and international tribunals, and diplomatic practice—relating to claims by both individuals and states. With regard to state claims, he concludes that "international law requires the payment of compensation for damage and loss to persons and property in a neighbouring State which can reasonably be calculated to arise as a result of increased radioactivity levels caused by the accident" (p. 30). Sands suggests that further efforts to develop the law of international liability for nuclear damage will be based in large part upon current efforts of the International Law Commission in the same area.⁴

The next question concerns whether a state has a duty to provide "pre-accident" and "post-accident" information to states that are or may be affected by the establishment or operation of nuclear installations. With regard to the former, Sands concludes that customary law does not "require States planning activities which might entail a significant risk of transfrontier pollution to give early notice to States likely to be affected and to enter into good faith consultations at the request of such a State." While this conclusion is not

³ Sands quotes Brownlie to the effect that strict liability is " 'essentially a *prima facie* responsibility, and various defences or qualifications may be available,' " while absolute liability is that " 'for which there can be no mode of exculpation' " (p. 19).

⁴ In particular, Sands refers to the "Schematic Outline" developed by the late Professor Robert Q. Quentin-Baxter, the ILC's original special rapporteur for its work on International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law. The Schematic Outline is reproduced in the documents section.

unsupportable, it is rather surprising in its conservatism. The only explanation offered for it is that such an obligation "is not yet supported by the requisite State practice or by *opinio juris*" (p. 35). Yet the authorities reviewed by the author suggest precisely the opposite. One is left wishing that more light had been shed upon why Sands regards existing authorities as providing insufficient support for these important "obligations."

The duty to provide postaccident information is less controversial. Prompt notification of a nuclear accident is now required by the 1986 Vienna Convention on Early Notification of a Nuclear Accident, concluded under the auspices of the IAEA in the aftermath of Chernobyl. Even in the absence of this agreement, there is substantial support for such a duty as a matter of general international law. While in Sands's view, "the evidence of State practice [in support of the duty] is hardly overwhelming" (p. 38), the evidence he reviews is not unconvincing. The brief discussion of the Notification Convention is informative and includes a critique of the agreement, dealing with what the Convention does and does not contain, and with reservations entered by a number of states.

The final question, whether states are under an international legal obligation to provide assistance to countries affected by a release of radioactive material, is again answered by Sands in the negative. He does, however, recognize the desirability of such an obligation and identifies the following legal issues that "require clear answers if the provision of assistance is to be encouraged": "the direction and control of the assistance; the reimbursement of any costs incurred; the attribution of liability in the event of damage being suffered by the assisting State . . . ; and the liability of the assisting State for damage it might cause . . . , including any privileges and immunities attaching to [it]" (p. 44). The 1986 Vienna Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency addresses many of these questions but, as Sands points out, is open to criticism on certain grounds. Perhaps the most striking of these is that a state that has caused a nuclear accident and provides assistance to another state may require reimbursement of assistance costs.

Sands concludes his introduction with the observation that while Chernobyl demonstrated that states are capable of taking prompt and decisive action within the framework of an international organization (the IAEA) when it is in their interests to do so, "perhaps the biggest impact of the accident will be on the traditional notion of State sovereignty. . . . [C]ertain activities which might previously have been considered the internal affairs of States . . . have been treated as matters of legitimate concern for neighbouring States and for the international community collectively" (p. 49).

The bulk of the volume (some 240 pages) consists of documents relating to the legal challenges posed by Chernobyl and other instances of transfrontier pollution. The materials are arranged chronologically and include treaties, guidelines, recommendations and resolutions of international organizations, restatements by scholarly associations, a government proposal, and national legislation. Each document is preceded by an editorial note that indicates the gist of the text, and most are followed by a "select bibliography." Full infor-

mation is provided on treaties, including source, dates of signature and entry into force, signatories or parties, and even reservations where relevant. Thus, the reader need not look elsewhere for the status of an agreement or information about it—something that unfortunately cannot be said of many compilations. Following the documents are maps, a “select general bibliography” and a detailed index. The documents themselves are well selected and provide the reader with the legal guideposts necessary to analyze Chernobyl-type problems, as well as to formulate ideas about where law and policy should be headed. This collection, especially because of the manner in which it is presented, will be of great value to lawyers, both inside and outside government, and more generally, to anyone interested in the increasingly serious problem of transfrontier pollution.

The book is topical, well researched, well written, and thoughtfully presented. As suggested at the outset of this review, the thrust of the work seems somewhat at variance with its title. One can only hope that potential readers will not be misled by this mild disguise and, further, that prospective purchasers will not be deterred by the rather formidable price.

STEPHEN C. MCCAFFREY

University of the Pacific, McGeorge School of Law

Communications (Includes Telecommunications). Thesaurus Acroasium. Volume XV (Session 1984). Thessaloniki: Institute of Public International Law and International Relations of Thessaloniki, 1987. Pp. 530. \$125.

Thesaurus Acroasium consists of a series of lectures and seminars conducted annually by the Institute of Public International Law and International Relations in Thessaloniki, Greece. The “sessions” deal generally with contemporary problems of international law. Volume XV records the session on communications, held in August of 1984. Eleven major lectures are included, as well as a series of short papers delivered by young scholars participating in the session.

There appears to be no area of concentration for this particular session. Hence, while many subjects are touched upon, most are superficially covered.

Fortunately, one important policy matter is given considerable attention, namely, the policy problems flowing from modern technology, particularly satellite delivery, whereby communications services are provided to large geographical areas without respect for national boundaries.

These transnational communications provide information, advertisements, entertainment and, yes, even propaganda to countries outside the boundaries of the originating country. The governments of countries that receive these programs object to the transmissions and resent the invasion of the foreign program material across their borders. Recent radical developments in Eastern Europe, stemming in part from increased availability of Western programming, suggest that these concerns are not without foundation.

Such objections are readily understandable where direct or indirect propagandizing is involved. But it is no less offensive to many of these administrations that general information and entertainment programs of foreign origin are available within their boundaries. Developing countries, for example, object to the influx of programs from Western sources, since those programs have a radical impact on their social and political cultures. There are also competing economic systems vying for viewers and selling products, all at the expense of domestic business interests.

Thus, the problem is one of balancing the freedom of communication against the interests of national sovereignty. In simplistic terms, the opposite positions are defined as one favoring "the free flow of information" (the traditional U.S. position), and the other favoring the "prior consent" of the countries within whose boundaries the programs are received. Several good articles in the *Thesaurus* deal with this conflict, particularly those by Professor Jost Delbrück (*International Communications and National Sovereignty*), Professor Zhao Lihai (*Some Legal Problems on International Direct Broadcasting Satellites*) and Jean Siotis (*Transfrontier Television and Radio Communications: A Challenge for Europe*).

Other articles deal with the closely related subject of a "new world information order," a proposal by the developing countries for a realignment of the world information flow. The current regime, based upon the domination of the industrial world, and more specifically the United States and the Soviet Union, would be replaced under this theory by a more balanced flow of communications with much greater informational and cultural input from the developing world. A good lecture on this subject is provided by P. Ivacic, Director of the International Press Center, Belgrade, Yugoslavia (*Non-aligned and Information Systems*).

There are other articles of less obvious relevance and of dubious intellectual content. Some are merely brief generalized expositions and others merely describe existing organizational structures. But, on balance, the *Thesaurus* provides an interesting historical perspective on some of the important international telecommunications issues.

My greatest criticism of the *Thesaurus* is the fact that it is already hopelessly out-of-date. This particular session occurred in the summer of 1984. Since that date, there have been some World Administrative Radio Conferences and one major Plenipotentiary Conference of the International Telecommunication Union, the organization generally responsible for the development of worldwide telecommunications policy. Also, communications technology has continued to explode. The critical telecommunications issues today are of a different order of magnitude from those discussed here. The *Thesaurus* will take its place as an informative collection of lectures of historical interest, but it provides little assistance to those who must grapple with today's telecommunications problems in a rapidly changing political and economic environment.

BEN C. FISHER
Of the District of Columbia Bar

Die beiden deutschen Staaten in der Dritten Welt. Die Entwicklungspolitik der DDR —eine Herausforderung für die Bundesrepublik Deutschland? By Hans-Joachim Spranger and Lothar Brock. Opladen: Westdeutscher Verlag, 1987. Pp. 428. DM 42.

This book covers a fascinating subject: the East-West conflict projected onto the Third World, as exemplified by the experience of the two Germanys. It starts with the ideological and strategic East-West conflict, which pushed both Germanys into the Third World, a region of little interest to the divided Germans of the 1950s and 1960s, who had no colonies to give up or in which to maintain a presence. The chief objective of West German policy in the emerging Third World was to maintain the claim of the Federal Republic of Germany (FRG) to be the exclusive representative of the German nation. Development aid was more or less overt bribery to the newly emerging states to keep them from recognizing the German Democratic Republic (GDR) as a sovereign state ("Hallstein doctrine"—*Alleinvertretungsanspruch*). East German policy, while paying tribute to solidarity with the struggle for liberation, and to political and ideological affiliations, was equally focused on obtaining formal recognition. The well-conceived, soundly researched and meticulously documented study by Spranger and Brock starts with the assertion that the intra-German struggle has benefited and affected remote peoples, and ends with the hope that ideological differences will not prevent the two states from cooperating on development aid. Written in 1987, the book now seems more historical than intended and more future oriented than the authors could have reasonably hoped to be.

The study examines the ideological underpinnings of development aid in both countries, particularly in the GDR. It documents the growing involvement of both states in development in the 1960s, pushed by their struggle over diplomatic recognition of the GDR and by strategic considerations deriving from membership in their respective power blocs. Gradually, in both states, it was realized that the Third World is neither homogeneous nor very interested in the German problem, but follows its own, often inchoate and inconsistent, agendas. The solutions offered by East and West—central planning, workers' solidarity and revolutionary struggle, on the one hand, and Western pluralism, market economy principles and a basically conservative orientation in politics, on the other—do not explain or further the evolution of states in the Third World.

In both countries, there was disappointment that the models offered to developing countries were not readily accepted and, if accepted, did not work as expected. The West German position was made easier by the fact that most of the Third World is integrated into the world capitalist system. One would have expected that, with the widespread diplomatic recognition of the GDR and the FRG's *Ostpolitik* in the early 1970s, the ideological competition between the German states would have faded away. Instead, ideological stridency intensified during the 1970s, at least in East Germany. The period was marked by the North-South conflict, and socialist countries saw themselves as well positioned on the winning side.

In the GDR, greater realism set in when it became evident, in the 1980s, that the Third World was not going to win its contest with the (Western) North. Expectations became more moderate, ideological conflict was put on the back burner and the study of the real conditions of the Third World gained prominence. Both German societies realized that there was little use in projecting the East-West conflict onto developing countries and that these countries had distinct problems of their own, to which development aid could offer some, though quite limited, support. Their review of the most recent period leads the authors to identify areas of possible cooperation between East and West; namely, where common concerns of humanity exist, such as environmental protection, the limitation of armaments and regional resolution of conflicts.

The study should be of interest to U.S. students of Third World politics and international aid since it presents the evolving perspective of two "middle power" states from different ideological camps. Notably, in both states, the economic interest propelling aid to the Third World is quite limited. Also, and particularly for the FRG, the so-called strategic interest that dominates U.S. foreign aid is quite minimal. West German aid, according to the study, seems based on the theory that assistance is an international obligation of rich economies, which should genuinely try to better the lot of the developing countries. This policy, of course, also benefits the export-oriented economy of the FRG. Also, the FRG's foreign aid appears much less interventionist, given without attempts to impose a domestic and ideological perspective on authentic Third World problems, than that of the United States. Clearly, the FRG is not a superpower and does not carry the burdens of a superpower; nor does it have a domestic clientele influencing the targets of foreign aid and Third World policy, especially since the core of the East-West German conflict in the Third World has been laid to rest.

Reviewing this book in 1990, one is curious about the implications of the evolution of East Germany and Eastern Europe for its theme. Some conjectures may be ventured. First, the further decline of the ideological, strategic and political conflict between East and West, between the GDR and the FRG, should promote convergence and collaboration for their Third World policy, as predicted by Brock and Spranger. The protection of the world's environment, a reduction in armaments, and regional management of interstate conflicts, with less fueling of such conflicts by superpower intervention, should be legitimate joint objectives for the Germans. On the other hand, there may be a much more ominous implication for the Third World: with West Germany, by force of geopolitics, national affiliation and economic interest, orienting itself eastward, pulling along by example and competition the rest of Europe, interest in—and resources for—Third World problems is bound to recede. The same is true for the East: the GDR can hardly afford any significant involvement in Third World aid when its own resources are stretched to the limit; the demands of a frustrated people, exacerbated by the view of—and access to—prosperous West Germany, are unmet, and there is no interest any longer in having its model prevail in remote countries.

It is hard not to feel sorry for the developing countries as their main lever over the North, the contest between East and West, disappears. Advancing from the study of East-West-South relations of the two Germanys to those of their principals, one must ask: does the relaxation of East-West tension and ideological contest not forebode a diminished interest—strategic, ideological, even economic—in the Third World? Do the superpowers realize that their heavy financial, political and military investment in the Third World causes a hemorrhage in their domestic fabric, to the advantage of strategically less-involved and -exposed economies such as Japan and Germany? Does it damage—or actually benefit—developing countries if the great-power blocs show less strategic and ideological interest in them, and is it possible to construct a world consensus on what the mutual problems of humankind are and how one could tackle them jointly?

THOMAS WAELDE
United Nations

Auslegung der Ostverträge und gesamtdeutsche Staatsangehörigkeit der Ostdeutschen. By Henn-Jueri Uibopuu, Alexander Uschakow, Eckart Klein and Gottfried Zieger. Bonn: Kulturstiftung der Deutschen Vertriebenen, 1980. Pp. 146.

Das Vier-Mächte-Abkommen in der Bewährungsprobe: Berlin im Spannungsfeld von Ost und West. By Gerhard Wettig. Berlin: Berlin-Verlag Arno Spitz, 1981. Pp. 279. Indexes.

Staatliche Kontinuität unter besonderer Berücksichtigung der Rechtslage Deutschlands. Edited by Boris Meissner and Gottfried Zieger. Cologne: Verlag Wissenschaft und Politik Berend von Nottbeck, 1983. Pp. 149. Indexes.

Staatliche Einheit und nationale Einheit Deutschlands—ihre Effektivität. Edited by Dieter Blumenwitz and Boris Meissner. Cologne: Verlag Wissenschaft und Politik Berend von Nottbeck, 1984. Pp. 167. Indexes.

Bundesverfassungsgericht und Ostverträge (2d ed.). By Eckart Klein. Bonn: Kulturstiftung der Deutschen Vertriebenen, 1985. Pp. 95.

Deutschland als Ganzes: Rechtliche und historische Überlegungen. Edited by Gottfried Zieger, Boris Meissner and Dieter Blumenwitz. Cologne: Verlag Wissenschaft und Politik Berend von Nottbeck, 1985. Pp. 342.

Die Rechtslage der deutschen Ostgebiete. Die Oder-Neisse-Grenze im Blickpunkt des Völkerrechts. By Michael Schmitz. Cologne: Verlag Wissenschaft und Politik Berend von Nottbeck, 1986. Pp. 102.

The publications reviewed here are different in character. Some are monographs like Gerhard Wettig's analysis of the performance of the Quadripartite Agreement on Berlin of 1971, Eckart Klein's critical discussion of the pronouncements of the German Federal Constitutional Court on the so-called *Ostverträge* (i.e., the treaties concluded by the Federal Republic of Germany with the Soviet Union, Poland and the German Democratic

Republic in 1970 and 1972), and Michael Schmitz's analysis of the legal status of the German eastern territories beyond the Oder-Neisse line, recognized as the present western border of Poland by the Federal Republic in the 1970 Warsaw Treaty. The other books are collections of papers presented to conferences on international legal issues related to the status of Germany as a whole, as well as to specific aspects of the impact of the *Ostverträge* on that status. The most comprehensive collection of papers is included in the *liber amicorum* for Herbert Czaja, a long-time representative to the Bundestag and member of the Christian Democratic Union. But this book, too, is mainly devoted to various legal aspects of Germany as a whole, as its title (*Deutschland als Ganzes*) suggests.

Most of these monographs and symposiums were published in the first half of the 1980s. To many a reader, the intensive treatment of the various legal aspects of the German question might have seemed puzzling then, when it was becoming harder and harder to keep the question of the legal status of Germany as a whole, not to speak of German (re)unification or the so-called openness of the German question, on the political agenda. With the dramatic changes in Eastern Europe since the fall of 1989, most of the issues dealt with have become topical. Even so, these books may still puzzle the reader, although from a very different angle, i.e., what the implications of their findings might be with regard to the now-imminent (re)unification of Germany.

Since it is impossible to deal with all the contributions to these volumes, the following remarks will concentrate on the most prominent subjects dealt with. These include the right or principle of self-determination of peoples; the problem of the continuity of states, including the continuity of Germany after its unconditional surrender in 1945 and division into two states; and the problems related to the legal fate of the all-German nationality in the context of the *Ostverträge*.

The principle of, or right to, self-determination, although codified in the UN Charter and the two UN Human Rights Covenants of 1966, has been the object of controversial scholarly debate for decades. The problem of defining the groups or peoples entitled to this right and its scope in terms of modes of implementation gave rise to extensive discussions. Both issues are treated by Theodor Veiter, an "old hand" in the field. In "Nation and People as Legal Concepts with Special Consideration of the German Question" (*Staatliche Einheit*, pp. 105–35), Veiter discusses at length the controversial definitions of people, nation and ethnic group, as well as the interrelatedness or overlap in meaning of those definitions. He draws on rich empirical materials concerning the status, role and history of numerous ethnic groups, particularly in the South Tirol area and Switzerland, as well as in France, since Veiter is intimately associated with the European national and ethnic minorities movement. His final conclusion, identifying the German people as a nation in the legal sense and also as a people in legal and sociological terms, is not particularly surprising and not of great consequence for the solution of the German question. The controversy has not so much centered on whether the German people are entitled to national self-determination. Rather, it is—and always has been—focused on the modalities by which the

German people may exercise the right to self-determination—definitely a political, rather than a legal, question.

In "Rights of Ethnic Groups and the Right to Self-Determination as Human Rights" (*Deutschland als Ganzes*, pp. 81–100), Veiter critically reviews the development of self-determination from a clearly nonlegal principle into a "principle" of state conduct in the UN Charter and later into a "right" enunciated in the UN Covenants on Human Rights. This author cannot fully agree with Veiter that in no instance was an Afro-Asian state decolonized as a result of exercising the right to self-determination. The introduction of the principle of self-determination into the UN Charter was mainly aimed at initiating the process of decolonization and was actually the ideological and legal underpinning of that process. But Veiter is to be commended for recognizing clearly that the right to self-determination in the case of minorities does not extend to them a right to secession from the majority/host country. Any other interpretation would bring the principle into conflict with other well-established principles of international law such as the territorial integrity of states. However, as is so often the case, the problems start with making such legal findings operative: who does decide—and when is it decided—whether a particular people or ethnic group constitutes a minority in Veiter's sense, or whether it constitutes a people—possibly forcibly kept in a "minority status" vis-à-vis the majority population—that is actually entitled to self-determination, i.e., to form a state?

Thorny doctrinal problems posed by the recognition of the principle and/or right to self-determination under international law are discussed by Murswiek in his article "Systematic Considerations of the Right to Self-Determination of the German People" (*id.* at 233–60). Like Veiter in his article on self-determination as a human right, Murswiek is concerned with the possible conflict of the right to self-determination with the territorial integrity of states. Murswiek rejects criticisms that hold that self-determination does not lend itself to operating as a legal concept on account of definitional vagueness and its inconsistencies with other principles of international law. Rather, he sees it as the task of international legal scholars to look for interpretations of self-determination that make it compatible with existing international law.

Murswiek proposes a distinction between two separate meanings of self-determination of peoples: one directed at establishing a nation-state for a people previously not organized within an independent nation-state (offensive self-determination), and the other directed at defending or recovering the status of nation-state (defensive self-determination). Since the latter notion of self-determination is aimed at maintaining or restoring an already or previously existing nation-state by an act of self-determination, no conflict with the principle of territorial integrity can occur. Even if a previously existing state is restored at the expense of another state that had (illegally) incorporated the former state, this would not be in conflict with the principle of territorial integrity because the incorporation was a breach of that principle and the act of self-determination would only redress that violation of international law.

As convincing as this partial solution to the conflict between self-determination and territorial integrity may seem in theory, the application of this approach to the German question—for which it was primarily designed—yields the desired results only if one shares Murswiek's premise that it is the whole of the German people as it exists in the two German states that is entitled to this defensive self-determination. This was a highly controversial point between the Governments of the two German states when the article was written. Events have rendered this controversy more or less moot. From a long-term perspective, however, it remains doubtful whether Murswiek's distinction between an offensive and a defensive right to self-determination, or the exercise thereof, will hold. The reconciliation of self-determination with other recognized principles of international law requires consideration not only of the principle of territorial integrity, but also of the overriding function of international law to maintain peace. Thus, the most that can be said now is that Murswiek has provided an interesting idea but that "more research is desirable," preferably detached from such a highly sensitive issue as the German question.

Other contributions on the subject of self-determination were written by Hacker, "The Right of Self-Determination of Peoples from the Perspective of the GDR" (*Deutschland als Ganzes*, pp. 133–57), and Fiedler, "The Problem of Continuity of States under International Law and the Specific Aspects of the Legal Status of Germany" (*Staatliche Kontinuität*, pp. 9–24). Hacker finds the pronouncements of international legal scholars of the GDR on self-determination to be inconsistent and believes that they have not advanced beyond an early work by Arzinger,¹ which lived up to scholarly standards of the time and was not so clearly intended as an instrument of GDR foreign policy as these later treatments.

Hacker sheds some light on major differences between Soviet and GDR international legal doctrine. For example, in contrast to the Soviet position, the GDR writers have given priority to the socioeconomic basis, over the national aspect, of self-determination. Fiedler, in his article on the continuity of states in international law and the specific aspects of the German question, points out that the continuing invocation of, and the insistence on the right to, self-determination by state organs, particularly by governments in their conduct of foreign relations, constitutes an important element in the assessment of state continuity in a given political and legal context such as the German one.

The problem of the continuity of states is prominently treated in the symposium *Staatliche Kontinuität*. Though specifically focused on the legal status of Germany, this volume contains a number of interesting articles on states other than Germany, some of which have become highly topical today. Seidl-Hohenveldern analyzes Austrian state practice, especially judicial pronouncements, with regard to the continuity of Austria as a subject of international law after its restoration in 1955 as an independent state (*Staatliche Kontinuität*, pp. 61–72); he provides interesting insights into how Austrian

¹ R. ARZINGER, *DAS SELBSTBESTIMMUNGSRECHT DER VÖLKER* (1966).

courts have coped with continuity in such diverse areas as criminal, nationality and tax law. Meissner discusses the continuity of the Baltic Republics, annexed by the Soviet Union in 1940. Although Meissner could point to a rich—yet diminishing—international practice of not recognizing the annexation and of accepting the assertion by the Baltic governments in exile that the republics did not cease to exist as subjects of international law, the fact is that the vast majority of states had recognized the annexation by the time Meissner wrote. Recent developments in the Baltic region, however, especially the breathtaking reassertion of nationhood by the peoples of Estonia, Latvia and Lithuania, put Meissner's findings in quite a different perspective. Given the conservative attitude of international law toward recognizing the discontinuity of states, Meissner's legal arguments might find their factual corroboration not too far in the future. Other articles are devoted to the treatment of continuity in the international legal writings of the Eastern European countries (Frenzke, "Problems of Continuity in Eastern International Law," *id.* at 89–105) and to the restoration of Poland from the point of view of international law (Uschakow, "The Restoration of Poland in the Light of International Law," *id.* at 107–28).

Specifically German aspects of the problem of continuity of states are treated in three articles: Fiedler, "The Problem of Continuity of States under International Law and the Specific Questions of the Legal Status of Germany" (*id.* at 9–24), Zieger, "Continuity under International Law in Germany from the Point of View of the GDR" (*id.* at 25–45), and Klein, "The Problem of Continuity and the Legal Status of the German Eastern Territories" (*id.* at 129–41). From a doctrinal point of view, Fiedler's paper offers the most interesting thoughts on continuity. His approach to the problem, i.e., focusing on the interactions of international and domestic law in determining the continuity or discontinuity of states and the impact of such interactions in a given political-historical context, is motivated by the intriguing subtleties of the various layers of legal rules determining the legal status of Germany (international, occupational and domestic constitutional law). It leads the author to a rather sober and critical evaluation of the limits to the stance taken by the West German legal community, that the pre-World War II Germany continued to exist though legally incapable of acting due to the lack of functioning state organs. His conclusion that, as of the time the article was written, there was still a sufficient basis for holding on to the notion of the continuity of the all-German state not only is legally arguable but also is clearly supported by the continuing existence of the Four Powers' responsibilities to Germany as a whole.

Zieger scrutinizes the development of the internal discussion of continuity within the GDR. He highlights the stages through which this discussion has developed. At the outset, the thesis was rejected that, because of the unconditional surrender or the *occupatio bellica*, Germany ceased to exist as a subject of international law. The shift of opinion toward the later official GDR position that Germany had disappeared took place around 1955. Zieger's observation that this new stance was entertained more vigorously by the GDR than by the Soviet Union is interesting and falls in line with the contin-

ued assertion by the Soviet Union of the Four Powers' reserved rights. The rather speculative glance at the future, in which the author does not rule out inclusion of the separate East German state into a confederated Soviet-Eastern European socialist state system, was pretty far-fetched at the time, and certainly has been rendered obsolete.

Probably the most politically sensitive issue is taken up by Klein not only in his contribution to the symposium on state continuity, but also in his book "Federal Constitutional Court and *Ostverträge*." From an international law angle, Klein argues that since Germany as a whole continues to exist within the boundaries of 1937, the Eastern territories still belong legally to Germany, Poland having only achieved territorial authority, as opposed to full sovereignty, over them. From a domestic constitutional angle, Klein argues that the constitutional mandate of the Basic Law to pursue the aim of German reunification includes the Eastern territories (p. 58 *et passim*).

A final determination of the Polish-German border must await the conclusion of a peace treaty with a united Germany. In a formal legal sense, this conclusion is as correct as it is politically unrealistic and even self-defeating in terms of achieving the moderated aim of unifying the two German states. One has to read Klein very carefully to find that he is not unaware of these implications. Thus, he states that interpreting the reunification mandate of the Basic Law as having a territorial dimension does not preclude a given government of the Federal Republic (or a unified Germany for that matter) from making "territorial concessions" so as not to obstruct the eventual unification of Germany. This finding relies on the ruling of the Federal Constitutional Court in the *Saar Territory* case, where the Court stated that a territorial arrangement—such as the Saar Statute—which is closer to the envisaged unified Germany than the previously existing state of affairs, was constitutional, even if such status would fall short of the maximum aim assumed to be set out in the Basic Law. If this is so—and this reviewer tends to agree that it is—and given the fact that at no other time was it politically clearer than when Klein was writing that none of the Four Powers would even think of supporting any change of the western Polish border, the question is why such elaborate legal argument with regard to the legal status of the Eastern territories is set out in the first place—a question to be asked with regard to the little monograph on the legal status of the *Ostgebiete* by Schmitz as well. Is it the provision of a lawyer's brief setting out a bargaining position for his client? If so, where is such bargaining to take place and with whom? All things considered, this reviewer thinks that the highly sensitive issue of the Polish border does not lend itself to any lawyering approach. The recent controversy over the border issue between Chancellor Kohl and the Western allies of the Federal Republic, on the one hand, and Poland, on the other, bears clear witness to this view.

Most contributors to the symposium on *staatliche Einheit* follow the same reasoning. A notable exception is Schreuer, whose article "The Influence of Domestic Law on the Interpretation of International Treaties" (*Staatliche Einheit*, pp. 27–41) is, from a doctrinal point of view, the most rewarding. Schreuer describes the various reasons for divergent interpretations of

treaties by the parties, such as problems of language (authentic languages v. local language), of reading a treaty in conformity with the domestic constitution rather than in strictly international terms, and of reconciling international and domestic legal terminology. All of these problems become particularly crucial with highly political treaties such as the *Ostverträge*. The author's conclusion that, ideally, an internationally oriented interpretation is called for, but that a certain tension between this demand and the actual interpretation of international legal instruments in the domestic legal order is inevitable, is sound and realistic.

From the point of view of reconciling German unity with the aim of building a European peace order, the article by Zieger, "German Unity and European Integration" (*id.* at 11–26), is even more topical today than when it was written. The author is to be commended for taking a broader perspective on the German question which—as he rightly observes—can only be resolved in the larger European context and by giving due consideration to the legitimate security concerns of Germany's neighbors. Viewed from this angle, European integration and German unity are not irreconcilable goals but, rather, complementary elements in building a new, stable European order.

"Berlin as a Symbol of German Unity" (*id.* at 97–104) by Ermacora, deals with the legal basis of the rather peculiar status of Berlin. In his final assessment of the various legal instruments determining the legal status of Berlin, Ermacora rejects any comparison of the status of Berlin with that of Danzig (Gdańsk) in the interwar period. Rather, he finds that the status of Berlin lies at the heart of the problem of the continuity of the German state and in this sense constitutes a symbol of German unity. The central importance of the status of Berlin in legal and political terms is emphasized in Wettig's meticulous assessment of the functioning of the Quadripartite Agreement on Berlin. The performance of this Agreement was considered a barometer of East-West relations at the time, and Wettig's findings bear this out in full.

The continuity of German nationality and citizenship is, of course, intimately related to the continuity of Germany as a state. This set of problems forms the central object of inquiry of the symposium on "Interpretation of the *Ostverträge* and All-German Nationality," but is also dealt with in an article by Klein in his volume "Federal Constitutional Court and *Ostverträge*." The pervading line of argument in the contributions by Klein and Zieger is that the conclusion of the *Ostverträge* did not—and because of the Basic Law (Article 16), could not—rescind or modify the nationality of Germans as determined and regulated by the still-binding German Nationality and Citizenship Act of 1913. Zieger traces the development of German nationality law in "The All-German Nationality as the Legal Integration of the German State-Nation with Special Consideration of the Germans of the Eastern Territories" (*Ostverträge und Staatsangehörigkeit*, pp. 85–146) and analyzes the implications of the changes in the Nationality Act for the course of the expansionist policies of the Third Reich. He also deals with the fate of the nationality of Germans who remained in Eastern European countries after the war and are therefore claimed as nationals by some Eastern Euro-

pean countries, but who consider themselves Germans under the German Nationality and Citizenship Act. These circumstances have particular relevance to whether the Federal Republic may extend diplomatic protection to these people and may (or must) accord them the full protection of the rights under the Basic Law.

This problem is also dealt with by Klein in his article, "The Jurisprudence of the Federal Constitutional Court on the *Ostverträge*, Especially with Regard to the Legal Positions of the Germans of the Eastern Territories" (*id.* at 67-83). Both authors' finding that the Federal Republic not only is acting legally under international law when treating that group of people as Germans, but is under a constitutional obligation to do so, is certainly not shared by the affected Eastern European countries. The sharp controversy over the West German legal position on this matter is related in part to the different reading of the *Ostverträge*. The editors of the volume on *Ostverträge und Staatsangehörigkeit* were quite aware of this. Thus, they included articles on the interpretation of the *Ostverträge* by the Soviet Union and Poland, by Uibopuu and Uschakow, respectively. The conclusion by Zieger that the existing problems can only be resolved adequately by the conclusion of a peace treaty is certainly pertinent.

The reader of all these volumes is most likely to put them aside with mixed feelings, especially if he or she is not German. The intricate legal arguments on problems that an outsider may regard as more political than legal may appear to be particularly out of proportion if considered in the context of the war and its horrible consequences. On moral grounds, this author shares such concerns. But there is another aspect that deters one from brushing aside the arguments set forth in the books reviewed.

In a recent symposium held at Stanford University, Wolfram Hanrieder suggested that the seeming obsession of Germans with an allegedly "legalistic" approach to the host of postwar problems facing them had much to do with the fact that they do not have any powerful means to articulate their concerns other than through the law. And concerns there are. The more the definite loss of the Eastern territories as a consequence of the Hitler aggression became apparent, the more there was a sense that the Germans or people of German stock who were expelled from those territories, or who remained there but were cut off from their people, should receive special care from the Federal Republic. But this entailed intricate legal problems, not to speak of political sensitivities. Although a careful and disengaged reading shows that the authors were not unaware of the concerns they may bring about on the part of, for instance, Poland, one wishes that this point had been made more forcefully. The forthcoming peace settlement with the unified Germany provides a chance for Germans at large, as well as for the German legal community in particular, to express their sense of responsibility toward the cause of lasting peace in Europe.

JOST DELBRÜCK
University of Kiel

BRIEFER NOTICES

Die Abwehr von Dumping: Das Beispiel des amerikanischen Rechts. By Stephan Koch. (Heidelberg: Verlag Recht und Wirtschaft GmbH, 1989. Pp. 328. Index. DM 114.)

Basispreise und Trigger-Preise im Antidumpingrecht: Eine vergleichende Untersuchung zu Recht und Praxis der Montanunion und der Vereinigten Staaten von Amerika unter Berücksichtigung des GATT. By Andreas Austmann. (Heidelberg: Verlag Recht und Wirtschaft GmbH, 1989. Pp. 221. Index. DM 78.) These two works on the law of dumping represent substantial investments of scholarship and analytical ability in complex aspects of U.S. trade law. Unfortunately, their appeal for most readers of the *Journal* is likely to be limited, even for readers who are at ease with German. One of the books focuses on the American "trigger price mechanism." That mechanism was devised by officials—including this reviewer—in the Treasury Department in 1977. Although it was a useful expedient at the time, experience has shown that it was not a viable model for the administration of antidumping law in the long run. It was an experiment for a particular time and place. Furthermore, in the Uruguay Round there is currently under way an effort to modify the GATT Antidumping Code. If this effort succeeds (and some success is anticipated), much more will be written about antidumping measures—and their control—that will be of timely interest to *Journal* readers.

PETER D. EHRENHAFT
Of the District of Columbia Bar

V. M. Koretskii: izbrannye trudy (V. M. Koretsky: Selected Works). Edited by V. N. Denisov, et al. (Kiev: Naukova Dumka, 1989. 2 vols. 14 rubles.) The late academician and professor V. M. Koretsky (1890–1984), sometime member of the International Law Commission (1948–1954), judge on the International Court of Justice (1961–1970), and member of the Institut de Droit International, ranks as one of the quietly outstanding Soviet international lawyers of his generation. His range was formidable, embracing public and private international law, comparative law and legal history. He graduated from the law faculty of Kharkov University in 1916 and, from 1920 on, devoted himself to a career as an academic and legal adviser. Early and highly original theoretical works on international economic law and international radio law (1928) established his reputation, although he never figured in the polemics of the 1920s onward with respect to theory. In 1949 his study of the Anglo-American doctrines and practice of private international law, based on a wide and scrupulous use of cases and literature, became the standard Russian-language work and still has no peer in Soviet literature on the subject. As a member of the ICJ, he contributed dissenting opinions in three cases, of which that in the *North Sea Continental Shelf* cases particularly won the admiration of colleagues for its craftsmanship and learning.

In the Ukraine he played a major role in developing, first, the Kharkov Juridical Institute and, later, the Institute of State and Law of the Ukrainian Academy of Sciences, which was named in his honor in February 1990; his career spanned the first six decades of Soviet Ukrainian legal development.

Perestroika has brought the publication of collected works of leading Russian and Soviet legal scholars long unobtainable and sometimes suppressed.

Koretsky's colleagues and admirers in Kiev have assembled with affection the best of his writings, including all the works mentioned above, deftly edited to delete obsolete references while preserving the essence of his points, together with an exhaustive bibliography and a substantial introductory appreciation. Only 910 copies were printed, and the set was oversubscribed upon publication. A splendid and well-conceived tribute, those international lawyers fortunate enough to acquire a copy will delight in its contents. There is a brief English précis (vol. 2, pp. 411-12) and the table of contents also is translated.

W. E. BUTLER
University of London

Die Streitbeilegung im Tiefseebergbaurecht: Die Probleme nach der Seerechtskonvention unter besonderer Berücksichtigung des Rechtsschutzes Privater. By Niels-Jürgen Seeberg-Elverfeldt. (Baden-Baden: Nomos Verlagsgesellschaft, 1986. Pp. xvi, 185. DM 47.) It is common knowledge that many creative efforts have been spent on devising a well-balanced system for the settlement of disputes under the UN Law of the Sea Convention of 1982. Niels-Jürgen Seeberg-Elverfeldt deals with a particular aspect of this complex system—the machinery for the settlement of disputes connected with deep seabed mining. One of the specific characteristics of the regime established for that purpose is the admission of private parties as litigants in proceedings before the Sea-Bed Disputes Chamber of the International Tribunal for the Law of the Sea. The author reviews the organizational structure of this judicial body (pp. 29-56), focuses on the different parties entitled to initiate proceedings (pp. 57-74), and analyzes, in his most extensive chapter (pp. 75-155), the various competences of the Sea-Bed Disputes Chamber. With some amazement, the reader notes how many important issues have been left unresolved by the imprecise wording of Article 187 of the Convention. In particular, there exists built-in tension between the jurisdiction of the Chamber under Article 187 of the Convention and the prohibition stated in Article 189, according to which the Chamber is debarred from ruling on the compatibility of acts of secondary legislation with the Convention. Seeberg-Elverfeldt concludes that, at least within certain limits, such review must be considered permissible because otherwise the right to challenge acts and omissions of the Authority would lose any meaning.

The study is written in a sober and unpretentious style. It draws extensively on the drafting history and succeeds in avoiding superfluous subtleties. Being thus well reasoned and concise, it will not fail to be taken into account in the future practice of the Sea-Bed Disputes Chamber.

CHRISTIAN TOMUSCHAT
Bonn

SpyBASE. By Daniel Brandt. (Arlington: Micro Associates, 1989 (periodically updated). 3½ inch or 5¼ inch diskette. IBM-compatible only. \$49; \$24 for updates.) This unique publication indexes names of individuals and groups active in foreign policy, politics and intelligence. A computerized who's who, it can be a useful research aid for scholars and others interested in tracking political and economic elites in the United States and abroad.

SpyBASE is distributed on diskettes as a package, including a custom database search program and a database of 47,000 names (92,000 citations). Citations are drawn from books, reports, directories, periodicals and newsletters, including many ephemeral or limited-circulation publications not indexed elsewhere. Photocopies of sources are available from Micro Associates. Every year, 10,000–12,000 citations are added.

Twenty to thirty percent of the entries relate to U.S., British and Soviet intelligence, and the rest deal with foreign policy elites in the United States, Latin America, South East Asia and Europe. The reviewer wishes that fuller coverage had been given to the Far East. For instance, a database of this sort would be invaluable in navigating through the complex personal networks in the Japanese political and bureaucratic world.

With *SpyBASE*, the user can do three types of name search for groups and individuals, including phonetic searches. Also available are searches of entries for a given country and time period (e.g., Honduras 1979–1983) or all entries from a particular source. The configuration menu permits *SpyBASE* to be set up for either a hard disk or dual floppy drives, but searches will go much faster on an AT model with a fast hard disk. The program is practically self-explanatory and should be accessible even for the novice computer user.

AMELIA PORGES
Of the District of Columbia Bar

English-French-Spanish-Russian Manual of the Terminology of the Law of Armed Conflicts and of International Humanitarian Organizations. By Isaac Paenson. (Brussels: Bruylant; London, Dordrecht, Boston: Martinus Nijhoff, 1989. Pp. xxxviii, 844. Index. Dfl.475; \$235; £155.) This important work was written by the linguist Dr. Isaac Paenson, author of similar significant books: *Economic and Social Terminology* (1964), *Terminology of Statistical Methods* (1971) and *Terminology of Public International Law (Law of Peace) and International Organizations* (1983). The book under review complements the last-mentioned one, with its double facet of law in peace and in war (a distinction taken from the classic treatise of Grotius, *De jure belli ac pacis*), and it is a useful—one could even say *indispensable*—manual for specialists in international law, and in general for all who are interested in this subject.

Paenson wrote the English, French and Russian versions of the *Manual*, with the collaboration of three lawyers: Professor Jean Pictet (Honorary Vice-President of the International Committee of the Red Cross and former Director of the Henry-Dunant Institute), to whom the work is dedicated; the late Professor Waldemar A. Solf; and Professor Igor P. Blischchenko. The excellent Spanish text was translated from the French original by Professor Fernando Murillo Rubiera.

The method used by Paenson, both in the aforementioned books and particularly in the *Manual*, consists of presenting the terms to be defined in their natural context, thus applying the general theory of systems to terminology. Pictet wrote:

We share his conviction, that a term belonging to a given scientific discipline can be fully understood only if we consider it as an element of the whole system of terminology of that discipline. The larger the con-

text taken, the clearer will be the meaning of the terms concerned. To tell the truth the author takes such a large context that his Manual may also be considered as [a] canvas for a model course of lectures on the Law of Armed Conflicts and many University professors teaching this subject could profitably draw their inspiration from it.

The original method invented by the author has also other advantages which the alphabetical method—lacking, as it does, any logical basis—can't offer.

Thus, this method of presenting terms facilitates the comparison between equivalents (because the Manual collates terms whose meaning is identical or similar), their discussion and, in case of doubt, their final choice. It also reveals interrelations between the different terms which are essential for their comprehension. (p. xi)

The former President of the International Committee of the Red Cross, Dr. Alexander Hay, affirms his agreement on the subject in his foreword (p. vii).

In summary, this is a great piece of work that has rightly won this praise from Pictet:

I would like to pay tribute to the erudite and conscientious work of the author. Thanks to his vast experience, his profound knowledge of the subject matter and its terminology he created a Manual extremely well conceived and remarkable from any point of view. There is no doubt that it will entirely attain its purpose and render signal services to all those who have to do with the law of armed conflicts—a highly topical and constantly developing discipline whose aim is nothing less than the survival of Man. (p. xi)

JOSÉ PÉREZ MONTERO
Oviedo University School of Law

BOOKS RECEIVED*

International Law—General

Recueil des Cours de l'Académie de droit international de La Haye, 1989. Vol. II. (Vol. 214 of the collection.) Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1990. Pp. 398. Dfl.185; \$108; £57.50.

Guide to International Legal Research. The George Washington Journal of International Law and Economics. Salem, N.H.: Butterworth Legal Publishers, 1990. Pp. 400. \$95.

Hague Yearbook of International Law/Annuaire de La Haye de droit international. Volume 2, 1989. Dordrecht: Martinus Nijhoff Publishers, 1989. Pp. xviii, 355.

Haller, Walter, Alfred Kölz, Georg Müller, and Daniel Thürer (eds.). *Im Dienst an der Gemeinschaft. Festschrift für Dietrich Schindler zum 65. Geburtstag*. Basel, Frankfurt am Main: Verlag Helbing & Lichtenhan, 1989. Pp. 826. F 98; DM 113.

Netherlands Yearbook of International Law. Volume XX, 1989. Published jointly with the Netherlands International Law Review and under the auspices of the T.M.C. Asser Instituut, The Hague. Dordrecht: Martinus Nijhoff Publishers, 1989. Pp. 478. Index.

* Mention here neither assures nor precludes later review.

- Ugena, Nila Torres (comp.). *Textos normativos de derecho internacional público* (2d ed.). Madrid: Editorial Civitas, 1990. Pp. 1154. Index.
- Virally, Michel. *Le droit international en devenir. Essais écrits au fil des ans*. Paris: Presses Universitaires de France, 1990. Pp. 504.

International Economic Law & Relations

- Blokker, Niels. *International Regulation of World Trade in Textiles: lessons for practice; a contribution to theory*. Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1989. Pp. xii, 405. Index. Dfl.185; \$95; £62.50.
- Bryant, Ralph C., David A. Currie, Jacob A. Frenkel, Paul R. Masson, and Richard Portes (eds.). *Macroeconomic Policies in an Interdependent World*. The Brookings Institution; Centre for Economic Policy Research. Washington: International Monetary Fund, 1989. Pp. vi, 420. \$17.50.
- Dembo, David, Ward Morehouse, and Lucinda Wykle. *Abuse of Power. Social Performance of Multinational Corporations: The Case of Union Carbide*. New York: New Horizons Press, 1990. Pp. vii, 161. Index. \$13.50.
- Díaz, Luis Miguel. *Globalización de las inversiones extranjeras. Nuevos aspectos jurídicos*. Mexico: Editorial Themis, 1989. Pp. xiv, 128. Index.
- Faber, Gerrit (ed.). *Trade Policy and Development. The role of Europe in North-South trade: a multi-disciplinary approach*. The Hague: Universitaire Pers Rotterdam, 1990. Pp. viii, 298. Dfl.45.
- Fox, Hazel, Paul McDade, Derek Rankin Reid, Anastasia Strati, and Peter Huey. *Joint Development of Offshore Oil and Gas. A Model Agreement for States for Joint Development with Explanatory Commentary*. London: British Institute of International and Comparative Law, 1989. Pp. 426. Index.
- Georgieff, Alexander. *Kollisionen durch extraterritoriale staatliche Regelungen im internationalen Wirtschaftsrecht*. Cologne, Berlin, Bonn, Munich: Carl Heymanns Verlag VG, 1989. Pp. xiv, 133. DM 52.
- Görizt, Andreas. *Zur Wesentlichen Vertragsverletzung Beim Warenverkauf. Wechselbeziehungen zwischen dem nordischen und dem international einheitlichen Recht*. Saarbrücken: Vortrag vor dem Europa-Institut der Universität des Saarlandes, 1988. Pp. 56.
- Henning-Bodewig, Frauke, and Annette Kur. *Marke und Verbraucher. Funktionen der Marke in der Marktwirtschaft. Band II: Einzelprobleme*. Weinheim: VCH Verlagsgesellschaft, 1989. Pp. xxxvi, 585. Index.
- Hobér, Kaj. *Joint Ventures in the Soviet Union. A Legal Treatise*. Dobbs Ferry, N.Y.: Transnational Juris Publications, Inc., 1989. Loose-leaf. \$125.
- Hudec, Robert E. *The GATT Legal System and World Trade Diplomacy* (2d ed.). Salem, N.H.: Butterworth Legal Publishers, 1990. Pp. xxi, 376. Index. \$85.
- Jackson, John H. *Restructuring the GATT System*. New York: Council on Foreign Relations Press, 1990. Pp. 121. \$14.95.
- Kaplan, Jacob J., and Günther Schleiminger. *The European Payments Union. Financial Diplomacy in the 1950s*. Oxford: Clarendon Press, 1989. Pp. xiv, 396. Index. \$72.
- Kunig, Philip, Niels Lau, and Werner Meng (eds.). *International Economic Law. Basic Documents*. Berlin, New York: Walter de Gruyter, 1989. Pp. xvi, 691. DM 228.
- Monti, Mario (ed.). *Fiscal Policy, Economic Adjustment, and Financial Markets*. Washington: International Monetary Fund; Milan: Centro di Economia monetaria e finanziaria, 1989. Pp. x, 283. \$16.
- Morici, Peter (ed.). *Making Free Trade Work: The Canada-U.S. Agreement*. New York, London: Council on Foreign Relations Press, 1990. Pp. xiv, 182. Index. \$17.95.
- Ostry, Sylvia. *Governments & Corporations in a Shrinking World. Trade & Innovation Policies in the United States, Europe & Japan*. New York, London: Council on Foreign Relations Press, 1990. Pp. xi, 123. Index. \$14.95.
- Triggiani, Ennio. *Gli aiuti statali alle imprese nel diritto internazionale e comunitario*. Bari: Cacucci Editore, 1989. Pp. xxiii, 400. Index.

Law of the Sea & Maritime Law

David, Steven R., and Peter Digeser. *The United States and the Law of the Sea Treaty*. Washington: The Johns Hopkins Foreign Policy Institute, The Paul H. Nitze School of Advanced International Studies, 1990. Pp. xi, 37.

McRae, Donald, and Gordon Munro (eds.). *Canadian Oceans Policy: National Strategies and the New Law of the Sea*. Vancouver: University of British Columbia Press, 1989. Pp. xiv, 268.

Roelandt, Marc. *La condition juridique des pipelines dans le droit de la mer*. Paris: Presses Universitaires de France, 1990. Pp. 241.

Terrorism

Lambert, Joseph J. *Terrorism and Hostages in International Law—A Commentary on the Hostages Convention 1979*. Cambridge: Grotius Publications Limited, 1990. Pp. xxv, 418. Index. \$110; £58.

Murphy, John F. *State Support of International Terrorism. Legal, Political, and Economic Dimensions*. Boulder, San Francisco: Westview Press; London: Mansell Publishing Limited, 1989. Pp. vii, 128. Index. \$39.95.

Human Rights

Bélanger, Michel. *Le droit international de la santé par les textes*. Paris: Berger-Levrault, 1989. Pp. 470.

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Chen, Mai. *Women and Discrimination: New Zealand and the UN Convention*. Wellington: Victoria University Press for the Institute of Policy Studies, 1989. Pp. ii, 85. \$15.

Dinstein, Yoram (ed.). *Israel Yearbook on Human Rights. Volume 19, 1989*. Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1989. Pp. 412. Dfl.180; \$105; £65.50.

Forsythe, David P. (ed.). *Human Rights and Development: International Views*. New York: St. Martin's Press, 1989. Pp. xvi, 369. \$45.

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Renteln, Alison Dundes. *International Human Rights. Universalism Versus Relativism*. Newbury Park, London, New Delhi: Sage Publications, 1990. Pp. 295. Index. \$35, cloth; \$16.95 paper.

Sudre, Frédéric. *La Convention européenne des droits de l'homme*. Paris: Presses Universitaires de France, 1990. Pp. 127.

International Labor Law

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World labour report 1989, Volume 4. Employment and labour incomes; Government and its employees; Statistical appendix. Geneva: International Labour Office, 1989. Pp. iv, 159.

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Tinoco, Arnaldo André. *Völkerrechtliche Grundlagen dauernder Neutralität. Die dauernde aktive und demilitarisierte Neutralität Costa Ricas unter der Satzung der Vereinten Nationen*. Baden-Baden: Nomos Verlagsgesellschaft, 1989. Pp. 286. DM 75.

Tzou, Byron N. *China and International Law: The Boundary Disputes*. New York, Westport, Conn., London: Praeger, 1990. Pp. xi, 158. Index. \$42.95.

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Chatterjee, S. K. (ed.). *Lloyd's Arbitration Reports 1989*. London, New York, Hamburg, Hong Kong: Lloyd's of London Press Ltd., 1989. Pp. xvi, 338. Index.

International Commercial Arbitration and the Courts. Dobbs Ferry, N.Y.: Transnational Juris Publications, Inc., 1990. Pp. v, 460. \$95.

The 1989 Guide to International Arbitration and Arbitrators. Dobbs Ferry, N.Y.: Transnational Juris Publications, Inc., 1989. Pp. ix, 981. \$85.

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Le Droit d'asile / The Right to Asylum. Centre for Studies and Research in International Law and International Relations, The Hague. Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1990. Pp. 121.

International Thesaurus of Refugee Terminology. Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1989. Pp. xxv, 475. Dfl.250; \$129; £85.

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Smith, Turner T., Jr., and Pascale Kromarek. *Understanding US and European Environmental Law. A Practitioner's Guide*. London, Dordrecht, Boston: Graham & Trotman/Martinus Nijhoff, 1989. Pp. xiv, 176. Index. Dfl.135; \$70; £46.50.

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Air & Space

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- L'Unificazione del diritto internazionale privato e processuale. Studi in memoria di Mario Giuliano*. Padua: Cedam, 1989. Pp. xxv, 1037.

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- Democracies in Regions of Crisis. Botswana, Costa Rica, Israel*. Washington: National Democratic Institute for International Affairs, 1990. Pp. vi, 145. \$7.95.
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THE AMERICAN JOURNAL OF INTERNATIONAL LAW (ISSN 0002-9300) is published quarterly, in January, April, July and October, and is supplied to all members of the American Society of International Law. Annual subscription rate to nonmembers is \$75.00, plus \$5.00 postage outside U.S.A. Available back numbers of AJIL will be supplied at \$27.50 each.

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NEW YORK UNIVERSITY SCHOOL OF LAW
40 WASHINGTON SQUARE SOUTH
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BUSINESS OFFICE:

2223 MASSACHUSETTS AVENUE, N.W.
WASHINGTON, D.C. 20008-2864

Second-class postage paid at Washington, D.C. and at additional mailing office.
POSTMASTER: If undeliverable, send notice on Form 3579 to the American Journal of International Law, 2223 Massachusetts Ave., N.W., Washington, D.C. 20008-2864.

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Printed by Lancaster Press, Lancaster, Pa. 17603

AMERICAN JOURNAL OF INTERNATIONAL LAW

VOL. 84

October 1990

NO. 4

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THE ROLES OF EQUITY IN THE DELIMITATION OF MARITIME BOUNDARIES

By L. D. M. Nelson*

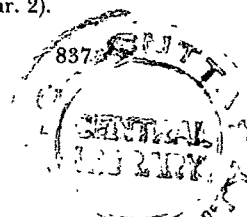
I. INTRODUCTION

The recent decisions of the International Court of Justice and various arbitral tribunals¹ with respect to the delimitation of maritime boundaries between states raise certain fundamental problems of jurisprudence. Among these are the legal consequences emanating from the proposition that each boundary is a *unicum*, that is to say, it is unique or monotypic; the part to be

* Of the Office for Ocean Affairs and Law of the Sea, United Nations. The views expressed are personal and do not necessarily reflect those of the Office for Ocean Affairs and Law of the Sea or of the United Nations.

¹ The cases are: North Sea Continental Shelf (FRG/Den.; FRG/Neth.), 1969 ICJ REP. 3 (Judgment of Feb. 20), *reprinted in* 8 ILM 340 (1969) [hereinafter North Sea]; Case concerning the Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic, Decision of 30 June 1977, 18 R. Int'l Arb. Awards 3, *reprinted in* 18 ILM 397 (1979) [hereinafter Anglo-French Award]; Continental Shelf (Tunisia/Libyan Arab Jamahiriya), 1982 ICJ REP. 18 (Judgment of Feb. 24), *reprinted in* 21 ILM 225 (1982) [hereinafter Tunisia/Libya]; Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.), 1984 ICJ REP. 246 (Judgment of Oct. 12), *reprinted in* 23 ILM 1197 (1984) [hereinafter Gulf of Maine]; Arbitral Award of Feb. 14, 1985, in Guinea/Guinea-Bissau Dispute concerning Delimitation of the Maritime Boundary, 25 ILM 251 (1986) [hereinafter Guinea/Guinea-Bissau Award]; Continental Shelf (Libyan Arab Jamahiriya/Malta), 1985 ICJ REP. 13 (Judgment of June 3), *reprinted in* 24 ILM 1189 (1985) [hereinafter Libya/Malta]; Arbitral Award of July 31, 1989 (Guinea-Bissau/Senegal), annexed to the Application filed on Aug. 23, 1989, by Guinea-Bissau with the International Court of Justice instituting proceedings against Senegal in respect of a dispute concerning the existence and validity of the award of July 31, 1989 [hereinafter Guinea-Bissau/Senegal Award].

In addition, decisions are pending in several maritime boundary cases recently submitted to third-party adjudication. Since 1986, a Chamber of the International Court of Justice has been seized of the dispute between Honduras and El Salvador concerning their land, island and maritime frontier. *See, e.g.,* Land, Island and Maritime Frontier Dispute (El Sal./Hond.), Composition of Chamber, 1989 ICJ REP. 162 (Order of Dec. 13). On August 16, 1988, Denmark, on the basis of the declarations made by both Denmark and Norway accepting the Optional Clause under Article 36(2) of the Statute of the International Court of Justice, submitted its maritime boundary dispute with Norway to the Court. It has been requested "to decide, in accordance with international law, where a single line of delimitation shall be drawn between Denmark and Norway's fishing zone and continental shelf areas in the waters between Greenland and Jan Mayen." Maritime Boundary in the Area between Greenland and Jan Mayen (Den. v. Nor.), Application Instituting Proceedings (Aug. 16, 1988), ICJ Doc. 1988 General List No. 78, at 4. On March 30, 1989, Canada and France concluded the Agreement Establishing a Court of Arbitration for the Purpose of Carrying out the Delimitation of Maritime Areas between France and Canada [St. Pierre and Miquelon], 29 ILM 1 (1990). On the proceedings before the International Court of Justice instituted by Guinea-Bissau against Senegal, referred to *supra*, see Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal), 1989 ICJ REP. 126 (Order of Nov. 1); and *id.*, Provisional Measures, 1990 ICJ REP. 64 (Order of Mar. 2).



played by equity in the delimitation process; the role of equidistance; the legal consequences of the demise of natural prolongation and the emergence of the distance criterion or principle; the notion of a properly structured system of equity; and the proper function of the Court or tribunal in dealing with these matters.

II. THE IDEA OF THE *UNICUM*

From the very inception of the doctrine of the continental shelf, the argument has been put forward that geographical features varied so greatly that it was difficult, if not impossible, to posit fixed rules governing the establishment of maritime boundaries between states.²

The idea of the uniqueness of each boundary finds significant support in the jurisprudence of the International Court of Justice and arbitral tribunals dealing with maritime boundary disputes. In the *Tunisia / Libya* case, the Court declared: "Clearly each continental shelf case in dispute should be considered and judged on its own merits, having regard to its peculiar circumstances; therefore, no attempt should be made here to overconceptualize the application of the principles and rules relating to the continental shelf."³

The Chamber in the *Gulf of Maine* case reiterated this point:

Although the practice is still rather sparse, owing to the relative newness of the question, it too is there to demonstrate that each specific case is, in the final analysis, different from all the others; that it is monotypic and that, more often than not, the most appropriate criteria, and the method or combination of methods most likely to yield a result consonant with what the law indicates, can only be determined in relation to each particular case and its specific characteristics. This precludes the possibility of those conditions arising which are necessary for the formation of principles and rules of customary law giving specific provisions for subjects like those just mentioned.⁴

The tribunal in the *Guinea / Guinea-Bissau* arbitration took up the theme:

The factors and methods referred to result from legal rules, although they evolve from physical, mathematical, historical, political, economic or other facts. However, they are not restricted in number and none of

² See, e.g., Hudson's observations in the 69th and 79th meetings of the International Law Commission. In particular, he stated at the 69th meeting that "[g]eographical differences prevented the formulation of a general principle." [1950] 1 Y.B. INT'L L. COMM'N 233, para. 53, and 306, para. 53, UN Doc. A/CN.4/SER.A/1950. Young also noted that "[e]ach situation is unique, and can be solved satisfactorily only in the light of its own facts and the particular interests there involved." Young, *The International Law Commission and the Continental Shelf*, 46 AJIL 123, 126 (1952). See also Grisel, *The Lateral Boundaries of the Continental Shelf and the Judgment of the International Court of Justice in the North Sea Continental Shelf Cases*, 64 AJIL 562, 590 (1970).

³ 1982 ICJ REP. at 92, para. 132. In the *Anglo-French Award*, the court of arbitration noted that "the appropriateness of the equidistance method or any other method for the purpose of effecting an equitable delimitation is a function or reflection of the geographical and other relevant circumstances of each particular case." 18 ILM at 426, para. 97 (emphasis added).

⁴ 1984 ICJ REP. at 290, para. 81.

them is obligatory for the Tribunal, since each case of delimitation is a *unicum*, as has been emphasized by the International Court of Justice The Tribunal will come back to the question of methods. Where factors are concerned, the Tribunal must list them and assess them. They result from the circumstances of each particular case and, in particular, from characteristics peculiar to the region.⁵

The almost endless variety of geographical situations,⁶ it is contended, makes each case in dispute a *unicum*. According to a certain view of the matter, some important juridical consequences emanate from the uniqueness of each case. The search for universally applicable rules becomes otiose. Judge Waldock made this point quite clearly:

The difficulty is that the problem of delimiting the continental shelf is apt to vary from case to case in response to an almost infinite variety of geographical circumstances. In consequence, to attempt to lay down precise criteria for solving all cases may be to chase a chimera; for the task is always essentially one of appreciating the particular circumstances of the particular case.⁷

Furthermore, the particularity of each case effectively impedes the formation of customary rules of international law⁸ since there are no universalizable rules.

III. THE ROLES OF EQUITY

It is generally accepted that maritime boundaries must be determined by the application of equitable principles, taking account of all the relevant circumstances so as to achieve an equitable result.⁹ In view of the fundamental role of equity in the delimitation of maritime boundaries, what is its proper function in the discharge of that role? Two fairly distinct positions seem to have emerged on this matter.¹⁰

The first interpretation views equity as a corrective. The role of equity here is to reduce the harshness of the law—"to mitigate the effects of the application of the rule of law in particular circumstances in which the strict rule of law would work an injustice."¹¹

⁵ 25 ILM at 289-90, para. 89 (citing Gulf of Maine, 1984 ICJ REP. at 290, para. 81) (citation omitted).

⁶ Judge *ad hoc* Jiménez de Aréchaga adds to this the historical and political factors that established the land frontiers separating the states parties to each dispute. See his separate opinion in Tunisia/Libya, 1982 ICJ REP. at 105, para. 22.

⁷ H. M. Waldock, The International Court and the Law of the Sea 13 (Cornelis van Vollenhoven Memorial Lecture, University of Leiden, May 22, 1979).

⁸ P. WEIL, THE LAW OF MARITIME DELIMITATION—REFLECTIONS 153 (1989) (translation of PERSPECTIVES DU DROIT DE LA DÉLIMITATION MARITIME (1988)).

⁹ See, e.g., Gulf of Maine, 1984 ICJ REP. at 295, para. 99. Note also Articles 74 and 83 of the United Nations Convention on the Law of the Sea, opened for signature Dec. 10, 1982, UN Doc. A/CONF.62/122, reprinted in UNITED NATIONS, THE LAW OF THE SEA: OFFICIAL TEXT OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA WITH ANNEXES AND INDEX, UN Sales No. E.83.V.5 (1983).

¹⁰ P. WEIL, *supra* note 8, at 165-67.

¹¹ Jennings, *Equity and Equitable Principles*, 42 ANNUAIRE SUISSE DE DROIT INTERNATIONAL 27, 32 (1986). In a later article, Judge Jennings bluntly stated that "[i]f equity is not to modify

The application of equity would thus result in modifying the general rule of law where the particular circumstances of the case so require. With regard to the delimitation of maritime boundaries, many commentators believe that application of the equidistance principle embodies this general rule.¹²

Under the second approach, equity is regarded as playing a more autonomous role. Equity here functions as an integral part of international law. The Court itself has observed:

Equity as a legal concept is a direct emanation of the idea of justice. The Court whose task is by definition to administer justice is bound to apply it. In the course of the history of legal systems the term "equity" has been used to define various legal concepts. It was often contrasted with the rigid rules of positive law, the severity of which had to be mitigated in order to do justice. In general, this contrast has no parallel in the development of international law; the legal concept of equity is a general principle directly applicable as law.¹³

The proposition that the uniqueness of each maritime boundary situation impedes the establishment, and therefore the application, of general rules of

the law, it can have no role to play other than to complicate and confuse the juristic terminology." Jennings, *The Principles Governing Marine Boundaries*, in STAAT UND VÖLKERRECHTSORDNUNG: FESTSCHRIFT FÜR KARL DOEHRING 397, 404 (1989) [hereinafter *Marine Boundaries*].

¹² In this respect the following observation from the *Anglo-French Award* may be noted: "The question is whether, in the light of all the pertinent geographical circumstances, that fact [the mere presence of the Scilly Isles in the position in which they lie] amounts to an inequitable distortion of the equidistance line producing disproportionate effects on the areas of shelf accruing to the two States." 18 ILM at 454, para. 243.

And from the *Tunisia/Libya* case: "Yet in the present case nothing was done to investigate the precise effect on an equidistance line of the relevant geographical features in the area of continental shelf under consideration, the 'unreasonable' . . . results which the equidistance method might produce and any modifications to be therefore envisaged." 1982 ICJ REP. at 149, para. 11 (Gros, J., dissenting). See also Zoller, *Recherche sur les méthodes de délimitation du plateau continental: à propos de l'affaire Tunisie-Libye*, 86 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC [RGDIP] 645, 669, 670, 674 (1982); P. WEIL, *supra* note 8, *passim*; Nelson, *Equity and the Delimitation of Maritime Boundaries*, IRANIAN REV. INT'L REL., No. 11-12, 1978, at 197, 202; Jennings, *Marine Boundaries*, *supra* note 11, at 408. See further section V *infra*.

¹³ *Tunisia/Libya*, 1982 ICJ REP. at 60, para. 71. Of course, Hudson's well-known observations in his individual opinion in *Diversion of Water from the Meuse* (Neth. v. Belg.) are to the same effect:

What are widely known as principles of equity have long been considered to constitute a part of international law, and as such they have often been applied by international tribunals. . . . A sharp division between law and equity, such as prevails in the administration of justice in some States, should find no place in international jurisprudence; even in some national legal systems, there has been a strong tendency towards the fusion of law and equity.

1937 PCIJ (ser. A/B) No. 70, at 76 (Judgment of June 28) (citations omitted). The idea of autonomous equity may have already been contained in the following dictum in the *North Sea Cases*: "Whatever the legal reasoning of a court of justice, its decisions must by definition be just, and therefore in that sense equitable." 1969 ICJ REP. at 48, para. 88. In concluding his criticism of this dictum in this seminal case, Judge Koretsky considered that the Judgment tended somewhat toward *ex aequo et bono*. *Id.* at 165 (Koretsky, J., dissenting).

delimitation seems to go hand in hand with the notion of autonomous equity—with equity playing a “lead role” in the delimitation process. The role of equity would be to provide rules or criteria in the light of the particular case and these rules or criteria would inevitably vary from case to case. It is this conception of equity that Judge Jiménez de Aréchaga had in mind when he noted:

To resort to equity means, in effect, to appreciate and balance the relevant circumstances of the case, so as to render justice, not through the rigid application of general rules and principles and of formal legal concepts, but through an adaptation and adjustment of such principles, rules and concepts to the facts, realities and circumstances of each case. . . . In other words, the judicial application of equitable principles means that a court should render justice in the concrete case, by means of a decision shaped by and adjusted to the relevant “factual matrix” of that case.¹⁴

This is indeed the *locus classicus* of the notion of autonomous equity.

IV. SOME CRITICISMS

Some important criticisms have been directed at this idea of the *unicum*, the idea that each maritime boundary “dispute should be considered and judged on its own merits, having regard to its peculiar circumstances.” It has been argued, for instance, that

an excessive individualisation of the rule of law, which changes from one case to another, would be incompatible with the very concept of law. Every legal rule presupposes a minimum of generality. A rule which is elaborated on a case by case basis rests on the discretionary power of the judge, on conciliation, on distributive justice—in brief, on *ex aequo et bono*.¹⁵

¹⁴ Tunisia/Libya, 1982 ICJ REP. at 106, para. 24 (Jiménez de Aréchaga, J., sep. op.). Cf. also these observations: “L’Équité’ peut être définie comme la solution qui convient le mieux à chaque cas qui se présente. Elle est donc autre chose que l’‘Equity’ du Droit anglo-saxon.” A. Alvarez, Preliminary Communication, 40 INSTITUT DE DROIT INTERNATIONAL, ANNUAIRE 151 (1937). Note too the following:

L’équité est essentiellement une affaire d’espèce: c’est là son caractère distinctif: il n’y a pas de “principes d’équité” Il ne peut y en avoir parce que ce qui est juste dans un cas n’apparaît que quand le cas est réalisé, pas auparavant. Il y a bien des principes de justice, mais c’est en considération des circonstances du cas que l’on choisit le principe applicable pour donner une solution d’équité.

Decencière-Ferrandière, *Quelques Réflexions touchant le règlement des conflits internationaux*, 36 RGDIP 416, 432 (1929), quoted in Mouskhéli, *L’Équité en droit international moderne*, 40 RGDIP 347, 353 (1933). To the same effect, see C. DE VISSCHER, *DE L’ÉQUITÉ DANS LE RÈGLEMENT ARBITRAL OU JUDICIAIRE DES LITIGES DE DROIT INTERNATIONAL PUBLIC* 7 (1972); and Reuter, *Une Ligne unique de délimitation des espaces maritimes*, in MÉLANGES GEORGES PERRIN: RECUEIL DE TRAVAUX OFFERTS À M. GEORGES PERRIN 251, 255 and 264 (1984).

¹⁵ Counter-Memorial submitted by the Republic of Malta (Libya/Malta), 1983 ICJ Pleadings (1 Continental Shelf) 59, para. 111 (Oct. 26, 1983) [hereinafter Malta Counter-Memorial]. See further, e.g., Bowett, *The Arbitration between the United Kingdom and France Concerning the Continental Shelf Boundary in the English Channel and South-western Approaches*, 49 BRIT. Y.B. INT’L L. 1,

As the language of these criticisms indicates, this problem is not at all confined to maritime boundary delimitation. The tension between the need for "particular justice" arising from the uniqueness of a specific case and the demand for "universalizable justice" constitutes a general legal problem.¹⁶ On the level of municipal law, the notion of "particular justice" has also received its share of criticisms. For example, Neil MacCormick has forcefully observed that

[t]o say, as can truly be said, that in some cases strict application of existing rules of positive law would be contrary to the merits of the case should not lead us to believe in some mysterious concept of equity under which individual cases are conceived as having their individual unique and particular merits. Equity cannot be understood, I would suggest, as something particular by contrast to the universalizability of justice. . . . [F]ormal rules of positive law may work injustice in their application, which may justify the creation of exceptions to the law for classes of situations to which for good reason the previously declared or enacted law ought not to be applied. But as that in itself says, equity is as much a matter of what is universalizable as is justice.¹⁷

A highly relevant question is whether the uniqueness that characterizes each maritime boundary situation is of a different order from the uniqueness encountered in other areas of the law.¹⁸ As has been seen, ever since the introduction of the doctrine of the continental shelf it has been maintained that the "infinite variety" of geographical situations effectively rules out the application of a general rule or rules or "precise criteria" for the resolution of maritime boundaries. This theme recurs both in the literature and in the jurisprudence of the International Court of Justice and arbitral tribunals dealing with the matter. The persistence of this viewpoint leads one to conclude that the law seems here to be faced with a stubborn fact of nature. Inevitably, it will be the law that will have to accommodate itself to this phenomenon, perhaps shedding in the process what some consider its most

14 (1978); Zoller, *supra* note 12, at 656; David, *La Sentence arbitrale du 14 février 1985 sur la délimitation de la frontière maritime Guinée-Guinée Bissau*, 31 *ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL* 350, 366 (1985); Charney, *Ocean Boundaries between Nations: A Theory for Progress*, 78 *AJIL* 582, 587 (1984); and P. WEIL, *supra* note 8, at 180-83.

¹⁶ See Newman, *Introduction to EQUITY IN THE WORLD'S LEGAL SYSTEMS* 15, 17 (R. A. Newman ed. 1973). There he refers to "the presence in the law of goals which are in direct and perennial conflict; the goal of certainty and the goal of individual justice."

¹⁷ N. MACCORMICK, *LEGAL REASONING AND LEGAL THEORY* 98-99 (1978). The theory of particular justice has also been attacked because it does not "provide a means by which a decision can be tested on rational grounds, or sufficient legal data from which rational inferences about the future can successfully be made." R. WASSERSTROM, *THE JUDICIAL DECISION: TOWARD A THEORY OF LEGAL JUSTIFICATION* 97 (1961).

¹⁸ P. WEIL, *supra* note 8, at 153, has observed: "Nor is the argument about the particularity of each case entirely convincing. It could be put forward in all fields, not just that of maritime delimitation"

fundamental characteristic, its universality,¹⁹ at least as far as the delimitation of maritime boundaries is concerned.

V. EQUIDISTANCE

The interpretation of equity as correcting the "unreasonable or inequitable" results of a primary application of the equidistance method may have ameliorated this apparently unsatisfactory state of affairs.²⁰ However, the International Court of Justice and arbitral tribunals dealing with the delimitation of maritime boundaries have consistently held that the equidistance principle (or method) was not a mandatory rule of international law and that it did not enjoy any priority or preferential status. This has been the settled jurisprudence since 1969.

As is well-known, the Court in the *North Sea Continental Shelf Cases* demoted the equidistance principle. It ceased to be a principle and became merely one method among others.²¹

In the *Tunisia / Libya* case, the Court dispelled any lingering doubts about the role of equidistance. It did not consider that it was

required, as a first step, to examine the effects of a delimitation by application of the equidistance method, and to reject that method in favour of some other only if it considers the results of an equidistance line to be inequitable . . . since equidistance is not, in the view of the Court, either a mandatory legal principle, or a method having some privileged status in relation to other methods.²²

¹⁹ It must be noted, however, that in the *Libya / Malta* case, the Court sought to downplay the effects of the *unicum* in the delimitation process. It said that

the justice of which equity is an emanation, is not abstract justice but justice according to the rule of law; which is to say that its application should display consistency and a degree of predictability; even though it looks with particularity to the peculiar circumstances of an instant case, it also looks beyond it to principles of more general application.

1985 ICJ REP. at 39, para. 45. This writer doubts whether these principles (see text at note 63 for a list of these equitable principles) in and of themselves possess the degree of precision enabling their application to produce the consistency and predictability necessary for all cases. In this connection Degan argues that "the application of these 'equitable principles' as allegedly a part of international law does not lead to predictable results. The margin of discretionary power of the Court is too large." Degan, "Equitable Principles" in *Maritime Delimitations*, in 2 INTERNATIONAL LAW AT THE TIME OF ITS CODIFICATION: ESSAYS IN HONOUR OF ROBERTO AGO 107, 133 (1987) [hereinafter CODIFICATION ESSAYS]. The discretionary power of the Court in this matter is discussed in the text at notes 74-81 *infra*.

²⁰ P. WEIL, *supra* note 8, *passim*.

²¹ In this respect Judge Waldock, *supra* note 7, at 11, labels the Judgment "as in some ways perhaps an unsettling contribution to the modern law."

²² 1982 ICJ REP. at 79, para. 110. Gros did not accept that there was any necessity for this "a priori opposition to the very notion of equidistance having any useful role to play in searching for an equitable solution." Gulf of Maine, 1984 ICJ REP. at 388, para. 46 (Gros, J., dissenting).

Moreover, the Chamber in the *Gulf of Maine* case²³ and the tribunal in the *Guinea / Guinea-Bissau* arbitration²⁴ adhered to this jurisprudence regarding equidistance.

In this respect the *Libya / Malta* case is of particular significance. Malta had put forward in clear terms the proposition that an equidistance line should be considered as a primary delimitation—"as starting the delimitation process"—to be adjusted as necessary in the light of all relevant circumstances.²⁵

The Court, however, again refused to accord equidistance any such special status. The Court observed that it was

unable to accept that, even as a preliminary and provisional step towards the drawing of a delimitation line, the equidistance method is one which *must* be used, or that the Court is "required, as a first step, to examine the effects of a delimitation by application of the equidistance method" Such a rule would come near to an espousal of the idea of "absolute proximity", which was rejected by the Court in 1969 . . . , and which has since, moreover, failed of acceptance at the Third United Nations Conference on the Law of the Sea.²⁶

Is there, or, for that matter, should there be, an obligation to accord equidistance a privileged status? This is perhaps the core of the problem. It has been argued, for instance, that since, "according to reliable testimony, governments always begin the negotiation of a maritime delimitation by considering an equidistance line, while at liberty subsequently to modify it, there is no reason why this practice should not be taken into account in the development of the customary law governing the delimitation process."²⁷ Yet it is one thing to assert that "governments always begin the negotiation of a maritime delimitation by considering an equidistance line"; it may be quite another to impose an obligation on negotiators and tribunals to do so.

In this writer's opinion, the role of the Third United Nations Conference on the Law of the Sea in this regard was decisive,²⁸ for it played a significant part in the downgrading of the equidistance principle. The legal norm embodied in Article 6 of the Geneva Convention on the Continental Shelf was deliberately abandoned quite early in the conference,²⁹ which only suc-

²³ See 1984 ICJ REP. at 297-98, paras. 105-07.

²⁴ See 25 ILM at 294, para. 102.

²⁵ Malta Counter-Memorial, *supra* note 15, at 78, para. 164. See further text at notes 51-52 *infra*.

²⁶ 1985 ICJ REP. at 37, para. 43 (quoting *Tunisia / Libya*, 1982 ICJ REP. at 79, para. 110, and *North Sea*, 1969 *id.* at 30, para. 41, respectively) (citations omitted).

²⁷ P. WEIL, *supra* note 8, at 154.

²⁸ The Court's decision in the *North Sea Cases* exerted a significant influence on the debates at the conference on this matter. The emergence of several new states had markedly increased the diversity of maritime situations, a fact that also played a significant role within the conference in weakening the global rule embodied in the equidistance principle. Nelson, *supra* note 12, at 208; and Quéneudec, *L'Affaire de la délimitation du plateau continental entre la France et le Royaume-Uni*, 83 RGDIP 53, 74 (1979).

²⁹ Paragraphs 1 and 2 of Article 6 of the Geneva Convention on the Continental Shelf, Apr. 29, 1958, 15 UST 471, TIAS No. 5578, 499 UNTS 311, read as follows:

ceeded in producing a formula giving general guidance on the delimitation of the exclusive economic zone and continental shelf. The real importance of the transactions of the conference on this issue lies in the fact that equidistance was unable to attract a consensus³⁰ among members of the international community that would have enabled it to be incorporated in the text of the Convention on the Law of the Sea.³¹

It must be concluded that the idea that equidistance forms the basis of a general rule to be modified, where appropriate, by the application of corrective equity has been so constantly rejected that it is now difficult to support this conception of the function of equity. As Jiménez de Aréchaga has pointedly observed, the notion of corrective equity "is not valid in the field of continental shelf delimitation, by reason simply of the absence of a general

1. Where the same continental shelf is adjacent to the territories of two or more States whose coasts are opposite each other, the boundary of the continental shelf appertaining to such States shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary is the median line, every point of which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.

2. Where the same continental shelf is adjacent to the territories of two adjacent States, the boundary of the continental shelf shall be determined by agreement between them. In the absence of agreement, and unless another boundary line is justified by special circumstances, the boundary shall be determined by application of the principle of equidistance from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured.

Paragraph 1 of Articles 61 and 70 of the first negotiating text of the Convention on the Law of the Sea, the Informal Single Negotiating Text, certainly gave pride of place to "equitable principles." Article 61(1) read thus: "The delimitation of the exclusive economic zone between adjacent or opposite States shall be effected by agreement in accordance with equitable principles, employing, where appropriate, the median or equidistance line, and taking account of all the relevant circumstances." And Article 70(1): "The delimitation of the continental shelf between adjacent or opposite States shall be effected by agreement in accordance with equitable principles, employing, where appropriate, the median or equidistance line, and taking account of all the relevant circumstances." UN Doc. A/CONF.62/WP.8/Part II, 4 THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA, OFFICIAL RECORDS 162 and 163, UN Sales No. E.75.V.10 (1975).

³⁰ See Anderson, *Maritime Delimitation—A View of British Practice*, 12 MARINE POL'Y 231, 237 (1988); Adede, *Toward the Formulation of the Rule of Delimitation of Sea Boundaries Between States with Adjacent or Opposite Coasts*, 19 VA. J. INT'L L. 207 (1979); Lauterpacht, *Equity, Evasion, Equivocation and Evolution in International Law*, 33 AM. BRANCH INT'L L. ASS'N, PROC. & COMM. REP. 43 (1977-78). For a detailed account of the evolution of the provisions of the 1982 Convention on the Law of the Sea on the delimitation of the continental shelf and the exclusive economic zone, see Dissenting Opinion of Judge Oda, *Tunisia/Libya*, 1982 ICJ REP. at 234-47.

³¹ Article 74(1) of the Convention on the Law of the Sea, *supra* note 9, reads as follows: "The delimitation of the exclusive economic zone between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution."

Article 83(1) of the Convention reads as follows: "The delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution."

rule of law which is to be moderated or corrected in its concrete application."³²

VI. THE DEMISE OF NATURAL PROLONGATION AND THE EMERGENCE OF THE DISTANCE CRITERION

A further question arises: that is, whether the recognition by the Court in the *Libya / Malta* case of the distance criterion or principle as the sole basis of title to the seabed and subsoil within the 200-nautical-mile limit and the consequent demise of the idea of natural prolongation have somehow, in spite of the clear dicta of the Court to the contrary, invested equidistance with any special status.³³

Natural Prolongation

The expression "natural prolongation" entered the vocabulary of the international law of the sea with the Judgment of the Court in the *North Sea Continental Shelf Cases*. There the Court declared as the most fundamental of all rules relating to the continental shelf that

the rights of the coastal State in respect of the area of continental shelf that constitutes a natural prolongation of its land territory into and under the sea exist *ipso facto* and *ab initio*, by virtue of its sovereignty over the land, and as an extension of it in an exercise of sovereign rights for the purpose of exploring the seabed and exploiting its natural resources.³⁴

In short, the title of a coastal state over its continental shelf was based on the fact that the shelf constituted the natural prolongation of its land territory.

Natural prolongation in this physical sense was not only a basis of entitlement, but also a criterion for the delimitation of continental shelf boundaries. The Court noted that

whenever a given submarine area does not constitute a natural—or the most natural—extension of the land territory of a coastal State, even though that area may be closer to it than it is to the territory of any other State, it cannot be regarded as appertaining to that State;—or at least it cannot be so regarded in the face of a competing claim by a State of whose land territory the submarine area concerned is to be regarded as a natural extension, even if it is less close to it.³⁵

³² Tunisia/Libya, 1982 ICJ REP. at 105, para. 21 (Jiménez de Aréchaga, J., sep. op.). See also Jiménez de Aréchaga, *The Conception of Equity in Maritime Delimitation*, in 2 CODIFICATION ESSAYS, *supra* note 19, at 229. *Per contra* P. WEIL, *supra* note 8, at 203 *et passim*.

³³ This section of the article is based partly on the report *The Relationship between the Exclusive Economic Zone and the Continental Shelf*, prepared by this writer for the Committee on the Exclusive Economic Zone for the 62d Conference of the International Law Association in his capacity as rapporteur of the committee. INTERNATIONAL LAW ASSOCIATION, REPORT OF THE 62D CONFERENCE HELD AT SEOUL AUGUST 24TH TO AUGUST 30TH, 1986, at 328.

³⁴ 1969 ICJ REP. at 22, para. 19.

³⁵ *Id.* at 31, para. 43.

Natural prolongation was thus considered a prime element in the delimitation process, reducing the relevance of absolute proximity, and with it equidistance.

The International Court of Justice and arbitral tribunals in principle have endorsed the Court's conclusion in the 1969 Judgment that the continental shelf of any state must be the natural prolongation of its land territory and must not encroach upon what is the natural prolongation of the territory of another state.³⁶

Nevertheless, no decision in fact has held that any geological or geomorphological feature constituted such a marked discontinuity in the seabed and subsoil as to indicate the limit of two separate continental shelves or two separate natural prolongations. For example, the court of arbitration in the *Anglo-French* case noted that the

geological faults which constitute the Hurd Deep and the so-called Hurd Deep Fault Zone, even if they be considered as distinct features in the geomorphology of the shelf, are still discontinuities in the seabed and subsoil which do not disrupt the essential unity of the continental shelf either in the Channel or the Atlantic region.³⁷

In this regard the Chamber in the *Gulf of Maine* case observed that "[e]ven the most accentuated of these features, namely the Northeast Channel, does not have the characteristics of a real trough marking the dividing-line between two geomorphologically distinct units."³⁸

In practice, states have disregarded the significance of undersea geological or geomorphological features both as the basis of legal entitlement and as a criterion for maritime boundary delimitation. The court of arbitration acknowledged this fact in stating that "to attach critical significance to a physical feature like the Hurd Deep-Hurd Deep Fault Zone in delimiting the continental shelf boundary in the present case would run counter to the whole tendency of State practice on the continental shelf in recent years."³⁹

Maritime boundary delimitation agreements have also ignored such features and several such agreements in fact cover seabed areas containing troughs or trenches of considerable depths.⁴⁰ For instance, the agreement between France and Spain disregards the Cap Breton Trench. The agreement between Cuba and Haiti establishes an equidistance line without taking notice of the Cayman Trench (which is 2,900 meters deep, 1,700 kilometers in length and 100 kilometers wide). The India-Thailand delimitation takes no account of the Andaman Basin. The agreements between the Dominican Republic and Colombia and the Dominican Republic and Venezuela ignore the Aruba Gap (4,600 meters deep). The delimitation between the United

³⁶ See, e.g., *Anglo-French Award*, 18 ILM at 423, para. 79; *Tunisia/Libya*, 1982 ICJ REP. at 57, para. 66; *Gulf of Maine*, 1984 ICJ REP. at 275, para. 47; *Guinea/Guinea-Bissau Award*, 25 ILM at 300, para. 117.

³⁷ 18 ILM at 428, para. 107.

³⁸ 1984 ICJ REP. at 274, para. 46.

³⁹ 18 ILM at 428, para. 107.

⁴⁰ *Malta Counter-Memorial*, *supra* note 15, at 73, para. 146.

States and Venezuela does not give any weight to the Venezuela Basin.⁴¹ There is an exception, however—the Indonesian-Australian Agreement of 1972. In establishing the maritime boundary between the two states, this Agreement takes the Timor Trench into account, in particular, by regarding the trench as establishing the natural limit of the Australian shelf.⁴²

The Distance Criterion or Principle

The 1982 Convention on the Law of the Sea introduced the distance criterion or principle into the definition of the continental shelf in paragraph 1 of Article 76:

1. The continental shelf of a coastal State comprises the sea-bed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, *or to a distance of 200 nautical miles from the baselines* from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.⁴³

The Court accorded recognition to the distance criterion in the *Tunisia / Libya* case. It interpreted Article 76, paragraph 1 of the 1982 Convention as consisting of two parts, employing different criteria:

According to the first part of paragraph 1 the natural prolongation of the land territory is the main criterion. In the second part of the paragraph, the distance of 200 nautical miles is in certain circumstances the basis of the title The legal concept of the continental shelf as based on the "species of platform" has thus been modified by this criterion.⁴⁴

The Court, however, was of the opinion that it could not take this distance criterion into account since both parties had relied on the principle of natural prolongation and had not advanced any argument based on the "trend" towards the distance principle.⁴⁵

⁴¹ Reply submitted by the Republic of Malta (Libya/Malta), 1984 ICJ Pleadings (Continental Shelf) 39, para. 70 (July 12, 1984).

⁴² Although Australia and Indonesia concluded agreements in 1971 and 1972 delimiting the continental shelf between the maritime areas east and west of Timor, they were unable to find any solution to the delimitation of the continental shelf boundary between Timor and northern Australia. Australia based its claim on the natural prolongation principle—on geomorphology—whereas Indonesia's claim rested on the distance criterion. On December 11, 1989, the two countries signed the Treaty between Australia and the Republic of Indonesia on the Zone of Cooperation in an Area between the Indonesian Province of East Timor and Northern Australia, *reprinted in* 29 ILM 469 (1990).

⁴³ Convention on the Law of the Sea, *supra* note 9, Art. 76(1) (emphasis added). The breadth of the exclusive economic zone also depends on distance, since it "shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured." *Id.*, Art. 57.

⁴⁴ 1982 ICJ REP. at 48, para. 47.

⁴⁵ *Id.* at 49, para. 48. In his separate opinion, Judge *ad hoc* Jiménez de Aréchaga adopted a clearly more positive approach:

The *Libya/Malta* case marked the reception of the distance criterion or principle into international law. There the Court established the distance criterion as the sole basis of title to the seabed and subsoil within the 200-nautical-mile limit.⁴⁶

The Court acknowledged that there had been a fundamental change in the legal regime of the continental shelf. "It is true that in the past the Court has recognized the relevance of geophysical characteristics of the area of delimitation if they assist in identifying a line of separation between the continental shelves of the Parties. . . . However to rely on this jurisprudence," the Court declared,

would be to overlook the fact that where such jurisprudence appears to ascribe a role to geophysical or geological factors in delimitation, it finds warrant for doing so in a régime of the title itself which used to allot those factors a place which now belongs to the past, in so far as sea-bed areas less than 200 miles from the coast are concerned.⁴⁷

These developments, in the Court's view, led to the conclusion that "there is no reason to ascribe any role to geological or geophysical factors within that distance [i.e., within the 200-mile limit] either in verifying the legal title of the States concerned or in proceeding to a delimitation as between their claims."⁴⁸ On the basis of this reasoning, of course, the Court did not accept Libya's contention that the rift zone constituted a fundamental discontinuity establishing the northward reach of Libya's natural prolongation.⁴⁹

VII. SOME OBSERVATIONS

It was reasonable to expect that the introduction of the distance criterion would enhance the role of proximity in the delimitation of maritime bound-

This new method of defining the continental shelf by laying down an agreed distance from the baselines definitively severs any relationship it might have with geological or geomorphological facts. The continental shelf extends, regardless of the existence of troughs, depressions or other accidental features, and whatever its geological structure, to a distance of 200 miles from the baselines, unless the outer edge of the continental margin is to be found beyond that distance.

Id. at 114, para. 51. See also Dissenting Opinions of Judge Oda, 1982 ICJ REP. at 249, para. 146; and Judge *ad hoc* Evensen, 1982 ICJ REP. at 286, para. 9.

⁴⁶ It is important to note that the Court's Judgment was significantly influenced by the institution of the exclusive economic zone. The Court observed:

Since the rights enjoyed by a State over its continental shelf would also be possessed by it over the sea-bed and subsoil of any exclusive economic zone which it might proclaim, one of the relevant circumstances to be taken into account for the delimitation of the continental shelf of a State is the legally permissible extent of the exclusive economic zone appertaining to that same State.

1985 ICJ REP. at 33, para. 33.

⁴⁷ *Id.* at 35-36, para. 40. Evans has questioned this finding of the Court. See M. EVANS, RELEVANT CIRCUMSTANCES AND MARITIME DELIMITATION 52 (1989).

⁴⁸ 1985 ICJ REP. at 35, para. 39.

⁴⁹ *Id.*

aries within the 200-mile limit. Since title to seabed areas situated at a distance of under 200 miles from the coast now depended solely on distance from the coast, the criterion of distance would serve as the leading test in the establishment of title within areas of potentially overlapping claims. It would follow that the emergence of the distance principle as a primary basis of coastal state title should have lent more weight to equidistance as a method of delimitation.⁵⁰

As has already been stated,⁵¹ the Court was unable to accept Malta's argument that the reception of the distance criterion gave primacy to the method of equidistance, at any rate for delimitation between opposite coasts. The introduction of the distance criterion, in the opinion of the Court, did not have the effect of conferring any special status on the equidistance method of delimitation—either as a general rule or as a mandatory method of delimitation or a "priority method, to be tested in every case."⁵²

Nevertheless, there is a compelling logic in the proposition that since the distance criterion has replaced natural prolongation as a basis of entitlement in areas within the 200-mile limit, that criterion in and of itself must have an important role to play in defining an equitable delimitation—a development that as a consequence enhances the role of equidistance. Moreover, the Court itself in the *Libya/Malta* case in fact began the delimitation process by drawing a median line as a provisional step. In adopting this approach, the Court reaffirmed its own jurisprudence by asserting that "the equitable nature of the equidistance method is particularly pronounced in cases where delimitation has to be effected between States with opposite coasts."⁵³ The Court warned, however, that the fact that the drawing of a median line constituted an appropriate step in that delimitation should not be understood "as implying that an equidistance line will be an appropriate beginning in all cases, or even in all cases of delimitation between opposite States."⁵⁴

The argument has been put forward that, with the demise of the notion of natural prolongation and the emergence of the distance criterion,

proximity (which is but another way of saying distance) is nowadays a fundamental part of the concept of the continental shelf, as well as the territorial sea, the contiguous zone and the exclusive economic zone. Equidistance flows from the "natural law" of each of these jurisdictions. It is "logically necessary" and has a "character of so to speak juristic inevitability."⁵⁵

The recent jurisprudence of the Court with respect to equidistance is simply dismissed as a "hangover from the past, a survival of ideas no longer valid.

⁵⁰ See Counter-Memorial submitted by Canada (Can. v. U.S.), 1983 ICJ Pleadings (Gulf of Maine) 231, para. 558 (June 28, 1983).

⁵¹ See text at note 26 *supra*.

⁵² 1985 ICJ REP. at 56, para. 77.

⁵³ *Id.* at 47, para. 62; see also *North Sea*, 1969 ICJ REP. at 36, para. 57.

⁵⁴ 1985 ICJ REP. at 56, para. 77.

⁵⁵ P. WEIL, *supra* note 8, at 80–81 (quoting *North Sea*, 1969 ICJ REP. at 28, para. 37, and 32, para. 46).

Just as the light of a dead star still reaches us years later, out of date juridical ideas take time to die out."⁵⁶

To this writer, however, in the present state of international law equidistance remains subject to the fundamental norm that the delimitation of maritime boundaries must be determined according to equitable principles. The emergence of the distance criterion has not affected the law in that respect. "Thus, under existing law, it must be demonstrated that the equidistance method leads to an equitable result in the case in question."⁵⁷

Moreover, it is not at all certain that natural prolongation in the physical sense has no role whatever to play in delimiting the continental shelf within the 200-mile limit.⁵⁸ The Court itself stated that natural prolongation "is in part defined by distance from the shore, irrespective of the physical nature of the intervening sea-bed and subsoil. The concepts of natural prolongation and distance are therefore not opposed but complementary; and both remain essential elements in the juridical concept of the continental shelf."⁵⁹ It is noteworthy that Judge Oda has interpreted this somewhat puzzling passage as a method of keeping natural prolongation artificially alive.⁶⁰

VIII. THE NOTION OF A PROPERLY STRUCTURED SYSTEM OF EQUITY

The Chamber in the *Gulf of Maine* case noted the absence of any "systematic definition of the equitable criteria that may be taken into consideration for an international maritime delimitation." The Court observed that defining such criteria "would in any event be difficult *a priori*, because of their highly variable adaptability to different concrete situations."⁶¹ In other words, the uniqueness of each concrete situation—the *unicum*—made the task of formulating a system of equity for maritime delimitation almost impossible.

The Court seemed to have changed its tack in the *Libya/Malta* case. It contended that "[w]hile every case of maritime delimitation is different in its circumstances from the next, only a clear body of equitable principles can permit such circumstances to be properly weighed, and the objective of an equitable result, as required by general international law, to be attained."⁶² And it cited several equitable principles:

⁵⁶ *Id.* at 81.

⁵⁷ *Libya/Malta*, 1985 ICJ REP. at 47, para. 63.

⁵⁸ Judge Bedjaoui noted that "au stade actuel d'évolution du droit de la mer et de la jurisprudence internationale correspondante, il serait sans doute hasardeux d'affirmer que les facteurs géologiques et géomorphologiques ont complètement perdu toute pertinence." *Guinea-Bissau/Senegal Award*, *supra* note 1, Dissenting Opinion at 175, para. 116.

⁵⁹ *Libya/Malta*, 1985 ICJ REP. at 33; para. 34.

⁶⁰ *Id.* at 128–29, para. 6 (Oda, J., dissenting). It may also be useful to bear in mind the following observations of the Court in the *Tunisia/Libya* case: "the physical factor constituting the natural prolongation is not taken as a legal title, but as one of several circumstances considered to be the elements of an equitable solution." 1982 ICJ REP. at 58, para. 68.

⁶¹ 1984 ICJ REP. at 312, para. 157.

⁶² 1985 ICJ REP. at 55, para. 76.

the principle that there is to be no question of refashioning geography, or compensating for the inequalities of nature; the related principle of non-encroachment by one party on the natural prolongation of the other, which is no more than the negative expression of the positive rule that the coastal State enjoys sovereign rights over the continental shelf off its coasts to the full extent authorized by international law in the relevant circumstances; the principle of respect due to all such relevant circumstances; the principle that although all States are equal before the law and are entitled to equal treatment, "equity does not necessarily imply equality" . . . , nor does it seek to make equal what nature has made unequal; and the principle that there can be no question of distributive justice.⁶³

Judge Jennings has noted that a "structured and predictable system of equitable procedures is an essential framework for the only kind of equity that a court of law that has not been given competence to decide *ex aequo et bono*, may properly contemplate."⁶⁴ The suggestion is that a properly structured system of equity would put a brake on the discretionary power of the judge and thus appreciably diminish the scope for arbitrariness and *ex aequo et bono*.

This writer does not support the view that it is possible to produce "a clear body of equitable principles" or "a structured system of equity" for maritime delimitation.⁶⁵ The choice of, and weight to be attributed to, any equitable principle are too dependent upon the vagaries of geography to allow any systematic body of such principles to develop. As the Chamber observed—correctly, in this writer's opinion—with respect to the role of equitable criteria:⁶⁶ "their equitableness or otherwise can only be assessed in relation to the circumstances of each case, and for one and the same criterion it is quite possible to arrive at different, or even opposite, conclusions in different cases."⁶⁷

Here again, it could be argued that a system of equity might have developed much more easily were the principle of equidistance to be viewed as the general rule of maritime delimitation, subject to modifications where the

⁶³ *Id.* at 39–40, para. 46 (quoting *North Sea*, 1969 ICJ REP. at 49, para. 91) (citation omitted).

⁶⁴ Jennings, *Equity and Equitable Principles*, 42 ANNUAIRE SUISSE DE DROIT INTERNATIONAL 27, 38 (1986).

⁶⁵ See Kwiatkowska, *The ICJ Doctrine of Equitable Principles Applicable to Maritime Boundary Delimitation and Its Impact on the International Law of the Sea*, in FORTY YEARS INTERNATIONAL COURT OF JUSTICE: JURISDICTION, EQUITY AND EQUALITY 119 (A. Bloed & P. van Dijk eds. 1988) [hereinafter FORTY YEARS ICJ].

⁶⁶ Referred to as equitable principles by the Court in the *Libya / Malta* case. See 1985 ICJ REP. at 39, para. 46. In Degan's opinion, the Chamber of the Court in the *Gulf of Maine* case was correct in qualifying some of these equitable principles as equitable criteria: "Almost none of them has the specific content of a source of legal rights and duties for States, nor can they be as such mandatory for a judicial organ." Degan, *supra* note 19, at 134.

⁶⁷ *Gulf of Maine*, 1984 ICJ REP. at 313, para. 158. To the same effect, the U.S. Counter-Memorial in the *Gulf of Maine* case stated that "[i]nasmuch as the circumstances of each boundary situation are unique, a method of delimitation that is equitable in one case may not produce an equitable solution in another case." Counter-Memorial submitted by the United States of America (Can. v. U.S.), 1983 ICJ Pleadings (*Gulf of Maine*) 146, para. 219 (June 28, 1983).

situation required—equity in its corrective role. But as has already been pointed out,⁶⁸ this role for the equidistance principle has been accepted neither by the International Court of Justice and arbitral tribunals dealing with the delimitation of maritime boundaries as demonstrated by their jurisprudence, nor—perhaps more importantly—by the international community as represented in the Third United Nations Conference on the Law of the Sea.

IX. THE FUNCTION OF THE COURT OR OTHER INTERNATIONAL TRIBUNAL

The Court in the *Tunisia/Libya* case viewed itself as “bound to apply equitable principles as part of international law, and to balance up the various considerations which it regards as relevant in order to produce an equitable result.”⁶⁹ In the opinion of the Court, the equitable result is the “primordial requirement” and the equitableness of a principle must be assessed in the light of its usefulness for the purpose of arriving at an “equitable result.”⁷⁰ This use of “autonomous equity” to achieve an equitable result has been roundly criticized. “The doctrine of the ‘equitable result,’” it has been said, “leads straight into pure judicial discretion and a decision based upon nothing more than the court’s subjective appreciation of what appears to be a ‘fair’ compromise of the claims of either side.”⁷¹ It has also been argued that this type of approach represents a “solution not through equity, but through a compromise sought at one and the same time between the claims of the Parties and the opinions held within the Court.”⁷² Such criticisms evidently raise basic questions about the proper function of courts and tribunals dealing with the delimitation of maritime boundaries, such as the limits of judicial discretion and the power of the Court to compose “conflicting interests.”⁷³

It was the Third United Nations Conference on the Law of the Sea that was largely responsible for emptying the law of maritime delimitation, as embodied in Article 6 of the Geneva Convention on the Continental Shelf,

⁶⁸ See section V *supra*.

⁶⁹ 1982 ICJ REP. at 60, para. 71. To the same effect, see *North Sea*, 1969 ICJ REP. at 49, para. 90.

⁷⁰ 1982 ICJ REP. at 82, para. 114, and 59, para. 70.

⁷¹ Jennings, *supra* note 64, at 30.

⁷² *Tunisia/Libya*, 1982 ICJ REP. at 153, para. 18 (Gros, J., dissenting). For further criticisms of the approach, see, e.g., Charney, *supra* note 15, at 594; Herman, *The Court Giveth and the Court Taketh Away: An Analysis of the Tunisia-Libya Continental Shelf Case*, 33 INT’L & COMP. L.Q. 825, 853 (1984); Decaux, *L’Arrêt de la Cour internationale de justice dans l’affaire du plateau continental (Tunisie / Libye)*, 28 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 357, 372 (1982); and P. WEIL, *supra* note 8, at 161.

⁷³ This type of criticism already surfaced in Judge Koretsky’s dissenting opinion in the *North Sea Cases* where he issued his celebrated warning that to introduce “so vague a notion [i.e., equity] into the jurisprudence of the International Court may open the door to making subjective and therefore at times arbitrary evaluations.” 1969 ICJ REP. at 166. See also Marek, *Le Problème des sources du droit international dans l’arrêt sur le plateau continental de la mer du Nord*, 6 REVUE BELGE DE DROIT INTERNATIONAL 44, 78 (1970–71).

of much of its juridical content.⁷⁴ "The legislator," so to speak, gave the judge only "a few general indications."⁷⁵ The goal of delimitation according to Articles 74, paragraph 1, and 83, paragraph 1 of the 1982 Convention on the Law of the Sea is simply "to achieve an equitable solution."⁷⁶ The generality of this goal, it may be contended, resulted from the difficulty of positing fixed rules for the variety of maritime situations that has increased so signifi-

⁷⁴ The Truman Proclamation on the natural resources of the subsoil and seabed of the continental shelf, issued by the United States on September 28, 1945, had declared in part that "[i]n cases where the continental shelf extends to the shores of another State, or is shared with an adjacent State, the boundary shall be determined by the United States and the State concerned in accordance with equitable principles." 3 C.F.R. 67 (1943-48). This was followed by similar action on the part of several states. See Memorial of the Federal Republic of Germany (FRG/Den.), 1968 ICJ Pleadings (1 North Sea) 31 (filed by Aug. 21, 1967). The Court in the *North Sea Cases* accorded the Truman Proclamation a "special status" not only with regard to the nature and extent of the right exercisable over the continental shelf, but also with regard to the delimitation of maritime boundaries. As to the latter, the Court held that the two concepts contained in the Truman Proclamation—delimitation by mutual agreement and delimitation in accordance with equitable principles—"have underlain all the subsequent history of the subject." 1969 ICJ REP. at 33, para. 47. Thus, the Court in the *North Sea Cases* ensured that the customary law initiated by the Truman Proclamation with respect to the role of equitable principles in the delimitation of maritime boundaries remained unaffected by the conventional norm embodied in Article 6 of the Geneva Convention on the Continental Shelf, *supra* note 29.

The *Anglo-French* court of arbitration, for its part, blurred the distinction between the rules contained in Article 6 of the Geneva Convention and the rules of customary international law, since in its opinion the object of both was the same—the delimitation of the boundary in accordance with equity—and it thus took "the heart out of the treaty regime." P. WEIL, *supra* note 8, at 147. See also McCrae, *Delimitation of the Continental Shelf between the United Kingdom and France: The Channel Arbitration*, 15 CAN. Y.B. INT'L L. 173, 195 (1977); Bowett, *supra* note 15, at 13.

⁷⁵ The fact that it was the international community that, as it were, opted to accord the judge this wide power and not the judge who usurped it is of some significance. David, *supra* note 15, at 365; Bedjaoui, *supra* note 58, at 157.

⁷⁶ See note 31 *supra*. The Court itself made the following observations on Article 83, paragraph 1 of the official Draft Convention, UN Doc. A/CONF.62/L.78 (1982):

In the new text, any indication of a specific criterion which could give guidance to the interested States in their effort to achieve an equitable solution has been excluded. Emphasis is placed on the equitable solution which has to be achieved. The principles and rules applicable to the delimitation of continental shelf areas are those which are appropriate to bring about an equitable result

1982 ICJ REP. at 49, para. 50. The provision, it has been said, is "limited to expressing the need for settlement of the problem by agreement and recalling the obligation to achieve an equitable solution." Gulf of Maine, 1984 ICJ REP. at 294, para. 95. However, it may be viewed as underpinning the fundamental norm of customary law governing maritime delimitation: "that delimitation, whether effected by direct agreement or by the decision of a third party, must be based on the application of equitable criteria and the use of practical methods capable of ensuring an equitable result." *Id.* at 300, para. 113. It may be noted that Judge Oda did not believe that the reference to "the basis of international law as referred to in Article 38 of the Statute of the International Court of Justice" furnished any practical assistance toward a solution, in the absence of any more specific designation of which principles and rules from the entire panoply of customary, general and conventional law were of particular significance. Tunisia/Libya, 1982 ICJ REP. at 246, para. 144 (Oda, J., dissenting).

cantly with the emergence of many new states within the international community.⁷⁷

As has justly been observed:

When the legislator himself realizes that the situations that he wants to set in order are so varied and so mobile that he cannot make exact rules about them, he will sometimes be content with a few general indications, *leaving to the equity of the judge their application in each particular case*⁷⁸

The generality of the norm that the Convention on the Law of the Sea prescribes for maritime delimitation undoubtedly leaves much room for judicial discretion⁷⁹ and perhaps even for a certain "praetorian subjec-

⁷⁷ See Nelson, *supra* note 12, at 208.

⁷⁸ C. PERELMAN, *JUSTICE, LAW AND ARGUMENT: ESSAYS ON MORAL AND LEGAL REASONING* 89 (1980) (emphasis added).

⁷⁹ In a sense the discretionary power of the judge is in inverse proportion to the generality of the norm. *Id.* at 40; see also Reuter, *Quelques Réflexions sur l'équité en droit international*, 15 *REVUE BELGE DE DROIT INTERNATIONAL* 165, 166 (1980-81); Degan, *supra* note 19, at 126; and Rosenne, *The Position of the International Court of Justice on the Foundations of the Principle of Equity in International Law*, in *FORTY YEARS ICJ, supra* note 65, at 85, 92. Interestingly, with respect to the relevance of economic considerations in maritime boundary delimitation, the Court has in effect circumscribed its discretionary power. In the seminal case on the matter, it stated that there was "no legal limit to the considerations which States may take account of for the purpose of making sure that they apply equitable procedures." *North Sea*, 1969 ICJ REP. at 50, para. 93; see also *Libya/Malta*, 1985 ICJ REP. at 40, para. 48. This line of thinking quite naturally led to the conclusion that economic considerations can constitute relevant factors in the delimitation process. Munkman, *Adjudication and Adjustment—International Judicial Decision and the Settlement of Territorial and Boundary Disputes*, 46 *BRIT. Y.B. INT'L L.* 1, 89 (1972-73). However, the Court in the *Tunisia/Libya* case did not accept the relevance of economic considerations for the delimitation of the continental shelf. "They are virtually extraneous factors," the Court held, "since they are variables which unpredictable national fortune or calamity . . . might at any time cause to tilt the scale one way or the other. A country might be poor today and become rich tomorrow as a result of an event such as the discovery of a valuable economic resource." 1982 ICJ REP. at 77, para. 107. The Court reaffirmed its position on this matter in the *Libya/Malta* case:

The Court does not however consider that a delimitation should be influenced by the relative economic position of the two States in question, in such a way that the area of continental shelf regarded as appertaining to the less rich of the two States would be somewhat increased in order to compensate for its inferiority in economic resources. Such considerations are totally unrelated to the underlying intention of the applicable rules of international law. It is clear that neither the rules determining the validity of legal entitlement to the continental shelf, nor those concerning delimitation between neighbouring countries, leave room for any considerations of economic development of the States in question.

1985 ICJ REP. at 41, para. 50. Judge Oda noted that "[t]his is a matter of future policy of world social justice which does not fall within the purview of a judiciary which has to employ solely the principles and rules of international law unless requested to decide a case *ex aequo et bono*." *Id.* at 159, para. 66 (Oda, J., dissenting). The Court's approach in a sense throws into relief the dominant role that geographical circumstances play in the delimitation of maritime boundaries. Bowett notes that the "unvoiced reason" behind the Court's reluctance to enter into economic factors is that "Courts are not concerned with 'distributive' justice or the task of establishing a regime of equitable allocation of resources; for that is a legislative rather than a judicial task."

tivism,"⁸⁰ but to that extent it increases the *responsibility*⁸¹ of tribunals dealing with disputes concerning the delimitation of maritime boundaries.

The question may legitimately be asked whether in its quest for an equitable solution for such disputes, the Court ought to take account of "the principle of minimization of the potential for international disputes,"⁸² that is, whether the solution arrived at will settle the dispute rather than engender further disputes. A judge of the International Court of Justice has observed that "[s]olutions likely to be considered by one of the parties as *inequitable* would be difficult to enforce, they would in time be evaded and *would breed new disputes*."⁸³

It may be useful to recall a much-cited dictum of the Court in the *North Sea Continental Shelf Cases*: "it is a truism to say that the determination must be equitable; rather is the problem above all one of defining the means whereby the delimitation can be carried out in such a way as to be *recognized* as equitable."⁸⁴ That the delimitation should be recognized as equitable can be interpreted to mean, without any difficulty, that the line of delimitation not only must constitute an equitable result in the view of the Court, but also must appear equitable in the eyes of the litigants. It is in this sense that it has been said that "the call for equity, viewed as the creation of an optimal state of relative mutual satisfaction between the parties, enters into the matter of continental shelf delimitation."⁸⁵

This writer believes that the interests of the parties, viewed from a dispute-reducing perspective, should be an element in the balancing-up of the

He argues, however, for a much less restrictive view of the judicial function in this matter. Moreover, "the economic interests of States lie at the very heart of the Convention. . . . There is therefore a reasonable, legal basis for the proposition that delimitation . . . ought not to be conceived as an abstract exercise based on coastal geography, and divorced from considerations of the economic interests of the States concerned." To be sure, Bowett continues, "one might even say that delimitation should not be divorced from the interests of the world community in promoting the economic well-being of States which have so far been economically under-developed or disadvantaged in terms of their access to resources." Bowett, *The Economic Factor in Maritime Delimitation Cases*, in 2 CODIFICATION ESSAYS, *supra* note 19, at 45, 61-62.

⁸⁰ See Joint Separate Opinion of Judges Ruda, Bedjaoui and Jiménez de Aréchaga, *Libya/Malta*, 1985 ICJ REP. at 90, para. 37.

⁸¹ *Id.*; see also Reuter, *supra* note 79, at 186; Degan, *supra* note 19, at 126; and M. KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 479, 496 (1989). Cf. H. LAUTERPACHT, THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY 319 (1933).

⁸² In the *Gulf of Maine* case, the United States put forward this principle as one of the equitable principles to be applied to produce an equitable solution. U.S. Memorial (Can. v. U.S.), 1982 ICJ Pleadings (Gulf of Maine) 139, para. 238 (Sept. 27, 1982). The Chamber agreed that these "'principles' . . . may in given circumstances constitute equitable criteria, provided, however, that no attempt is made to raise them to the status of established rules endorsed by customary international law." 1984 ICJ REP. at 298-99, para. 110.

⁸³ *North Sea*, 1969 ICJ REP. at 92 (Padilla Nervo, J., sep. op.).

⁸⁴ 1969 ICJ REP. at 50, para. 92 (emphasis added).

⁸⁵ Rothpfeffer, *Equity in the North Sea Continental Shelf Cases*, 42 NORDISK TIDSSKRIFT FOR INTERNATIONAL RET 81, 120 (1972).

various factors so as to achieve a just and equitable solution—that is not to say, by any means, that it should be an exclusive element.⁸⁶

X. SOME CONCLUDING OBSERVATIONS

The idea that each maritime boundary dispute is unique or monotypic has fundamental importance in any consideration of the law of maritime boundary delimitation. The emergence of numerous new states, with the consequent increase in maritime boundaries, has served to highlight the significance of this idea.

The uniqueness of each maritime boundary has rendered inadequate the application of a global or general rule such as is embodied in the principle of equidistance. This fact, in this writer's opinion, more than anything else, has militated against the reception of the principle of equidistance in both the conventional and the customary law of maritime boundary delimitation. A corrective role for equity is thus effectively ruled out. Equity cannot be viewed as correcting the application of a rule of law—equidistance—where that rule would lead to "manifest hardship."⁸⁷ On the other hand, equity

⁸⁶ It is of some significance that Judge Lachs, the President of the arbitral tribunal in the Guinea/Guinea-Bissau arbitration, had this to say before the handing down of the award: "Notre effort ne saurait avoir de meilleur résultat que de vous voir satisfaits." Discours du Juge Manfred Lachs, Président du Tribunal Arbitral pour la Délimitation de la Frontière Maritime Guinée/Guinée-Bissau, prononcé avant la lecture de la sentence le 14 février 1985. However, Judge *ad hoc* Sørensen wrote that if maritime boundary delimitation is to be governed by a principle of equity, only considerable legal uncertainty will ensue—giving rise to international disputes—while the function of law is to reduce the causes of disagreement and disputes to a minimum. North Sea, 1969 ICJ REP. at 256–57 (Sørensen, J., dissenting). Commenting on this view, Monconduit stated quite rightly, in this author's opinion, that "la réalisation de l'équité, permettant de satisfaire, autant qu'il est possible, les intérêts contradictoires de plusieurs Etats, est la meilleure garantie contre l'apparition de différends." Monconduit, *L'Affaire du plateau continental de la Mer du Nord*, 15 ANNUAIRE FRANÇAIS DU DROIT INTERNATIONAL 213, 244 (1969). Sir Hersch Lauterpacht's observations may also be borne in mind:

The settling of interests is normally within the province of the legislature, but that does not mean that courts have nothing to do with composing conflicting interests. As the judicial activity is nothing else than legislation *in concreto* it is possible to assert dogmatically that the settling of conflicts of interests is outside the province of judicial tribunals?

H. LAUTERPACHT, *supra* note 81, at 320. In her analysis of some important land boundary awards, Munkman, *supra* note 79, at 27, observed:

[A]ll the boundary awards afford a compromise between the claims of the parties. This may be regarded as evidencing a diplomatic desire to give some satisfaction, and to ensure that the award is acceptable to both parties; or it may be the result of taking into consideration all the interests argued by the parties—clearly these will rarely weigh in favour of one party alone.

Bardonnet also saw equity as providing "la nécessaire et impartiale balance des intérêts." Bardonnet, *Equité et frontières terrestres*, in MÉLANGES OFFERTS À PAUL REUTER, LE DROIT INTERNATIONAL: UNITÉ ET DIVERSITÉ 35, 74 (1981). Johnston views the adjudication of maritime boundary disputes as serving primarily a facilitative function. D. JOHNSTON, THE THEORY AND HISTORY OF OCEAN BOUNDARY-MAKING 123–222 (1988).

⁸⁷ Sandström, Remarks, in [1953] 1 Y.B. INT'L L. COMM'N 126, para. 14, UN Doc. A/CN.4/SER.A/1953.

assumes a lead role—an autonomous role—in the search for principles, or rather criteria, “in order to achieve an equitable solution” in the particular situation.⁸⁸

The “infinite variety” of maritime situations also prevented the Third United Nations Conference on the Law of the Sea from producing any definitive rules on maritime boundary delimitation, investing tribunals dealing with such disputes with wide powers of discretion—in fact, creating a situation that is closely akin to a grant of *ex aequo et bono* jurisdiction.

The task of the judge is to produce an equitable and just result in the particular case. To reach such a result, the judge has to take into account the relevant circumstances of each case not only by balancing the various circumstances, but also, in the view of this author, by balancing or composing the interests of the parties.

⁸⁸ See note 31 *supra*.

EDITORIAL COMMENTS

INTERNATIONAL LAW AFTER THE COLD WAR

The Cold War was one of the major events of modern time. It did not, happily, reenact the mass slaughter of the other conflicts of this century, but in terms of lives affected, wealth consumed, geographical reach and long-term environmental consequences, it is certainly one of the great conflicts of human history. It was marked by continuing high expectations of violence and the ongoing mobilization and detailed planning for war by two military antagonists, whose alliances and hegemonic relations incorporated a large part of the globe, each part of which was deemed to have some strategic value. The Cold War surely involved more human beings than any other conflict.

The geo-strategic confrontation of the Cold War was sustained by two mutually incompatible ideologies, or "contending systems of world public order," deriving, curiously, from the same cultural and historical sources. Each viewed the other in Manichaeian terms and disseminated or inculcated its message intensively in its own sphere. One was intent on "containing," if not "rolling back," its adversary; the other, bent on "burying" its adversary. At the height of the Cold War, there were two worlds on the planet, between which trade and other human contact were drastically reduced. In many ways, there were two systems of international law and two systems of world public order. The Cold War had virtually become part of the natural environment. Few thought it would ever end.

Within each of the adversaries, the anxiety generated by the anticipated conflict reached into and influenced many sectors of life. Both superpowers took on, in varying degree, garrison-state features. In the West, the effects were felt in ordinary democratic processes, in civil and human rights, in school curriculums, in literature and art, in environmental protection, in individual health, in the skewing of economies for defense, in the allocation of public funds for weapons development and the maintenance of a large standing military—indeed, in every sector of life. In the East, the ideology was totalitarian; millions of people were subjected to high degrees of control and deprived of accurate information about what was occurring elsewhere. A larger and larger proportion of the national wealth was diverted to military and security matters. Though the elites of neither superpower could have taken any pleasure in developments that would poison the environment for generations and increase the incidence of certain diseases among their own children, the threshold of "acceptable costs" for the maintenance of security through weapons development and testing and of the consequential environmental degradation was pushed higher and higher.

The Cold War was not a hot war because the introduction and constant symmetrical refinement of nuclear weapons established a "balance of terror." While that balance prevented hot war between the superpowers, it

aggravated the general sense of anxiety. The few incidents in which the protagonists faced one another "eyeball to eyeball" were traumatic experiences for practically everyone on the planet. The balance of terror, however, did not deter proxy wars and what came to be known as "low-intensity, protracted conflict." If the big war never eventuated, violence, in one form or another, never abated.

I.

The Cold War deformed the traditional international law that had developed over centuries to facilitate and regulate political, economic and other human relationships across national boundaries. It could hardly have been otherwise. For almost half a century, the world lived in a state of neither war nor peace. The independence and rights of choice of smaller states were restricted by larger neighbors in their own interest and, it was often avowed, in the interest of systemic security. The slow effort to centralize authoritative coercive force and to restrict the freedom of unilateral action, the hallmark of civilized political arrangements and the major acknowledged defect of international law, was impeded by an international security system that accorded a veto power to each of the major protagonists. That ensured its ineffectiveness. Even the freedom of the oceans, one of the most venerable struts of the international system, which had reserved five-sevenths of the planet as a public highway for exchange, was attenuated to facilitate weapons development. As soon as outer space became accessible, it, too, became part of the military arena.

Formal prohibitions on unilateral uses of force were skirted by exceptions like "wars of national liberation," which, in turn, generated and sustained counterexceptions such as "freedom fighters." Symmetrical doctrines of selective intervention—Brezhnev or Reagan—were developed and vigorously applied by each of the protagonists. The *jus in bellum*, which, historically, had sought to reduce the savagery of war and to maintain a distinction between combatants and noncombatants, suffered serious injuries from the application of modern industry to warfare in the two world wars. It was dealt an additional blow by the nuclear weapons of the Cold War. By their nature, these weapons cannot be made to discriminate between targets and noncombatants or meet any test of proportionality. The notion of necessity as one of the traditional cumulative criteria of lawfulness was also rendered meaningless by elective strategic doctrines, such as "Mutual Assured Destruction." The doctrine worked, in the sense that it deterred nuclear conflict, but the moral implications of such a "defensive" strategy could not but have corrosive effects on other aspects of domestic public order.

Espionage and covert actions were conducted almost with impunity. A new quasi-legal category of "rules of the game" developed, but the word "rules" was an oxymoron, for they were, in fact, euphemisms for reciprocally tolerated violations of verbally accepted international law. The level of international treaty morality sank to an all-time low in arms control agreements; terms such as "national means of verification" were an explicit ac-

knowledge and acceptance, as part of the treaty regime, of the parties' reciprocal belief in the misrepresentation and perfidy of their treaty partners.

II.

Historians will quibble about the exact moment of its demise, no less than about the exact date of the start of the Cold War. Much depends on whether one views the war as a continuing effort by the Western capitalist world to contain and blunt the revolutionary force of socialism or as a struggle between a Western world that had already coopted and incorporated key planks of the socialist program and Stalin and his successors, who, capitalizing on Soviet gains in the Second World War, had mobilized the symbols of socialism in the service of an imperial totalitarianism.

Quibbles aside, it is beyond doubt that the Cold War has ended. The expectation of violence between the two major strategic powers has been drastically reduced. At the ideological level, one of the contending systems of world order has been discredited and lost its legitimacy in the countries over which it held sway and one of the military blocs has all but disintegrated. Overall, the military character of the international arena, at the strategic level, has been perceptibly reduced.

III.

Some of the traditional norms and practices of international law that were suppressed during the Cold War can now be revived. As between the two blocs, the distinction between war and peace, each with its own legal regime, will be reinstated. As a consequence, there should be reduced tolerance for, hence conduct of, covert activities. There should be less international tolerance, but not necessarily less national public support, for interventions in so-called critical defense zones under rubrics such as the Brezhnev and Reagan Doctrines. The American military action in Panama was widely supported in the United States, though the reasons for the swelling of support are not clear. Both France and the United States indicated that neither would oppose a Soviet intervention in Romania at the time of the overthrow of the Ceausescus. Nevertheless, in terms of a pre-Cold War baseline, one should expect some revival of the norm of national political autonomy.

But national political autonomy will not mean a revival of the older notion of sovereignty in its entirety. Radical changes in conceptions of the legitimacy of national authority, deriving from the international human rights program, have supplanted the older absolute notions. There is much more room for the operation of human rights norms, for the global communications system means that all of the inhabitants of the globe live in a state of electronic simultaneity, if not physical proximity. Instantaneous communication has extended the basis for symbolic, and perhaps physical, interventions into domestic processes in which gross violations of international norms are occurring. But because such humanitarian interventions, as exercises of power, are perforce reflections of the world power process, the arena of

their operation will continue to be the internal affairs of smaller and weaker states.

Not all the dead shall be raised. Many institutions of international law that had been in a state of suspended animation may now prove beyond rehabilitation. Some are victims of the Cold War. Others are rendered obsolete by its conclusion. Still others, by radical changes in circumstances.

Consider the Charter conception of the security role of the United Nations. While many now look toward the United Nations with the hope that it will play a major role in the maintenance of world order, the changes that have taken place make key parts of the UN system caducous. One should recall that the term "United Nations" was the collective name for the Allies in World War II. The permanent members of the Security Council were the victors in that conflict and the Charter itself provided for the resumption of joint action should any of the Axis powers revive.

But the *rapport de force* of 1945 has changed dramatically. The end of the Cold War is also the end of the Second World War. As such, it is marked by the reascendancy of a now effectively united Germany and a vigorous Japan, each of which is stronger than at least three of the Security Council's permanent members. At the same time, a number of new states may claim a power base sufficient to warrant the special prerogatives that the Charter assigned to the most powerful nations of the world. With the possible reduction of the military value of nuclear weapons, whose possession heretofore was almost a membership card in the global elite club, even that group of aspirants may swell in number. For the short term, at least, the Security Council may simply not be strong enough to perform the role assigned to it. In the meanwhile, the question will be whether the United States, the erstwhile bulwark of international security, will lose its vision, its sense of mission and its credibility. Should that happen, there may be *no* international security system.

Adaptation of the security structure of the United Nations to contemporary realities is a necessity. To be credible, a security system must be effective. Hence, it must reflect the actual distribution of power. Until the United Nations adapts itself to the new realities, one may expect to see a shift of decision making out of the UN system and a concentration, rather than a sharing, of decision competence. A large proportion of international decisions may be made by an economic oligarchy of states, the G-7. Japan, a leading member of this club, has already indicated that it would like it to play a more overt political role and the Soviet Union has indicated that it would like a seat at the table. The G-7 may emerge as an increasingly autonomous and dominant decision process, in many cases the real Security Council but without the Charter and answerable to none other than its own members. Dynamics within the G-7 may create an "inner group" of effective power composed of no more than three states.

Within the United Nations, the regional system and the gentlemen's agreements make less and less sense, though they appear to have continued to operate through 1990. The hidden agreements on the assignment of key Secretariat posts to national officials who have been seconded by their governments, who often continue to receive supplementary salaries from them,

and who can be considered "international civil servants" only in a very limited sense (as widely practiced by some Western European as by the former socialist states) should no longer be tolerated. One hopes that this practice will be succeeded by the institution of a genuine international civil service, which the Charter called for and the world urgently needs. But this change will require fundamental rethinking of attitudes at high levels of the Secretariat. It is sad to note that in the recent Chinese cases before the UN Administrative Tribunal, the Secretariat supported what was in effect a permanent member's claim to purge the Secretariat of nationals that it no longer wanted there. It was the Tribunal that supported the concept of an independent international civil service, thereby rebuking a permanent member and the Secretariat!

Developments set into operation by the end of the Cold War may accelerate the decline of the international refugee system. It was largely a product of the war in Europe and may have since been stretched beyond its tensility. Clearly, many states are less willing to accept refugees, a development that is especially alarming as it coincides with instability in Eastern and Central Europe and North Africa, the likely outflow from those regions of large numbers of people seeking refuge, and the recrudescence of parochialism and, in particular, racism in Western Europe.

With the ending of the Cold War, the strategic value of many parts of the Third World will diminish, if not evaporate. International development aid, which was directed, in limited amounts and often for strategic reasons, to the Third World and which was an important part of its development program, could be drastically reduced as the finite amount of such aid is redirected to Eastern and Central Europe. Then the frequently mentioned "North-South" division will come into much sharper focus. In terms of human rights, some countries may benefit, as dictators, dependent on outside forces, fall and are replaced by popular governments. But the reduction of funds to key, but thoroughly dependent, countries such as Egypt and Israel could generate internal instability with uncertain consequences for the region.

IV.

The end of the Cold War means the reduction of one particular pattern of violence; but it does not mean the beginning of peace, nor does it signal a new international stability. Far from it. Both physically and politically, the world is in a more parlous situation than it was in past decades. The physical environment is undergoing change and possible deterioration, with some predictable changes in epidemiology and in climate. Emergent climatic changes will benefit some states and regions, but will prove calamitous for others, from which instability may be expected promptly to be exported. Plagues such as AIDS that have proven resistant to cure move about the planet with ease, for in an economically interactive and interdependent system, possibilities of quarantine are limited. Mutations in the virus could make it even more dangerous.

The relatively stable political environment that has prevailed for half of a century is also breaking up. Since 1945, the international system has resisted the fragmentation of its component parts. In Africa, postcolonial governments committed themselves to maintaining the borders inherited at the time of national independence. But now the Soviet Union, heir to the empire of the tsars, is belatedly undergoing decolonization. Many of its component republics will probably sever connections or radically change the nature of their relationship with Moscow. The result is likely to be greater instability in those zones as the external force that contained indigenous political activities is withdrawn. Political vacuums are likely to suck in outside political forces, which will reignite the controversy about lawful support for insurgencies.

The USSR may be the last of the great European empires, but it is not the last of empires. India, Pakistan, China, Iran, Nigeria, Ethiopia—indeed, as recent events in Canada forcefully demonstrate, any system incorporating groups of distinct identity who do not believe that there are real advantages to remaining within the collective entity—will be subjected to increased pressure for secession or reorganization. With each additional breakup, the international resistance to fragmentation will weaken further and other subgroups will find it easier to withdraw. In Western Europe, the political significance of such reorganizations will be smaller, thanks to the existence of an overarching community structure. In Africa, the development could signal major disruptive changes.

In the new context, the travail and duration of “secession” may prove to be quite different from in the past. In the old world, secession could be taken quite literally to mean as complete a severance as the parties wished. In an interdependent world, there can, in fact, be no such thing as total secession and independence—only reorganization and rearrangement. This will mean that withdrawals will become more protracted and, though there may be violent phases, ultimately each rearrangement will require overlapping bilateral and plurilateral negotiations.

The breaking of traditional links and the forging of new arrangements will have quite varied effects. Some states, such as Russia, with ample population, rich natural resources and a warming Siberia, freed of the burdens of colonialism and a crippling economic doctrine, could be major winners. Others will suffer, not simply economically but because they may discover that, alone, they are not defensible. Hence, there could be a scramble for new alliances and a gradual expansion of the arena of potential conflict.

V.

The bankruptcy of communism has led to smugness, even hubris, among some members of the Western or free market world. But the West is hardly impervious to stress and can only, at its peril, ignore processes and changes that could disrupt it. The national debt of the United States, aggravated by the additional charge of more than \$500 billion arising from the savings and loan debacle, continues to grow. Its international implications cannot be overstated. Possible slowdowns or arrests in economic growth could paralyze the West, jolt into self-consciousness inchoate classes and strata of have-nots,

the latent "inner proletariat" of every system, and set off massive internal social dislocations that could quickly be felt elsewhere, given the interdependence of the international system. Regardless of whether the configuration that stabilizes is better or worse than its predecessor, the costs of the transition could be very high.

VI.

The end of the Cold War does not mean, additionally, the end of war and all that it entails. Even shorn of its empire, Russia will remain a superpower. The national ideology that will succeed socialism and will hold the system together is not yet apparent; nor are its international implications. But it is not improbable that as the conventional threat of the East diminishes, the West will abandon its "first strike" nuclear doctrine and begin to characterize it as unlawful and immoral; while the East, feeling weak on the ground, will take up "first strike" as its own. The dancers will simply trade places. The minuet could well continue.

While the Cold War infected and, in turn, incorporated almost all other conflicts on the globe, those conflicts were not epiphenomena of the Cold War. They existed in their own right and will continue to rage at varying levels of intensity until each finds its own solution. Without an international security system or the order imposed by superpowers, local bullies may be tempted to turn to thuggery, as has Saddam Hussein of Iraq. Some local wars that have been dragging on may increase in viciousness. Many of the newer weapons that have been developed are more prone to proliferation. More than forty states now have ballistic missiles. New chemical and biological weapons are within the reach of many poor and otherwise underdeveloped states. Iraq's use of them in the gulf war and then domestically has shown that, in certain types of conflicts, it can be done with impunity. And even new states may be born with nuclear birthrights. As the Soviet Union fragments, many of its components may come into existence as nuclear states, thanks to the stockpiles of nuclear weapons that Moscow distributed about the federation. The end of the Cold War does not signal the end of the nuclear age.

The revolutionary appeal of socialism may have diminished in many parts, but there is no dearth of causes for which people are willing to fight and die. Islamic fundamentalism is extending to Egypt and North Africa in the west and as far east as China. In Eastern Europe, the revival of nationalism appears to be accompanied in many cases by politicized religious and mystical notions and the recrudescence of anti-Semitism. In parts of Western Europe, racism and anti-Semitism have become significant political factors. And, while Germany is so strong that no one wants to be seen to oppose its reunification now that it appears inevitable, behind the official faces of happiness and congratulation, security specialists are whistling past the graveyard; the effect of German reunification on Germany's political consciousness and historic geo-strategic conception is as yet unfathomable.

In this context, economic stagnation and human desperation can be especially volatile. In a world in which everyone will know what others are accomplishing, economic failure in one sector is likely to generate pressure for

migration, which will be resisted as states reach their absorptive capacity. Closed borders could aggravate the desperation and lead, as in the past, to the development of bizarre ideologies and aggressive tendencies. There will be no possibility of quarantine.

VII.

In some eschatologies, debate rages over whether there will be a need for law of any sort after the arrival of the Messiah. The international political system is at the threshold of a time of hope. The ending of the Cold War is a major achievement, but we are not about to enter the millennium. "This *annus*," as Auden said, "is not *mirabilis*." The need for international law after the Cold War will be more urgent than it was during the conflict. In many ways, what is expected of international law will be greater.

In a period of rapid change, no system of law can content itself with a pious, mechanical replication of the past, for the future may be quite different from the past. Replication may then be a formula, not for reaching what was gained in the past, but for disaster. The challenge to international lawyers and scholars must be to clarify continuously the common interests of this ever-changing community, drawing on historic policies but bearing in mind that the constitutive and institutional arrangements that were devised to achieve them may no longer be pertinent or effective.

W. MICHAEL REISMAN

SOVEREIGNTY AND HUMAN RIGHTS IN CONTEMPORARY INTERNATIONAL LAW

anachronism . . . 1: an error in chronology; esp: a chronological misplacing of persons, events, objects or customs in regard to each other . . . 2: a person or a thing that is chronologically out of place; esp: one that belongs to a former age and is incongruous if found in the present . . .

Webster's Third International Dictionary

I.

Since Aristotle, the term "sovereignty" has had a long and varied history during which it has been given different meanings, hues and tones, depending on the context and the objectives of those using the word.¹ Bodin and Hobbes shaped the term to serve their perception of an urgent need for internal order. Their conception influenced several centuries of international politics and law² and also became a convenient supplementary secular

¹ See [Installment] 10 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 397, 399 (R. Bernhardt ed. 1989) (discussion of historical evolution of term "sovereignty" from Aristotle to present).

² *Id.* at 401-02.

slogan for the various absolute monarchies of the time. Sovereignty often came to be an attribute of a powerful individual, whose legitimacy over territory (which was often described as his domain and even identified with him) rested on a purportedly direct or delegated divine or historic authority but certainly not, Hobbes's covenant of the multitude³ notwithstanding, on the consent of the people.

The public law of Europe, the system of international law established by the assorted monarchs of the continent to serve their common purposes, reflected and reinforced this conception by insulating from legal scrutiny and competence a broad category of events that were later enshrined as "matters solely within the domestic jurisdiction."⁴ If another political power entered the territory of the sovereign (whatever the reason) without his permission, his sovereignty was violated. In such matters, the sovereign's will was the only one that was legally relevant.

With the words "We the People,"⁵ the American Revolution inaugurated the concept of the popular will as the theoretical and operational source of political authority. On its heels, the French Revolution and the advent of subsequent democratic governments confirmed the concept. Political legitimacy henceforth was to derive from popular support; governmental authority was based on the consent of the people in the territory in which a government purported to exercise power. At first only for those states in the vanguard of modern politics, later for more and more states, the sovereignty of the sovereign became the sovereignty of the people: popular sovereignty.

It took the formal international legal system time to register these profound changes. Another century beset by imperialism, colonialism and fascism was to pass, but by the end of the Second World War, popular sovereignty was firmly rooted as one of the fundamental postulates of political legitimacy. Article 1 of the UN Charter established as one of the purposes of the United Nations, to develop friendly relations between states, not on any terms, but "based on respect for the principles of equal rights and self-determination of peoples."

Any lingering doubt that use of the term "self-determination" might have amounted to a mechanical, or at best a deferential, carry-over from Wilsonian diplomacy, and not a radical decision that henceforth the internal authority of governments would be appraised internationally, was dispelled three years later. In the Universal Declaration of Human Rights, a document then describing itself as "a common standard of achievement" but now accepted as declaratory of customary international law, Article 21(3) provided that "[t]he will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be

³ T. HOBBS, *LEVIATHAN* (M. Oakeshott ed. 1946).

⁴ Under Article 15(8) of the Covenant of the League of Nations, if the Council found a dispute between any two parties "to arise out of a matter which by international law is solely within the domestic jurisdiction of that party," the Council would refrain from making any recommendation as to its settlement. See *LEAGUE OF NATIONS COVENANT* Art. 15, para. 8, reprinted in 13 *AJIL* 128, 134 (Supp. 1919).

⁵ U.S. CONST., Preamble.

by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures."⁶ Of course, there had been regional pacts based upon similar notions,⁷ much as there had been holy alliances based on their antithesis. The significance of this statement in the Universal Declaration was that it was now expressed in a fundamental *international* constitutive legal document. In international law, the sovereign had finally been dethroned.

Unlike certain other grand statements of international law, the concept of popular sovereignty was not to remain mere pious aspiration. The international lawmaking system proceeded to prescribe criteria for appraising the conformity of internal governance with international standards of democracy.⁸ Thanks to a happy historical conjunction, modern communications technology has made it possible to verify that conformity rapidly and economically and to broadcast it widely. International and regional organizational monitors now use the new technology in critical national elections so as to ensure that they are free and fair.⁹ The results of such elections serve as evidence of popular sovereignty and become the basis for international en-

⁶ Universal Declaration of Human Rights, GA Res. 217A (III), UN Doc. A/810, at 71 (1948).

⁷ See, e.g., Central American Treaty of Peace (Treaty of Washington), Additional Convention to the General Treaty, Art. I, 2 FOREIGN RELATIONS OF THE UNITED STATES 1907, at 696, 696, reprinted in 2 AJIL 229, 229-30 (Supp. 1908):

The Governments of the High Contracting Parties shall not recognize any other Government which may come into power in any of the five Republics as a consequence of a *coup d'état*, or of a revolution against the recognized Government, so long as the freely elected representatives of the people thereof have not constitutionally reorganized the country.

⁸ See, for example, United Nations Declaration on the Elimination of All Forms of Racial Discrimination, GA Res. 1904 (XVIII) (Nov. 20, 1963); International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, 660 UNTS 195; International Convention on the Suppression and Punishment of the Crime of *Apartheid*, GA Res. 3068 (XXVIII) (Nov. 30, 1973); Convention against Discrimination in Education, Dec. 14, 1960, 429 UNTS 32; Convention concerning Equal Remuneration for Men and Women Workers for Work of Equal Value, June 29, 1951, 165 UNTS 303; Convention on the Elimination of All Forms of Discrimination against Women, GA Res. 34/180 (Dec. 18, 1979); Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, GA Res. 36/55 (Nov. 25, 1981); Convention concerning Forced or Compulsory Labour, June 28, 1930, 39 UNTS 55; Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA Res. 3452 (XXX) (Dec. 9, 1975); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA Res. 39/46 (Dec. 10, 1984); Code of Conduct for Law Enforcement Officials, GA Res. 34/169 (Dec. 17, 1979); and Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, GA Res. 40/34 (Nov. 29, 1985); as well as the numerous conventions on social welfare, marriage and the family and cultural rights. See also Resolutions Adopted by the General Assembly During its 20th Session, 20 UN GAOR Supp. (No. 14) at 53-65, UN Doc. A/6014 (1965) (series of resolutions adopted on non-self-governing territories).

⁹ For example, in the recently concluded Namibia elections, the ballot counting and tabulation were overseen by 1,700 electoral supervisors, part of a United Nations Transition Assistance Group (UNTAG). See UN CHRON., March 1990, at 42. Similarly, a UN observation mission for the verification of elections in Nicaragua (ONUVEN) was set up there in December 1989 to observe and monitor the 1990 elections. *Id.* at 64.

dorsement of the elected government.¹⁰ In functional terms, this process constitutes a new type of inclusive international recognition. Decisions to withhold recognition where the will of the people has been demonstrably ignored or suppressed have increasingly led to the next stage, the institution of international programs designed to permit or facilitate the realization of the popular will.¹¹

II.

Although the venerable term "sovereignty" continues to be used in international legal practice, its referent in modern international law is quite different. International law still protects sovereignty, but—not surprisingly—it is the people's sovereignty rather than the sovereign's sovereignty. Under the old concept, even scrutiny of international human rights without the permission of the sovereign could arguably constitute a violation of sovereignty by its "invasion" of the sovereign's *domaine réservé*. The United Nations Charter replicates the "domestic jurisdiction—international concern" dichotomy, but no serious scholar still supports the contention that internal human rights are "essentially within the domestic jurisdiction of any state" and hence insulated from international law.

This contemporary change in content of the term "sovereignty" also changes the cast of characters who can violate that sovereignty. Of course,

¹⁰ After the November 1989 elections in Namibia, the UN Security Council congratulated the people of Namibia and affirmed the election results; the Special Committee on Decolonization declared on December 4 that the Namibian elections had been held "in conformity with established UN standards of decolonization"; and Special Representative Ahtisaari declared that the electoral process had "at each stage been free and fair." See *id.* at 41–43.

¹¹ After Rhodesia's unilateral declaration of independence in 1965, the international community overwhelmingly denounced the action and refused to recognize Rhodesia as one independent state. See generally *The Situation in Southern Rhodesia: Resolutions Adopted by the General Assembly and the Security Council of the United Nations*, reprinted in 60 AJIL 921 (1966). For commentary, see McDougal & Reisman, *Rhodesia and the United Nations: The Lawfulness of International Concern*, 62 AJIL 1 (1968).

With respect to Namibia, the United Nations consistently refused to recognize South Africa's occupation of Namibia. See, e.g., Marín-Bosch, *How Nations Vote in the General Assembly of the United Nations*, 41 INT'L ORG. 705, 705–06 (1987) (pointing out that Namibia was the subject of more resolutions than all other past decolonization issues combined). Indeed, by Resolution 2145 (XXI) of October 27, 1966, the General Assembly placed Namibia under the direct responsibility of the United Nations so as to enable Namibians to exercise their right of self-determination. It also established the UN Council for Namibia (by Resolution 2248 (S-V) of May 19, 1967) with the objective, inter alia, of obtaining the withdrawal of South Africa from Namibia. See Report of the United Nations Council for Namibia, 39 UN GAOR Supp. (No. 24) at 1, UN Doc. A/39/24 (1984). Other international programs eventually led to the independence of Namibia on March 21, 1990.

The South African situation has also gained the attention of the international community in the past few decades. See, e.g., the Policies of *Apartheid* of the Government of the Republic of South Africa, GA Res. 3151 (XXVIII), 28 UN GAOR Supp. (No. 30) at 33, UN Doc. A/9030 (1973); GA Res. 39/72, 39 UN GAOR Supp. (No. 51) at 40, UN Doc. A/39/51 (1985); International Convention on the Suppression and Punishment of the Crime of *Apartheid*, GA Res. 3068 (XXVIII), 28 UN GAOR Supp. (No. 30), *supra*, at 75. Talks are currently under way to work out a form of representative government for a future South Africa. See Waldmeir, *ANC May End Armed Struggle*, Fin. Times (London), May 5, 1990, at 1, col. 7.

popular sovereignty is violated when an outside force invades and imposes its will on the people. One thinks of the invasion of Afghanistan in 1979 or of Kuwait in 1990.¹² But what happens to sovereignty, in its modern sense, when it is not an outsider but some home-grown specialist in violence who seizes and purports to wield the authority of the government against the wishes of the people, by naked power, by putsch or by coup, by the usurpation of an election or by those systematic corruptions of the electoral process in which almost 100 percent of the electorate purportedly votes for the incumbent's list (often the only choice)? Is such a seizer of power entitled to invoke the international legal term "national sovereignty" to establish or reinforce his own position in international politics?

Under the old international law, the internal usurper was so entitled, for the standard was *de facto* control: the only test was the effective power of the claimant. In the *Tinoco* case,¹³ Costa Rica sought to defend itself by claiming a violation of its popular sovereignty. Tinoco, the erstwhile Minister of War, had seized power in violation of the Constitution. Therefore, the subsequent restorationist Costa Rican Government contended, his actions could not be deemed to have bound Costa Rica. But Chief Justice Taft decided that by virtue of his effective control, Tinoco had represented the legitimate government as long as he enjoyed that control.

The *Tinoco* decision was consistent with the law of its time. Were it applied strictly now, it would be anachronistic, for it stands in stark contradiction to the new constitutive, human rights-based conception of popular sovereignty. To be sure, there were policy reasons for *Tinoco*, which may still have some cogency, but the important point is that there was then no countervailing constitutive policy of international human rights and its conception of popular sovereignty.

Caudillos and their like appear to be susceptible to a megalomania that identifies their corporeal selves with the symbols of the nation and the state. They invoke a "'sovereignty' so grandiose and capricious . . . it might be supposed to be a deliberate caricature, save for the intensity of the sentiments that are mobilized around the symbol itself."¹⁴ Happily, the international legal system in which declamations such as "l'état, c'est moi" were coherent has long since been consigned to history's scrap heap. In our era, such pronouncements become, at least for audiences at a safe remove, the stuff of refined comedy. They would be occasions for general hilarity, even in the countries where they are still staged, were it not for the endless misery that the dictators who grant themselves sovereignty always inflict upon the human beings trapped within the boundaries of the territory the dictators have confused with themselves.

¹² On the invasion of Afghanistan by the Soviet Union and the applicable norms of armed conflict, see generally Reisman & Silk, *Which Law Applies to the Afghan Conflict?*, 82 AJIL 459 (1988).

¹³ *Tinoco* case (Great Brit. v. Costa Rica), 1 R. Int'l Arb. Awards 369 (1923), reprinted in 18 AJIL 147 (1924).

¹⁴ McDougal, Lasswell & Reisman, *The World Constitutive Process of Authoritative Decision*, in M. S. McDougal & W. M. Reisman, *INTERNATIONAL LAW ESSAYS* 197 (1981).

III.

In many countries, the internal political situation is murky and constitutional procedures for the orderly transfer of power are nonexistent or ineffective. In a flurry of coups and putsches, both outsiders and insiders may be unable to ascertain the popular will, especially if the disorder or tyranny has prevented it from being consulted or expressed. Even in the absence of elections—indeed, even when there are “supervised” elections—it is often clear that the vast majority of the people detest those who have assumed power and characterize themselves as the government. It is more difficult, however, to say who the people would wish in their stead. They may not know, which is one of the reasons that international legal supervision of elections is designed to include an adequate period for candidacies to be developed and to allow campaigning, so that voters can make the informed choice that is at the center of free and fair elections.

But in circumstances in which free elections are internationally supervised and the results are internationally endorsed as free and fair and the people’s choice is clear, the world community does not need to speculate on what constitutes popular sovereignty in that country.

When those confirmed wishes are ignored by a local caudillo who either takes power himself or assigns it to a subordinate he controls, a jurist rooted in the late twentieth century can hardly say that an invasion by outside forces to remove the caudillo and install the elected government is a violation of national sovereignty. Cross-border military actions should certainly never be extolled, for they are necessarily brutal and destructive of life and property. They may well be unlawful for a variety of other reasons. But if they displace the usurper and emplace the people who were freely elected, they can be characterized, in this particular regard, as a violation of sovereignty only if one uses the term anachronistically to mean the violation of some mystical survival of a monarchical right that supposedly devolves *jure gentium* on whichever warlord seizes and holds the presidential palace or if the term is used in the jurisprudentially bizarre sense to mean that inanimate territory has political rights that preempt those of its inhabitants.¹⁵

This is not to say that every externally motivated action to remove an unpopular government is now permitted, or that officer corps that feel obsolescence hard upon them can claim a new *raison d’être* and start scouring the globe for opportunities for “democratizing” interventions. Authoritative conclusions about the lawfulness of the unilateral use of force, no less than about any other unilateral action, turn on many contextual factors: e.g., the contingencies allegedly justifying the unilateral use, the availability of feasible persuasive alternatives, the means of coercion selected, the level of coercion used (the classic test of necessity and proportionality), whether the ob-

¹⁵ See Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972); Tribe, *Ways Not to Think about Plastic Trees: New Foundations for Environmental Law*, 83 YALE L.J. 1315 (1974). For a cogent critique on this point, cf. Schwartz, *The Rights of Nature and the Death of God*, PUB. INTEREST, No. 97, 1989, at 3.

jectives of the intervener include internationally illicit aims, the aggregate consequences of inaction, and the aggregate consequences of action.¹⁶ But it is to say that the suppression of popular sovereignty may be a justifying factor, not a justification *per se* but a *conditio sine qua non*. And it is to say that the word "sovereignty" can no longer be used to shield the actual suppression of popular sovereignty from external rebuke and remedy.

International law is still concerned with the protection of sovereignty, but, in its modern sense, the object of protection is not the power base of the tyrant who rules directly by naked power or through the apparatus of a totalitarian political order, but the continuing capacity of a population freely to express and effect choices about the identities and policies of its governors. In modern international law, the "unilateral declaration of independence" by the Smith Government in Rhodesia was not an exercise of national sovereignty but a violation of the sovereignty of the people of Zimbabwe.¹⁷ The Chinese Government's massacre in Tiananmen Square to maintain an oligarchy against the wishes of the people was a violation of Chinese sovereignty. The Ceausescu dictatorship was a violation of Romanian sovereignty. President Marcos violated Philippine sovereignty, General Noriega violated Panamanian sovereignty, and the Soviet blockade of Lithuania violated its sovereignty. Fidel Castro violates Cuban sovereignty by mock elections that insult the people whose fundamental human rights are being denied, no less than the intelligence of the rest of the human race. In each case, the violators often brazenly characterize the international community's condemnation as itself a violation of their sovereignty. Sadly, some organizations and some scholars, falling victim to anachronism, have given them comfort.

In modern international law, sovereignty can be violated as effectively and ruthlessly by an indigenous as by an outside force, in much the same way that the wealth and natural resources of a country can be spoliated as thoroughly and efficiently by a native as by a foreigner.¹⁸ Sovereignty can be liberated as much by an indigenous as by an outside force. As in the interpretation of any other event in terms of policy, context and consequence must be considered.

IV.

The international human rights program is more than a piecemeal addition to the traditional corpus of international law, more than another chapter sandwiched into traditional textbooks of international law. By shifting the fulcrum of the system from the protection of sovereigns to the protection of people, it works qualitative changes in virtually every component. Many of the old terms survive, but in using them in a modern context, one should bear in mind Holmes's lapidary dictum: "A word is not a crystal,

¹⁶ See M. S. McDOUGAL & F. FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER*, ch. 3 (1961).

¹⁷ See *supra* note 11.

¹⁸ See Reisman, *Harnessing International Law to Restrain and Recapture Indigenous Spoliations*, 83 AJIL 56 (1989).

transparent and unchanged; it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."¹⁹

When constitutive changes such as these are introduced into a legal system while many other struts of the system are left in place, appliers and interpreters of current cases cannot proceed in a piecemeal and mechanical fashion. Precisely because the human rights norms are constitutive, other norms must be reinterpreted in their light, lest anachronisms be produced. This process of "updating" or "contemporization" or *actualisation*, as French scholars call it, is not unknown to international law. In the *South-West Africa* opinion,²⁰ the International Court indicated the absurdity of mechanically applying an old norm without reference to fundamental constitutive changes, and national courts have often expressed the need and authority to actualize.²¹ The same style of actualization is required with regard to the assessment of the lawfulness of human rights actions. When this is not done, legal arguments and judgments will be marked by anachronism.

In the debate over the U.S. action in Panama in the United Nations, the Nicaraguan Permanent Representative, whose Government had requested the meeting, opened it by proclaiming: "Once again an offence has been committed against our peoples. Once again an attempt is being made to make brute force appear to be law. Once again the principles which are the foundation of international relations have been violated."²² The Permanent Representative proceeded to cite, chapter and verse, the United Nations Charter and the OAS Charter to establish "[t]his flagrant violation of Panama's sovereignty and territorial integrity."²³ No reference whatsoever was made to Manuel Antonio Noriega's suppression of popular sovereignty, or to the fact that both the internationally supervised election before the military action and the opinion polls after it indicated overwhelming support for the change that was realized.²⁴ These issues were swept away by indirection, when the Permanent Representative said that "no argument can possibly justify intervention against a sovereign state."²⁵

¹⁹ *Towne v. Eisner*, 245 U.S. 372, 376 (1918).

²⁰ *South-West Africa—Voting Procedure*, 1955 ICJ REP. 67, 77 (Advisory Opinion of June 7).

²¹ M. S. McDUGAL, H. LASSWELL & J. MILLER, *THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER*, ch. 4 (1967).

²² UN Doc. S/PV.2899, at 3–5 (Dec. 20, 1989). I treat this statement as made in good faith. It is not inappropriate to note, however, that those who invoke this argument frequently reserve for their governments a right of intervention for various revolutionary purposes, e.g., wars of national liberation. See, in this regard, Reisman, *Old Wine in New Bottles: The Reagan and Brezhnev Doctrines in Contemporary International Law and Practice*, 13 YALE J. INT'L L. 171 (1988).

²³ UN Doc. S/PV.2899, *supra* note 22, at 4.

²⁴ One of the more ironic aspects of the Panama affair was that all indications before and after the U.S. invasion were that while the vast majority of the Panamanian people viewed it as a liberation, the other governments of the region voted in the OAS to condemn it as a violation of Panamanian sovereignty. According to most news reports, the U.S. military action in Panama was met with overwhelming approval by the Panamanian people. See, e.g., *After Noriega*, *ECONOMIST*, Jan. 16, 1990, at 37.

²⁵ UN Doc. S/PV.2902, at 7 (Dec. 23, 1989).

This is what Professor D'Amato, in his remarkable article, has called "the rhetoric of statism."²⁶ The anachronism here is effected by the *selective* use of the language of international law, carefully screening out everything that has been introduced by the human rights movement. It may be contrasted with the remark of Thomas Pickering, the United States Permanent Representative, that "the people, not governments, are sovereign."²⁷ That formulation, in turn, oversimplifies the decision calculus now required, for, as expressed, it could make that single variable determinative of lawfulness in all future cases. But at least it expresses the critical new constitutive policy in international law, which is completely absent from the Nicaraguan formula.

Under the Nicaraguan version, sovereignty is not international protection of the will of the people, but international protection for a group that calls itself the government against the wishes of the people. There is no international test of the legitimacy of a self-proclaimed government. The only test is internal naked power. Under this version, Panama's sovereignty is violated by the removal of the usurper and the establishment of conditions for the assumption of power by the legitimate government. That is an anachronism.

Anachronism can only be avoided in legal decision by systematic actualization, which considers inherited norms in the context of changed constitutive normative systems and makes sensitive assessments of the relative weight each is to be given and the various intensities with which each is demanded.

V.

The consequences of these changes are far-reaching. Some are clearly beneficial to the new values of the international system. Some hold the potential for destabilizing the system. On the credit side, international human rights puts current and erstwhile tyrants on notice that monarchical and elitist conceptions of national sovereignty cannot be invoked to immunize them from the writ of international law. Some have already grasped the implications of this development. Haiti, in July 1990, asked the United Nations to provide three hundred civilian officials to supervise its upcoming elections and forty military officers to ensure that the local armed forces would be part of the solution rather than part of the problem.²⁸ Haiti's provisional Foreign Minister, Kesler Clermont, said such a team would set "a powerful precedent" for UN monitoring of Third World elections "to certify their legitimacy."²⁹ Three of the seven Third World members of the Security Council opposed the request.³⁰ The princes may not like this, but for peoples languishing under despotism and dictatorship, the development promises, at least, the condemnation by international law of the violation of their sovereignty and the possibility, uncertain as it may be, of a remedy.

²⁶ D'Amato, *The Invasion of Panama Was a Lawful Response to Tyranny*, 84 AJIL 516, 518 (1990).

²⁷ UN Doc. S/PV.2902, *supra* note 25, at 8.

²⁸ Lewis, *Haiti Wants U.N. to Monitor Vote*, N.Y. Times, July 22, 1990, at 10, col. 6.

²⁹ *Id.*

³⁰ *Id.*

On the debit side, while the bite of human rights norms is extended, so, too, is systemic instability. In decentralized systems whose members themselves perforce make the decisions, the more the number of constitutive appraisal norms, the more the number of cross-border appraisals and the greater the possibility of cross-border meddling by various actors. The problem is contained, to an extent, when internationally supervised "free and fair" elections credibly and unequivocally indicate the wishes of a majority of the people. It is also contained when other nonelectoral indicators show the popular will, though without the clarity and freedom vouchsafed by secret ballot. When popular wishes are usurped violently, the confirmed expression of popular sovereignty tells everyone who the real usurper is and who should rightfully constitute the government, no matter how convincing the newspeak of the dictator's apparatus may be.

Unambiguous situations, however, may be exceptions. When the internationally supervised elections result in an absence of consensus on who should govern, *or* the integrity of the elections is doubtful, *or* there have been no elections, *or* a civil insurrection has left diverse groups vying for power, no one can be sure that the unilateral intervener from the outside is implementing popular wishes. To varying extents, the intervener will be shaping them. In some circumstances, the banner of popular sovereignty can become a fig leaf for its suppression by foreign intervention, especially when governments bent on intervention maintain stables of alternative local leaders who can be brought forward to authorize an invasion at the appropriate time.³¹ In practice, therefore, there may be a factual "gray" area between unequivocal expressions of popular will through internationally supervised, observed or validated elections, on the one hand, and the atrocities that warrant humanitarian intervention, on the other. Situations falling into the gray area will simply not lend themselves to unilateral action.

The most satisfactory solution to this problem is the creation of centralized institutions, equipped with decision-making authority and the capacity to make it effective. But in the immediate future, that solution remains unlikely, and to make it a condition of lawful decision now only evades addressing the policies that the notion of popular sovereignty encapsulates. The given of contemporary international decision making is the absence of such institutions and the need to focus on regulating unilateral decision making. Because rights without remedies are not rights at all, prohibiting the unilateral vindication of clear violations of rights when multilateral possibilities do not obtain is virtually to terminate those rights.

It is no longer politically feasible or morally acceptable to suspend the operation of human rights norms until every constitutive problem is solved. In the interim, new criteria for unilateral human rights actions must be established. In addition, more refined techniques for their legal appraisal and more effective means for their condemnation when such actions are themselves unlawful must be developed. One contribution of our profession

³¹ See, e.g., Reisman & Silk, *supra* note 12, at 466-79 (discussion of factual situation in Afghanistan leading to "invitation" of Soviet armed forces by Afghan "government").

should be to develop methods for assessing popular will and making judgments about divergences.

The violation of sovereignty has heretofore largely been treated with passive strategies: absorbing those who have been obliged to flee their own countries. With the increasing refinement of transportation, domestic human rights pathologies now generate larger and larger numbers of refugees. But the welfare democracies of the world, which are the preferred refuge of those fleeing human rights violations in their own countries, have begun to reach the limits of their absorptive capacities. The passive strategy of dealing with violations of sovereignty will no longer work. An active strategy that addresses the pathology itself is required, both pragmatically and by the very conception of modern sovereignty.

VI.

Because human rights considerations introduce so many more variables into the determination of lawfulness, an even heavier burden of deliberation devolves upon international lawyers in assessing the lawfulness of actions. Matters become more complex and uncertain than they were in an international legal system that was composed of a few binary rules applied to a checkerboard of monarchical states and, most particularly, that lacked an international code of human rights. One can no longer simply condemn externally motivated actions aimed at removing an unpopular government and permitting the consultation or implementation of the popular will as *per se* violations of sovereignty without inquiring whether and under what conditions that will was being suppressed, and how the external action will affect the expression and implementation of popular sovereignty. The identification of what is clearly "externally motivated action" is itself an increasingly difficult task.

No one is entitled to complain that things are getting too complicated. If complexity of decision is the price for increased human dignity on the planet, it is worth it. Those who yearn for "the good old days" and continue to trumpet terms like "sovereignty" without relating them to the human rights conditions within the states under discussion do more than commit an anachronism. They undermine human rights.

W. MICHAEL REISMAN

CORRESPONDENCE

TO THE EDITOR IN CHIEF:

July 30, 1990

From its inception, the Society has had an interest—reflected in the *Journal*—in the teaching of international law.¹ Often that interest has been implicit, deriving from the fact that many Society members at one time took courses in international law and some decided to become teachers of international law. Regularly and periodically, this general interest in teaching intensifies; the Society may have panels at its Annual Meeting focusing on teaching and has, from time to time, sponsored surveys of teaching.

In 1962, as part of its program to strengthen the teaching of international law, the Ford Foundation made a grant to the American Society of International Law for a comprehensive survey. The principal tangible products of the grant were two publications, *International Legal Studies: A Survey of Teaching in American Law Schools 1963–1964* (1965) and *A Survey of the Teaching of International Law in Political Science Departments* (1963), both written by Richard Edwards, then a program assistant with the Society. These studies remain the most thorough and comprehensive compendiums of information and analysis of international law teaching produced in the United States. Especially noteworthy is the combination of two different perspectives, i.e., general summaries of the state of international law teaching and descriptions of individuals' experiences, course syllabuses, and so on. Both studies were carried out in two "waves," one going to academic administrators and another to faculty members teaching international law.

The political science department survey found that roughly two-thirds of institutions offered no course in international law. Of the 264 departments that did offer international law, about one-fifth combined it with international organizations. If one had to explain whether or not a school offered international law, the strongest determining factor appeared to be enrollment; over 80 percent of institutions with an enrollment of over 10,000 offered international law.²

As for law schools, Edwards found that of the 134 law schools surveyed, 91 (or 68 percent) offered international law and almost half of the law schools offered more than one course in international law. Although many of the deans whom Edwards surveyed indicated that 20–40 percent of law school students took international law, the small size of most international law classes suggested that, as of the early 1960s, probably not more than 10 percent of law students elected international law. Only two schools—Rutgers (Newark) and Washington University—required international law.³

¹ The first article ever published in the *Journal* was Secretary of State Elihu Root's eloquent plea for better and broader education in international law, *The Need of Popular Understanding of International Law*, 1 AJIL 1 (1907).

² R. EDWARDS, *A SURVEY OF THE TEACHING OF INTERNATIONAL LAW IN POLITICAL SCIENCE DEPARTMENTS* 9 (1963).

³ R. EDWARDS, *INTERNATIONAL LEGAL STUDIES: A SURVEY OF TEACHING IN AMERICAN LAW SCHOOLS 1963–1964*, at 32, 14 and 33 (1965).

During the 1970s, the Society endeavored to update its survey, although resources did not exist to replicate the 1962 work. Michael Cardozo supervised an update and was able to report that, in 1974, 140 of 150 nationally accredited law schools (some 93 percent) offered at least one "international legal studies" course.⁴ He found much cause for optimism: "the state of education in international law is good. The number of institutions offering courses in the field has increased since 1964. More teachers are involved in the subject. Courses are available to more students. The interest of teachers and students has increased both relatively and absolutely."⁵

The need for an up-to-date survey was acknowledged by many people during the 1980s. When, in mid-1989, the Ford Foundation seemed receptive to funding a survey, agreement on the content of the proposal was achieved easily.

The work of the Survey of Academic International Law (SAIL) has been carried out with the assistance of a project advisory committee.⁶ This group, whose assistance to us has already been invaluable, was selected to provide the widest range of experience and perspectives on international law teaching.

During the fall of 1990, we shall mail thousands of questionnaires to administrators and international law teachers. Several objectives have shaped our approach to this task. First, we want our results to be comparable to the earlier surveys (the first of which was conducted in 1912 by the Carnegie Endowment for International Peace). The possibility of having an 80-year perspective on international law teaching is very important. The survey will include schools of law and departments of political science in both the United States and Canada—a major change from previous studies, which sometimes neglected political science departments and never included Canada.

We are confident that the survey will provide an accurate, comprehensive picture of international law teaching in the United States and Canada. But two additional aspects of SAIL will help to put those results in perspective. Michael Molitor will assist with an "international" survey that will assess

⁴ M. CARDOZO, *THE PRACTICAL STATE OF TEACHING AND RESEARCH IN INTERNATIONAL LAW* 1974 (1977).

⁵ Cardozo, Remarks, 71 ASIL PROC. 95 (1977).

⁶ The advisory committee consists of the following members: K. Adede, United Nations; Anne-Marie Burley, University of Chicago; Goler Butcher, Howard University; Hugo Caminos, Organization of American States; Michael Cardozo, the Society; Abram Chayes, Harvard University; Lori Damrosch, Columbia University; Richard Edwards, University of Toledo; Cees Flinterman, University of Limburg (the Netherlands); David Forsythe, University of Nebraska; Maria Frankowska, Southern Illinois University; John Lawrence Hargrove, the Society; Douglas Johnston, University of Victoria (Canada); Charlotte Ku, the Society; Igor Lukashuk, Institute of State and Law (USSR); Steven Marks, Yeshiva University; Michael Molitor, Harvard University; Yasuaki Onuma, Tokyo University (Japan); Bernard Oxman, University of Miami; Alain Pellet, University of Paris (France); M. J. Peterson, University of Massachusetts; Bruno Simma, University of Michigan and University of Munich (Germany); Edwin Smith, University of Southern California; Louis Sohn, University of Georgia; Tullio Treves, University of Milan (Italy); Daniel Turp, University of Montreal (Canada); Wang Tieya, Peking University (China); Sharon Williams, York University (Canada); Stephen Zamora, University of Houston.

international law teaching in twenty-five other countries. After the results of the broadly based U.S./Canadian survey are evaluated, we shall undertake a "focused" survey examining in more detail twenty-five institutions that seem remarkable in their attention (or in some cases, inattention) to international law.

There are both new opportunities and some risks associated with carrying out a survey in the 1990s. Because of computers, we have access to more information about teachers, institutions and courses. We can store and manipulate vast amounts of information far more easily than at any time in the past. In other ways, surveying is more difficult today. Most of us in academia feel inundated with questionnaires of all types; it may be too tempting to ignore another questionnaire, regardless of how important it is. In the thirty years since the Edwards surveys, international law teaching has become much more specialized and varied. For example, thirty years ago most law schools offered at most a public international course and a course in international business transactions.

For the SAIL project to have the maximum positive impact, we must be careful to separate advocacy from description. We began this endeavor convinced that international law does not receive the attention it deserves. We have ample reason for this belief, not the least of which is the results of numerous earlier studies. But the primary goal of SAIL must be to provide an accurate, thorough description of international law teaching as it exists today. Only then will we be in the strongest position to make a case for more attention in the form of faculty positions, courses, grants, and so on. If we are going to assert, as Judge Vanderbilt did forty years ago, "that not one lawyer in five hundred, possibly not one lawyer in a thousand, has ever even had a course in international law,"⁷ we must begin by getting our facts right.

We invite all readers of the *Journal* to help us conduct a successful study, largely by seeing that any questionnaires that come their way or to the attention of their colleagues are answered promptly and completely. This way, the results of the SAIL project can be of maximum benefit to us all.

JOHN KING GAMBLE, JR.
The Behrend College
Pennsylvania State University

KEITH HIGHT
The Fletcher School of Law and Diplomacy
Tufts University

TO THE EDITOR IN CHIEF:

March 22, 1990

I must write to disagree with the argument by my friend and colleague Frederic L. Kirgis, Jr., that the state of Palestine does not meet the standard recognized criteria for statehood under customary international law (84 AJIL 218 (1990)). At the request of the Palestine Liberation Organization (PLO), on June 22, 1987, I delivered a speech before a special session of the

⁷ Vanderbilt, *Responsibilities of Our Law Schools to the Public and the Profession*, 3 J. LEGAL EDUC. 207, 209 (1950).

United Nations Committee on the Exercise of the Inalienable Rights of the Palestinian People that was convened at UN headquarters in New York City in order to commemorate the twentieth anniversary of the 1967 Middle East war. Therein I argued that under the current political conditions in both Israel and the United States, there was no realistic prospect for the convocation of an international peace conference on the Middle East for the immediate future. I therefore suggested that the Palestinian people unilaterally proclaim their own independent state; that the United Nations Organization immediately recognize the independent state of Palestine; and that the United Nations then proceed to apply the same approach to obtaining Israeli withdrawal from the occupied state of Palestine as it has applied to obtaining South African withdrawal from the occupied state of Namibia. In my opinion at the time, the creation of the independent state of Palestine would fulfill the historic right of the Palestinian people to self-determination while also creating a dramatic breakthrough in the prospects for obtaining peace with justice in the Middle East.

Several members of the Palestine Liberation Organization were present at this UN conference to hear my speech, and were seriously interested in my proposal that the Palestinian people unilaterally create the independent state of Palestine. They requested that I prepare a research paper for them on this subject that would discuss at greater length their legal authority for the unilateral creation of the independent state of Palestine; how this could be done; how the United Nations should recognize the independent state of Palestine; and how the United Nations could then act to obtain the withdrawal of Israeli occupation troops from Palestine, etc. I agreed to undertake this research project for them on a pro bono basis.

On March 11, 1988, I submitted my research paper to the PLO and to several prominent Palestinian Americans, some of whom are members of the Palestine National Council (PNC). This paper was entitled *CREATE THE STATE OF PALESTINE!* There matters stood until July 31, 1988, when King Hussein of Jordan gave his now-famous speech in which he severed all forms of legal and administrative ties between Jordan and what he called the West Bank. Immediately thereafter, I was asked to serve as a legal adviser to the Legal Committee of the Palestine National Council that was placed in charge of the project to create the independent state of Palestine. On November 15, 1988, the independent state of Palestine was proclaimed by the Palestine National Council, meeting in Algiers, by a vote of 253 to 46, as well as in front of Al-Aksa Mosque in Jerusalem, the capital of the new state, after the close of prayers.

Of course, there is no way in this brief communication that I could even begin to recapitulate the arguments found in *CREATE THE STATE OF PALESTINE!* Nevertheless, this research paper has since become a public document and has also been published in several readily available sources.¹ Here I can only refer the reader to it for a full exposition of the position that the Palestinian people have the perfect right under international law to create the state of Palestine. Generally put, however, there are four elements constituent of a state: territory, population, government, and the capacity to enter into relations with other states. As I argued in my position paper, all

¹ See AM.-ARAB AFF., No. 25, Summer 1988, at 86; SCANDINAVIAN J. DEV. ALTERNATIVES, Nos. 2 and 3, June-September 1988, at 25; 4 PALESTINE Y.B. INT'L L. 15 (1987-88); THE FUTURE OF INTERNATIONAL LAW AND AMERICAN FOREIGN POLICY 135 (1989).

four characteristics have been satisfied by the newly proclaimed independent state of Palestine.

Indeed, as long ago as 1919, the Palestinian people were provisionally recognized as an independent nation by the League of Nations in League Covenant Article 22(4), as well as by the 1922 Mandate for Palestine that was awarded to Great Britain. This provisional recognition continues in effect until today because of the conservatory clause found in Article 80(1) of the United Nations Charter. Pursuant to the basic right of self-determination of peoples as recognized by UN Charter Article 1(2), as well as by the International Court of Justice in the *Namibia* and *Western Sahara* advisory opinions, the Palestinian people have proceeded to proclaim their own independent state in the land that they have continuously occupied for hundreds of years.

1. *Territory.* The territory of a state does not have to be fixed and determinate. For example, Israel does not have fixed and permanent borders (except most recently with respect to Egypt) and yet it is generally considered to be a state. Thus, the state of Palestine also does not have to have declared borders either. Rather, borders will be negotiated between the Government of Israel and the Government of Palestine. This is the same way peace negotiations would occur between any other two states/governments in dispute over the existence of their respective borders. To be sure, however, it is quite clear from reading the Palestinian Declaration of Independence and the attached Political Communiqué that the PLO contemplates that the new state of Palestine will consist essentially of what has been called the West Bank and Gaza Strip, together with its capital being East Jerusalem.

2. *Population.* In occupied Palestine, there lives the population of the Palestinian people; they have lived there forever, since time immemorial. They are the original inhabitants and occupants of this territory. They are fixed and determinate, and so they definitely constitute a distinguishable population. They have always been in possession of their land and are therefore entitled to create a state therein.

3. *Government.* During the course of his various public pronouncements in Europe during December 1988, Yasir Arafat stated that currently the PLO is serving as the provisional government of the state of Palestine. Acting in conjunction with the Unified Leadership of the Intifada, this provisional government already controls substantial sections of occupied Palestine, as well as the entire populace of occupied Palestine. It is thus already exercising effective control over large amounts of territory and people, and is providing basic administrative functions and social services to the Palestinian people living in occupied Palestine and abroad.² This is all that is required for there to be a fulfillment of this criterion for statehood under international law.

4. *The capacity to enter into international relations.* Over 114 states have already recognized the newly proclaimed state of Palestine, which is more than the 93 that maintain some form of diplomatic relations with Israel. Furthermore, on December 15, 1988, the United Nations General Assembly adopted Resolution 43/177, essentially recognizing the new state of Palestine and according it observer-state status throughout the United Nations Organization. That resolution was adopted by a vote of 104 in favor,

² See, e.g., G. FULLER, *THE WEST BANK OF ISRAEL: POINT OF NO RETURN?* (1989).

the United States and Israel opposed, and 44 states abstaining. For reasons fully explained in my position paper, such General Assembly recognition of the new state of Palestine is constitutive, definitive and universally determinative.

The Palestinian uprising or *intifada* will continue until the Israeli Government is willing to sit down and negotiate an overall peace settlement with the PLO on the basis of a two-state solution. In this regard, the Palestine National Council has taken several steps in the Palestinian Declaration of Independence and in the Political Communiqué attached thereto in order to establish the framework necessary for negotiating a comprehensive peace settlement with Israel. First and foremost, the Declaration of Independence explicitly accepted the UN General Assembly's Partition Resolution 181 (II) of 1947. The significance of this acceptance by the Palestinian Declaration of Independence cannot be overemphasized. Prior thereto, from the perspective of the Palestinian people, the Partition Resolution had been deemed to be a criminal act that was perpetrated upon them by the United Nations. Today, the acceptance of the Partition Resolution in their actual Declaration of Independence itself signals a genuine desire by the Palestinian people to transcend the past forty years of history and now reach a historic accommodation with Israel on the basis of a two-state solution: the Declaration of Independence is the foundational document for the state of Palestine. It is definitive, determinative and irreversible.

Quite obviously, a remarkable opportunity for peace with justice for all has been created by the Palestinian Declaration of Independence, its attached Political Communiqué, and subsequent public statements made by Yasir Arafat acting in his official capacity as President of the new state of Palestine. What is needed now from the Bush administration is the same type of dynamic leadership and will for peace that was demonstrated by the Carter administration at Camp David over a decade ago. Failure by the Governments of the United States and Israel to seize this moment for peace will only make another general war in the Middle East an inevitability. I doubt very seriously that history will give any of us a second chance.

FRANCIS A. BOYLE
University of Illinois
College of Law

TO THE EDITOR IN CHIEF:

June 21, 1990

It seems to me that the title of the *Agora* essay by Professor Anthony D'Amato published in the April 1990 issue of the *Journal* (at p. 516), i.e., *The Invasion of Panama Was a Lawful Response to Tyranny*, would have been more accurate had it read "The Invasion of Panama Could Have Been a Lawful Response to Tyranny." The reason is to be found in the last sentence of paragraph 5 of section II (p. 522). This sentence refers to a deplorable characteristic of the operation, namely, that it was not carried out in such a way as to minimize civilian casualties. And the sentence clearly implies that this characteristic of the operation rendered it unlawful.

The underlying general question, which Professor D'Amato should have brought within the framework of his thesis that, under international law,

governments having the means to do so may forcibly overthrow foreign tyrants, is that of the maximum permissible cost of those operations in civilian casualties. Clearly, if a government forcibly rids a foreign country of a tyrant in such a way that the only injury its population sustains is a slight bruise on the thigh of a vigorous youth, then, if Professor D'Amato's thesis holds water, the government's intervention will have been altogether lawful. But what if, even though every care has been taken to minimize bloodshed, the overthrow of the tyrant has claimed the lives or physical integrity of 5 percent of the civilian population?

Professor D'Amato should have sought to tell us where the line of demarcation is to be drawn in this respect. In doing so, he would no doubt have adverted to an additional difficulty: should one, in ascertaining how far it is lawful to go in sacrificing civilians on the altar of democracy, factor in the more or less repressive and, particularly, genocidal nature of the tyranny and the likelihood that purely internal forces may overthrow it in the not-too-distant future? If, for instance, the tyrant is young and healthy, the prospect of his being overthrown by his subjects is dim, and he is systematically exterminating large numbers of them, would his overthrow by foreign forces not be lawful even if the number of civilian casualties it involves would appear excessive were the tyranny less savage?

Another factor that cannot be overlooked is to be weighed on the other scale of the balance. I refer to the degree of probability that, once the tyrant is removed, democracy will take root. This will normally depend, chiefly but not exclusively, on the existence of vigorous democratic traditions in the country concerned. If conditions there are such that a relapse into tyranny is likely, the overthrow of the tyrant might well be unlawful even if it can be accomplished with relatively minor harm to the population. Except, of course, if the intervening government is willing to tutor the local authorities and the population at large in the ways of democracy. But to do this, it will have to exercise, for a sufficiently long time, some degree of control over the local authorities, which involves occupying the country. Does Professor D'Amato believe that international law would allow the government that ousted the tyrant to render this complementary "service"?

Does Professor D'Amato believe that in assessing the lawfulness or otherwise of the overthrow of a tyrant by outside forces, the toll taken on the tyrant's military can be disregarded? Since, in stating that the casualties the invasion of Panama entailed were excessive, Professor D'Amato refers only to *civilian* ones, it might be that this question should be answered in the affirmative. But is it fair in all cases to tar the tyrant's military with the brush made for him? Did all the German soldiers in their teens or early twenties who fell fighting for Nazism deserve their fate? Obviously, the answer is no.

Professor D'Amato should therefore have refined his doctrine about the overthrow of tyrannies by conditioning the lawfulness of the crusades he advocates on the need to keep within certain bounds not only civilian casualties, but also those suffered by the tyrant's forces. And it is hardly necessary to add that material and other purely economic losses inflicted on the target country deserve to be taken into account in a similar manner.

Professor D'Amato should also have discussed a defect from which his doctrine obviously suffers: in the nature of things, it operates very unevenly. As a result of the need to meet what could be dubbed the "Rambo condition" (in no Rambo movie would it do for the hero to end up grievously

wounded), governments will overthrow foreign tyrants by force of arms only if the casualties their military thereby incurs can be expected to be, if not minimal, at least below a certain minimum. Since real life is not exactly what we see in Rambo movies, this ensures that only countries that are weak and small (preferably, ministates), easily accessible and not likely to be succored by powerful allies, will "benefit" from the application of Professor D'Amato's doctrine. Thus, the "favor" the United States did to the people of Panama is not one that the people of North Vietnam can look forward to.

Also in the interest of realism, yet another factor making for unevenness in the application of the doctrine should have been noted (and regretted) by Professor D'Amato. I refer to the disinclination that, for obvious reasons of domestic politics, a government (at least a democratic one) will, in the absence of special circumstances, normally have to use its military to oust a foreign dictator; unless relations between the government and the dictator are seriously strained and he is in bad odor with the majority of the population of the country concerned, its government is not likely to seek to overthrow the tyrant. Thus, even if the United States could overthrow certain other Third World despots without its military sustaining other than minimal casualties, it would not do the people under their yoke the "kindness" it did to the Panamanian people.

To conclude, I wish to make it clear that it is by no means on the sole ground of its having resulted in avoidable bloodshed that I share Professor D'Amato's opinion that the invasion of Panama was unlawful. For I am in general agreement with the views expressed by Professors Farer and Nanda in the same *Agora* section (84 AJIL at 503 and 494, respectively). If those views are correct, no need exists for the invidious calculus by which the blessings of prospective democracy are balanced against the loss of life, other human suffering and economic losses attendant on the overthrow of despotic regimes by foreign forces.

ROBERTO LAVALLE

Professor D'Amato replies:

Mr. Lavalle may be surprised that I basically agree with him. The factors he mentions certainly must be taken into account in assessing the legality of any particular humanitarian intervention. The daunting nature of that assessment drives many people to abandon the enterprise entirely and seek only bright-line prohibitions against any transboundary use of force. But to me the latter choice is an abdication. The real world is complex and messy; we should not turn away from it because we insist that our legal rules be clear and simple. Those who choose simple rules are, in my opinion, doomed both to observing their constant "violation" and then rationalizing the results in law journals.

In the space of my brief essay on Panama, I was only able to suggest a few of the permutations that Mr. Lavalle notes. If my essay succeeds in convincing people to put aside the superficial clarity of Article 2(4) and take up instead the task of working out the complexities of the law of humanitarian intervention, it will have been worth writing. I hope that Mr. Lavalle will be one of those who accept the challenge.

CONTEMPORARY PRACTICE OF THE UNITED STATES RELATING TO INTERNATIONAL LAW

MARIAN NASH LEICH*

The material in this section is arranged according to the system employed in the annual *Digest of United States Practice in International Law*, published by the Department of State.

COASTAL STATE ECONOMIC ZONE

(U.S. *Digest*, Ch. 7, §3)

U.S.-USSR Maritime Boundary Agreement

On June 1, 1990, Secretary of State James A. Baker III and Soviet Foreign Minister Eduard A. Shevardnadze signed at Washington the Agreement between the United States of America and the Union of Soviet Socialist Republics on the Maritime Boundary, which is intended (1) to resolve issues concerning the maritime boundary between the two parties, and (2) to ensure that coastal state jurisdiction is exercised in all maritime areas in which either party could exercise such jurisdiction for any purpose, in accordance with international law, in the absence of a maritime boundary.

In Article 1 the parties agree that the line described as the "western limit" in Article 1 of the Convention Ceding Alaska,¹ as defined in Article 2 of the 1990 Agreement, is the maritime boundary between the United States and the Soviet Union. Each party shall respect the maritime boundary as limiting the extent of its coastal state jurisdiction otherwise permitted by international law for any purpose.

Article 2 defines the location of the boundary as follows: for its northern portion, the boundary is a defined meridian from a stated initial point; and for its lower or southwesterly portion, the boundary extends from the same initial point through eighty-seven turning points defined by geographical coordinates, set out in an annex that constitutes an integral part of the Agreement. The initial point, 65°30' north, is the latitude coordinate contained in the 1867 Convention delimiting the western limit of the boundary and is specified in the 1990 Agreement as being on a longitude of 168°58'37" west. From this initial point, the maritime boundary extends north along the 168°58'37" west meridian through the Bering Strait and Chukchi Sea into the Arctic Ocean "as far as permitted under international law."

From the same initial point, the maritime boundary extends southwestward and is defined by geodetic lines connecting the eighty-seven geographic positions set forth in the annex (the first thirty-seven boundary positions are in the Western Hemisphere; the remainder are located in the East-

* Office of the Legal Adviser, Department of State.

¹ Mar. 30, 1867, 15 Stat. 539, TS No. 301, 11 Bevans 1216.

ern Hemisphere). In all but four segments, the connecting lines are geodetic lines. In three instances the boundary is calculated by reference to arcs each having a radius of 200 nautical miles, with centers specified by geographic coordinates, and in the fourth instance the boundary is calculated by reference to the rhumb line defined by the following points: 64°5'8" north, 172°0'0" west, 53°43'42" north, 170°18'31" east. All geographic positions are defined in the World Geodetic System 1984.

Under Article 3, each party agrees, in effect, that the other party may exercise sovereign rights and jurisdiction derived from exclusive economic zone jurisdiction in a "special area" on the other party's side of the maritime boundary that lies beyond 200 nautical miles of the baselines from which the breadth of the other party's territorial sea is measured and within 200 nautical miles of the baselines from which the breadth of the party's own territorial sea is measured.²

A White House Fact Sheet, dated June 1, 1990, described the provisions of Article 3 as

innovative provisions to ensure that all areas within 200 miles of either coast fall under the resource jurisdiction of one or the other party. The U.S.S.R. transfers to the United States jurisdiction in three "special areas" within 200 miles of the Soviet coast, beyond 200 miles of the U.S. coast, and on the U.S. side of the maritime boundary. The United States transfers to U.S.S.R. jurisdiction in one "special area" within 200 miles of the U.S. coast, beyond 200 miles of the Soviet coast, and on the Soviet side of the maritime boundary.³

Article 4 of the Agreement states that the maritime boundary as therein defined shall not affect or prejudice in any manner either party's position

² Article 3 reads as follows:

1. In any area east of the maritime boundary that lies within 200 nautical miles of the baselines from which the breadth of the territorial sea of the Soviet Union is measured but beyond 200 nautical miles of the baselines from which the breadth of the territorial sea of the United States is measured ("eastern special area"), the Soviet Union agrees that henceforth the United States may exercise the sovereign rights and jurisdiction derived from exclusive economic zone jurisdiction that the Soviet Union would otherwise be entitled to exercise under international law in the absence of the agreement of the Parties on the maritime boundary.

2. In any area west of the maritime boundary that lies within 200 nautical miles of the baselines from which the breadth of the territorial sea of the United States is measured but beyond 200 nautical miles of the baselines from which the breadth of the territorial sea of the Soviet Union is measured ("western special area"), the United States agrees that henceforth the Soviet Union may exercise the sovereign rights and jurisdiction derived from exclusive economic zone jurisdiction that the United States would otherwise be entitled to exercise under international law in the absence of the agreement of the Parties on the maritime boundary.

3. To the extent that either Party exercises the sovereign rights or jurisdiction in the special area or areas on its side of the maritime boundary as provided for in this Article, such exercise of sovereign rights or jurisdiction derives from the agreement of the Parties and does not constitute an extension of its exclusive economic zone. To this end, each Party shall take the necessary steps to ensure that any exercise on its part of such rights or jurisdiction in the special area or areas on its side of the maritime boundary shall be so characterized in its relevant laws, regulations, and charts.

³ 26 WEEKLY COMP. PRES. DOC. 868 (June 4, 1990).

with respect to the rules of international law relating to the law of the sea, including those concerned with the exercise of sovereignty, sovereign rights or jurisdiction with respect to the waters or seabed and subsoil.

Under Article 5, for purposes of the Agreement "coastal state jurisdiction" refers to the sovereignty, sovereign rights or any other form of jurisdiction with respect to the waters or seabed and subsoil that may be exercised by a coastal state in accordance with the international law of the sea. Under Article 6, any dispute concerning the interpretation or application of the Agreement is to be resolved by negotiation or other peaceful means agreed by the parties. Under Article 7, the Agreement is subject to ratification and shall enter into force on the date of exchange of instruments of ratification. By an exchange of notes on June 1, 1990, the parties agreed "to abide by the terms of that Agreement as of June 15, 1990" (i.e., to apply the Agreement provisionally from that date), pending its entry into force.⁴

EXPROPRIATION CLAIMS

(U.S. *Digest*, Ch. 9, §2)

Exhaustion of Local Remedies and External Measures

On June 28, 1990, U.S. Ambassador Crescencio S. Arcos, Jr., and Benjamin Villanueva, Honduran Minister of Finance and Public Credit, and Ricardo Maduro, President of the Central Bank of Honduras, signed an agreement¹ under which the Government of Honduras transferred the amount of \$7.8 million to the Government of the United States in full and final settlement of all claims of the United States and its nationals that had been the subject of special provisions in Public Law No. 100-71, the Supplemental Appropriations Act of 1987,² and Public Law No. 101-167, the foreign operations appropriations legislation for the fiscal year ending September 30, 1990.³

The dispute between an American citizen, Temistocles Ramirez de Arellano, and the Government of Honduras had arisen through the latter's expropriation of land to establish a Regional Military Training Center for instructing and training Honduran soldiers, as well as soldiers of friendly countries in the region, in connection with bilateral military assistance agreements with the United States. The Government of Honduras provided the land; the U.S. Government provided trainers and equipment. The expropriated land belonged to a Honduran company of which the U.S. citizen was the ultimate owner through a chain of corporate entities.

The claimant had sought injunctive relief against U.S. officials in U.S. courts, initially without success.⁴ Following an *en banc* rehearing, however,

⁴ Dept. of State Files L/T.

¹ For the text, see Dept. of State File No. P90 0121-2189/2190.

² Ch. IV, 101 Stat. 391, 406-07 (1987). ³ Sec. 567, 103 Stat. 1195, 1242 (1989).

⁴ See *Ramirez de Arellano v. Weinberger*, 568 F.Supp. 1236 (D.D.C.), *dismissal aff'd on other grounds*, 724 F.2d 143 (D.C. Cir. 1983), *summarized in* 78 AJIL 446 (1984).

the Court of Appeals for the District of Columbia Circuit held on October 5, 1984, that the dismissal had been precipitate and remanded the case for further proceedings on the merits.⁵ The United States petitioned, unsuccessfully, for a rehearing from the *en banc* judgment, in light of legislation approved on October 12, 1984, that specifically dealt with the Regional Military Training Center; viz., the Foreign Assistance and Related Programs Appropriations Act of 1985, enacted in section 127 of Public Law No. 98-473.⁶

The United States thereupon applied for certiorari to the U.S. Supreme Court, which granted the writ on May 20, 1985, vacating the *en banc* judgment of the D.C. Circuit and remanding the case "for reconsideration of its opinion and judgment in light of the Foreign Assistance and Related Programs Appropriations Act for fiscal year 1985, Pub. L. 98-473, 98 Stat. 1884, 1893-1894, and other events occurring since October 5, 1984."⁷

On April 18, 1986, the court of appeals upheld the dismissal of the complaint in view of the fact that "since November 27, 1985 all U.S. military personnel have departed and all U.S.-owned facilities have been removed" from the land at issue, and that the controversy had "become too attenuated to justify the extraordinary relief sought through equity's intervention."⁸ (In mid-1987, however, Honduran military forces still occupied a portion of the Ramirez land.⁹)

In the meantime, a series of congressional enactments and proposed enactments sought to expedite settlement of the Ramirez claim. Public Law No. 98-473¹⁰ had prohibited the obligation or expenditure of any funds for the construction or operation of a Regional Military Training Center in Honduras until the President provided to the congressional appropriations committees his determination that the Honduran Government (1) recognized the need to compensate the U.S. citizen "as required by international law," and (2) was taking steps to discharge its obligations in that regard. The Department of State reported to Congress on efforts to resolve the dispute, as required by that law.¹¹

The Ramirez dispute also threatened to jeopardize the grant of preferential trade benefits to Honduras under the Caribbean Basin Initiative. The Government of Honduras, which had offered a valuation process as early as December 1983, formally commenced valuation proceedings in the Honduran court of jurisdiction in March 1985. The claimant Ramirez initially refused to participate, taking the position that he had exhausted his "practical" local remedies, but in October 1985 he agreed with the

⁵ 745 F.2d 1500 (D.C. Cir. 1984), summarized in 79 AJIL 449 (1985).

⁶ 98 Stat. 1884, 1893-94 (1984).

⁷ 471 U.S. 1113 (1985).

⁸ 788 F.2d 762, 763-64 (D.C. Cir. 1986).

⁹ See letters from Acting Secretary of State John C. Whitehead to Senators Inouye and Kasten, among others (June 10, 1987), Dept. of State Staff Secretariat Log. No. 8716693.

¹⁰ See note 6 *supra*.

¹¹ The Conference Report on the Department of Defense Authorization Act of 1985, Pub. L. No. 98-525, 98 Stat. 2492, had directed the Secretary of Defense to make a report on certain specific questions. See H.R. REP. NO. 1080, 98th Cong., 2d Sess. 285-86 (1984).

Honduran Government to nonbinding fact-finding. In December 1985, the Honduran Government accepted the fact finder's report as the basis for a settlement, but Ramirez rejected it.

The Supplemental Appropriations Act of 1987, Public Law No. 100-71,¹² prohibited the expenditure of \$20 million in Economic Support Fund assistance specified for Honduras until its Government and Ramirez reached a settlement concerning compensation. It required the Department of State to select an independent fact finder to "correct and expand, as may be appropriate, the existing factfinder's report," and to issue a new report by September 30, 1987. If the parties did not reach a full and final settlement of the matter by November 30, 1987, the Department of State was to request that they submit the disagreement to binding international arbitration in accordance with the rules of procedure of the Inter-American Commercial Arbitration Commission. The Commission was to select the arbitrators and to appoint experts as necessary to establish a base of factual and financial information for the case. The Act continued:

Provided further, That if the Government of Honduras refuses to agree to binding international arbitration, then the \$20,000,000 shall be deobligated and immediately returned to the Treasury of the United States: *Provided further*, That if the United States citizen refuses to agree to binding international arbitration and refuses to agree that the award resulting from the arbitration will constitute a full and final settlement of any and all claims, liabilities and demands, including those which may be directed at the United States, its officers, agents, and employees, arising directly or indirectly from the establishment of the Regional Military Training Center, then the \$20,000,000 shall be made available for expenditure to the Government of Honduras¹³

In December 1987, the Government of Honduras accepted the second fact-finding and offered to settle for the amount specified by the fact finders. Ramirez rejected the fact-finding and the offer. Although neither of the parties rejected the possibility of submitting the dispute to international arbitration, they took no steps to do so.

The Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1989¹⁴ also addressed the *Ramirez* dispute, providing in section 574:

It is the sense of the Congress that, pursuant to the procedures . . . enacted in Public Law 100-71, the Honduran Government appears to have made a reasonable and good faith settlement offer based on a factual analysis by third parties, and the owner of the property in question is strongly encouraged to accept the proposed settlement. Therefore, notwithstanding the provisions of such section, \$5,000,000 of the Economic Support Funds made available by Public Law 100-71 for Honduras but withheld from expenditure shall be available for expenditure upon enactment of this Act: *Provided*, That if a settlement is

¹² 101 Stat. 391, note 2 *supra*.

¹³ *Id.* at 406-07; see also H.R. REP. NO. 195, 100th Cong., 1st Sess. 47 (1987).

¹⁴ Pub. L. No. 100-461, 102 Stat. 2268 (1988).

reached on the property in question, then the additional \$15,000,000 withheld from expenditure pursuant to such section shall then be available for expenditure.¹⁵

Finally, Public Law No. 101-167, the foreign operations appropriations legislation for the fiscal year ending September 30, 1990,¹⁶ released a further \$5 million from the Economic Support Fund assistance for Honduras impounded by Public Law No. 100-71.¹⁷ Congress again found that "the Honduran Government appears to have made a reasonable and good faith settlement offer based on a factual analysis by third parties, and the owner of the property in question is strongly encouraged to accept the proposed settlement." Section 567 of this statute contained a further proviso: "That if a settlement is reached on the property in question, then the additional \$10,000,000 withheld from expenditure pursuant to such section [sec. (j)] under "Assistance for Central America," in Pub. L. No. 100-71] shall then be available for expenditure."¹⁸

In the agreement signed on June 28, 1990,¹⁹ the United States Government declared that the payment of the \$7.8 million canceled any liability or obligation of the Government of Honduras to U.S. nationals or their subsidiaries, branches and affiliates in respect of the subject matter of the Agreement, and that it therefore satisfied the criteria of U.S. Public Laws Nos. 100-71 and 101-167.²⁰

MARY W. ENNIS

CLAIMS SETTLEMENT AGREEMENTS

(U.S. *Digest*, Ch. 9, §3)

United States-Iran (1990)

On May 13, 1990, the United States Government concluded a settlement agreement with the Government of Iran for an overall amount of \$105 million that covered: (1) the remaining 2,361 "small claims" (less than \$250,000 each) of U.S. nationals still pending before the Iran-United States

¹⁵ *Id.* at 2268-45.

¹⁶ Sec. 567, 103 Stat. 1195, 1242 (1989).

¹⁷ See note 2 *supra*.

¹⁸ 103 Stat. at 1242-43. Sec. (j) of Pub. L. No. 100-71 is at 101 Stat. 406.

¹⁹ See note 1 *supra*.

²⁰ On July 5, 1990, the Department of State transferred the \$7.8 million to the claimant Temistocles Ramirez de Arellano against a release signed by him in his own right and as agent and attorney in fact for four named Honduran corporations. Dept. of State File No. P90 0114-2205.

In identical letters, dated July 10, 1990, Janet G. Mullins, Assistant Secretary of State for Legislative Affairs, informed Senator Robert C. Byrd, Chairman of the Senate Committee on Appropriations, and Congressman Jamie L. Whitten, Chairman of the House Committee on Appropriations, of the settlement of the dispute "between a U.S. citizen and the Government of Honduras" by means of a government-to-government agreement. *Id.*, No. P90 0114-2203/2204.

Claims Tribunal in The Hague; and (2) the United States Government's own claim against Iran (Case No. B38) for repayment of fifteen loans made between 1955 and 1967 as part of the U.S. long-term economic development assistance program in Iran. On June 22, 1990, pursuant to a Joint Request for an Arbitral Award on Agreed Terms from the two Governments, filed with the Claims Tribunal on May 17, 1990, the Full Tribunal rendered an Award on Agreed Terms (Award No. 483), recording and giving effect to the Settlement Agreement.

The Agreement settled all "Claims of less than \$250,000," defined as any and all claims of less than that amount, filed with the Iran-U.S. Claims Tribunal by the United States on behalf of U.S. nationals, included in Cases Nos. 10,001 through 12,785 and still pending (set out by number on a list attached to the Agreement), whether or not recategorized as Official "B" Claims by the Tribunal (such as the claims in Cases Nos. B76 and B77, specifically mentioned as having been originally filed as Cases Nos. 10,189 and 11,651, respectively), and "whether or not the amount of any of such claims is ultimately adjudicated to be more than \$250,000." The Settlement Agreement also included and specifically mentioned Case No. 86, the umbrella case that the U.S. Government filed with the Tribunal to cover all the small claimants. The term "Claims of less than \$250,000" did not include the claims in Cases Nos. 12,129 and 12,130, in which settlements had already been concluded between the parties. The Agreement defined "Claimants" as "any and all of the natural or juridical persons or other entities" who had made the Claims of less than \$250,000 covered by the Agreement.

The United States and Iran agreed, in addition, to consider as Claims of less than \$250,000 for purposes of the Settlement Agreement (1) claims of U.S. nationals for less than \$250,000 that had been submitted to the U.S. Department of State but were not timely filed with the Tribunal (its filing deadline of January 19, 1982, having been established pursuant to the Claims Settlement Declaration of Algiers¹), and (2) claims of U.S. nationals for less than \$250,000 that the claimants had withdrawn or the Tribunal had dismissed for lack of jurisdiction.

Article II of the Settlement Agreement defined its scope and subject matter as:

(i) to settle, dismiss, and terminate definitively, forever and with prejudice all the disputes, differences, claims, counterclaims and matters directly or indirectly raised or capable of arising out of the relationships, contracts, transactions, occurrences, obligations, rights and interests contained in, arising out of, or related to the Claims of less than \$250,000, Case No. 86 and Case No. B38.

(ii) to quitclaim and transfer to the Islamic Republic of Iran property of the Claimants as specified in Article VII.

¹ Declaration of the Government of the Democratic and Popular Republic of Algeria concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, Jan. 19, 1981, DEPT. ST. BULL., No. 2047, February 1981, at 3, *reprinted in* 75 AJIL 422 (1981).

Under Article III, the settlement amount of \$105 million was to be paid to the United States out of the Security Account established pursuant to paragraph 7 of the (first, or basic) Declaration of Algiers.² The United States acknowledged that the settlement amount was the sole amount to be paid in consideration of "complete, full, final and definitive settlement, liquidation, discharge, and satisfaction of all the disputes, differences, claims, counterclaims and matters directly or indirectly raised or capable of arising out of the relationships, contracts, transactions, occurrences, obligations, rights and interests contained in or related to" the Claims of less than \$250,000, Case No. 86 and Case No. B38. Further, after payment thereof, the Islamic Republic of Iran (including all respondents in the Claims of less than \$250,000) would not have to pay any other amount and/or would not have to make any other consideration to the United States or any person, whether natural or juridical, in relation to the Claims of less than \$250,000, Case No. 86, and Case No. B38. Article III provided further:

(iii) The Government of the United States shall place the Settlement Amount in one or more interest bearing accounts pending distribution. The distribution of the Settlement Amount falls within the sole competence and responsibility of the Government of the United States and shall in no way engage the responsibility of the Islamic Republic of Iran or any Iranian natural or juridical person.

(iv) The United States Department of State shall refer the Claims of less than \$250,000 to the Foreign Claims Settlement Commission, United States Department of Justice, for adjudication.

(v) In adjudicating such claims, the Foreign Claims Settlement Commission shall apply Tribunal precedent concerning both jurisdiction and the merits, and shall take into account all issues including counterclaims and liens. Notwithstanding any other section of this Agreement, the Commission will adjudicate on the merits any claim, among those settled by this Agreement, which the claimant demonstrates to the Commission's satisfaction could have been properly pursued in any forum other than the Tribunal. The Commission shall also take into account, as appropriate, any transfers under Article VII of this Agreement, without in any manner entailing any liability for the Islamic Republic of Iran or for any respondents in Claims of less than \$250,000.

Article V, Termination of the Claims, sets out, *inter alia*, the obligation of the United States

to cause, without delay, all proceedings against the Islamic Republic of Iran (including all respondents in the Claims of less than \$250,000) in relation to the claims, counterclaims and matters related to the Claims of less than \$250,000, and/or Case No. 86 and/or Case No. B38, in all courts, fora, or before any authority or administrative body to be definitively and with prejudice dismissed, withdrawn and terminated.

Further, the United States is "barred from instituting or continuing with any such proceedings (including interpretive disputes and official claims) before

² Declaration of the Government of the Democratic and Popular Republic of Algeria, Jan. 19, 1981, DEPT. ST. BULL., No. 2047, February 1981, at 1, *reprinted in* 75 AJIL 418 (1981).

the Tribunal or any other forum, authority or administrative body whatsoever, including but not limited to any court in the United States or the Islamic Republic of Iran." This provision does not affect the proceedings envisaged by the United States in paragraphs (iv) and (v) of Article III, "and which will not in any manner entail any liability for the Islamic Republic of Iran or for any respondents in Claims of less than \$250,000." A corresponding obligation is also placed upon Iran.

Article VI sets out the mutual obligations of the parties regarding releases of

any and all claims, causes of action, rights, interests and demands, whether in rem or in personam, past, present or future, which have been raised, may in the future be raised, or could have been raised in connection with disputes, differences, claims, counterclaims and matters stated in, related to, arising from, or capable of arising from the Claims of less than \$250,000 and/or Case No. 86 and/or Case No. B38.

Article VII constitutes a blanket quitclaim and transfer by the United States, "unconditionally, irrevocably and without any right to recourse, 'as is and where is,' " to the Islamic Republic of Iran, of "all of the Claimants' tangible and intangible assets, rights, properties and real estate, of any kind, located in the Islamic Republic of Iran, asserted in the Claims of less than \$250,000 and/or Case No. 86."

Article IX prescribes in detail the delivery of documents connected with the automatic transfer of real and personal assets, which the United States agreed to in Article VII as part of the small claims settlement. It provides:

(i) Within three months of receipt of a written request from the Islamic Republic of Iran, the United States agrees to furnish the Islamic Republic of Iran copies of any formal statements of claims submitted by U.S. nationals to the Foreign Claims Settlement Commission, including documentary evidence, as well as the Commission's decisions with respect to the validity and amounts of such claims. The Commission shall require, as a precondition to granting compensation to a claimant, that the claimant furnish any original share certificates and title deeds in his possession concerning assets, rights and properties transferred to the Islamic Republic of Iran under Article VII above. Following the adjudication of each claim, the United States shall furnish such documents to the Islamic Republic of Iran. Where a claimant is able, on justifiable grounds, to prove that the originals of such documents are not in his possession, the Commission shall require from him a notarized affidavit in which the claimant sets out his reasons for not being in possession of the originals of the said documents, and waiving his rights thereto. In such cases, the United States shall furnish the Islamic Republic of Iran with the submitted affidavits and copies of the documents at issue.

(ii) Within three months of receipt of a written request from the Government of the United States, and for a period up to three years following the issuance by the Tribunal of the Award on Agreed Terms, the Islamic Republic of Iran agrees to furnish to the Government of the United States available documents, information, evidence, and records, including details as to the ownership and value of property, rights and interests pertaining to any of the Claims of less than \$250,000.

Article X covers the delivery of property in the United States to Iran. It provides:

At any time prior to adjudication by the Foreign Claims Settlement Commission, the interested parties to any of the Claims of less than \$250,000 may reach agreements concerning the delivery to the Islamic Republic of Iran of tangible property located in the United States. To become effective, any such agreement must be submitted to, and approved by, the Commission, which shall upon approval authorize any payment due from the Settlement Amount. Property shall be transferred to the Islamic Republic of Iran pursuant to such agreements in accordance with United States law.

Under Article XI, nothing in the Settlement Agreement may be relied upon or construed as relevant to, or may affect in any way, any arguments the parties have raised, or may raise, concerning the jurisdiction or the merits of other cases, whether before the Tribunal or any other forum.

Article XII requires that for the purpose of construing and interpreting the Settlement Agreement, the entire Agreement is to be read and construed as a whole, without any specific effect being given to any article separately.

Article XIII provides: "Upon the issuance by the Tribunal of the Award on Agreed Terms, and in contemplation of the payment of the Settlement Amount, the releases, dismissals, waivers, withdrawals, and transfers of property located in Iran, contained and referred to in this Settlement Agreement shall automatically become self-executing."³

A fact sheet on the settlement of the small claims, prepared by the Office of the Legal Adviser under date of May 14, 1990 (with bracketed additional information from Office records), read in part:

Originally 2795 U.S. small claims were filed with the Tribunal. The Tribunal has decided only 36 of these [i.e., only 1.29 percent of the total—with awards to "small" claimants totaling \$1,359,186]. Another 72 cases have been settled by the parties, with these settlements approved by the Tribunal [for a total payment to the "small" claimants of \$1,661,124]. The settlement agreement covers 2361 small claims still pending at the Tribunal, 10 dismissed by the Tribunal for lack of jurisdiction, 326 filed with the Tribunal but subsequently voluntarily withdrawn, and 415 submitted to the State Department but not filed with the Tribunal because the time limit for filing had expired.

The small claims will be transferred to the Foreign Claims Settlement Commission, an agency within the U.S. Department of Justice. Legislation enacted in 1985 authorized this Commission to receive and determine the validity and amounts of these claims. In due course, the Commission will inform claimants and the public of the procedures and deadlines that will be applicable to its adjudication of claims. The Commission's processing of the claims will be much quicker than the Tribunal's.

³ Dept. of State Files L/T.

The Tribunal's caseload of U.S. small claims has now been settled. In addition, to date the Tribunal has previously disposed of 1310 cases of the 3856 cases filed: 13 disputes concerning interpretation of the Algiers Accords, 65 claims of Iran or the United States against each other, 797 claims of U.S. nationals against Iran for \$250,000 or more ("large claims"), and 435 small claims. The Tribunal has awarded U.S. claimants \$1.3 billion. After the small claims settlement, there will remain at the Tribunal 12 interpretive disputes, 11 disputes between the governments, 160 U.S. large claims, 2 Iranian large claims, and 108 Iranian small claims. Included, for example, among the remaining claims are claims by U.S. oil companies against Iran and Iran's claim against the U.S. Government arising out of the Iranian Foreign Military Sales Program [which, spanning a fifteen-year period, consisted of over 2800 contracts by 1979, with a cumulative value of over \$20 billion].⁴

In a letter to Stanley J. Glod, Chairman, Foreign Claims Settlement Commission, dated June 28, 1990, Michael J. Matheson, Acting Legal Adviser of the Department of State, formally transferred to the Commission the responsibility to adjudicate the claims of U.S. nationals of less than \$250,000 that were covered by the Award and Settlement Agreement.⁵

BILATERAL INVESTMENT TREATIES

(U.S. *Digest*, Ch. 10, §4)

United States-Poland

On June 19, 1990, President George Bush forwarded to the Senate for its advice and consent to ratification the Treaty between the United States of America and the Republic of Poland Concerning Business and Economic Relations, with Protocol and four related exchanges of letters, signed March 21, 1990, at Washington. The Treaty, the first transmitted by the President for strengthening economic relations with East European countries in support of their ongoing political and economic reforms, is intended to encourage, facilitate and protect U.S. investment and business activity in Poland. It will also serve, the President stated, to stimulate the growth of the private sector and of market institutions in that country.

⁴ Dept. of State File No. P90 0111-1911/1912.

Under the Foreign Relations Authorization Act, Fiscal Years 1986 and 1987, Pub. L. No. 99-93, title V, 99 Stat. 405, 437 (1985), the Foreign Claims Settlement Commission is authorized to determine the validity and amounts of claims by U.S. nationals against Iran that have been settled en bloc. In settling these claims, the Commission is to apply, in the following order:

- (1) the terms of any settlement agreement;
- (2) the relevant provisions of the Declarations of the Government of the Democratic and Popular Republic of Algeria of January 19, 1981, giving consideration to interpretations thereof by the Iran-United States Claims Tribunal; and
- (3) applicable principles of international law, justice, and equity.

50 U.S.C. §1701 note (Supp. V 1987).

⁵ Dept. of State File No. P90 0111-1919.

In his letter of transmittal, the President pointed out that the Treaty reflects a tenet of U.S. international investment policy; namely, that U.S. direct investment abroad and foreign investment in the United States should receive fair, equitable and nondiscriminatory treatment. Under the Treaty, the parties also agree to international law standards for expropriation and compensation; free financial transfers; and procedures for the settlement of disputes, including international arbitration.

The President's letter of transmittal was accompanied by a report on the Treaty from Acting Secretary of State Lawrence Eagleburger, dated June 8, 1990, the major portion of which follows:

This treaty is expected to reinforce and to further the extraordinary recent political and economic developments in Poland. It will serve to stimulate the growth of the private sector and of market institutions in Poland, consistent with the economic reform program adopted by that government. In addition, the treaty will encourage, facilitate and protect U.S. investment and business activity in Poland, which can act as an important stimulus to economic reform. Potential U.S. investors who otherwise might perceive uncertainties in the current business climate in Poland will find considerable assurance in the protections provided by this treaty.

The treaty with Poland extends the reach and scope of U.S. investment policies from the developing world, as reflected in bilateral investment treaties (BITs), into the different landscape of Eastern Europe. Poland's willingness to provide U.S. investors with significant investment guarantees and assurances as a way of inducing additional foreign investment therefore constitutes a noteworthy precedent for the area. While it is U.S. policy to advise potential treaty partners that conclusion of an investment agreement with the United States does not in and of itself result in immediate increases in U.S. investment flows, the treaty with Poland nevertheless will become a key feature in strengthening the U.S.-Poland bilateral investment relationship. The United States currently is seeking to build similar investment ties to other East European states and to the Soviet Union through the negotiation of treaties comparable to that with Poland.

Congressional support for the Poland treaty is contained in Section 306 of the Support for East European Democracy (SEED) Act of 1989, which provides:

The Congress urges the President to seek bilateral investment treaties with Poland and Hungary in order to establish a more stable legal framework for United States investment in those countries.

A number of European countries, including the United Kingdom and the Federal Republic of Germany, have concluded investment protection treaties with Poland. Other European countries are negotiating investment treaties with Poland as well. The U.S. treaty with Poland, while resembling its European counterparts in a number of important respects, is, however, more comprehensive and far-reaching.

THE U.S.-POLAND TREATY

Summary of Key Provisions

This treaty was negotiated by the Department of State, the Office of the United States Trade Representative, the Department of Commerce and the Department of the Treasury, in conjunction with other interested U.S. Government agencies. In the course of negotiations, the United States pursued four main objectives:

Foreign investors are to be accorded treatment in accordance with international law and are to be treated no less favorably than investors of the host country or of third countries, whichever is the most favorable treatment ("national" or "most-favored-nation" (MFN) treatment), subject to certain specified exceptions;

International law standards shall apply to the expropriation of investments and to the payment of compensation for expropriation;

Funds associated with an investment may be freely transferred into and out of the host country; and

An investor may take a dispute with a Party directly to binding third-party arbitration without first resorting to domestic courts.

Provisions of the treaty reflecting these objectives are described below.

The treaty with Poland is significant in that it represents the first occasion on which an East European country expressly has recognized the "prompt, adequate, and effective" international law standard of compensation for expropriation. Nor has an East European country previously consented generally to international arbitration of alleged discriminatory treatment accorded a foreign investor by that Party; previously, such disputes were to be resolved by domestic courts. Finally, the provision for free transfers of returns, which is subject to a transitional exception for repatriation of certain types of profits, is also precedential in its breadth for an East European country whose investment climate formerly was heavily influenced by the inconvertibility of its currency.

Definitions

The definitional section of the U.S.-Poland treaty clarifies terms such as "investment," "control," "commercial activity" and "company of a Party." The concept of "investment" is broad and designed to be flexible; although numerous types of economic interests are enumerated, the intent is to include all legitimate interests in the territory of either Party, whether directly or indirectly controlled by nationals of the other, having economic value and associated with an investment. One such specified category of "investment" is intellectual property, the definition of which has been modified from recent BITs in order to reflect new developments in the field. "Control" is defined as a substantial interest in or the ability to exercise substantial influence over the management and operation of an investment, thus encompassing appropriate non-equity financial stakes as well as investment controlled via stockholdings.

The comprehensive nature of the treaty with Poland is indicated by its coverage of "commercial activities," defined as non-investment activ-

ities by a national or company of a Party related to the sale or purchase of goods and services and the granting of franchises or rights under license. This provision is intended to ensure protection to, e.g., representative offices of U.S. companies in pursuing sales in Poland, without, however, conferring rights related to trade in goods (covered exclusively by the GATT). A final significant definition in the treaty is "company of a Party," which refers to any organization constituted under the laws of a Party, whether privately or governmentally owned.

Treatment

The U.S.-Poland treaty accords the better of national or most-favored-nation treatment ("non-discriminatory" treatment) to established foreign investment, subject to each Party's exceptions which are listed in a separate Annex. (Entry of U.S. investments to Poland is, however, subject to certain restrictions contained in Polish law, which are discussed further below.) The exceptions are designed to protect state regulatory interests and, for the United States, to accommodate the derogations from national treatment contained in state or federal law relating to areas such as air transport, shipping, banking, telecommunications, energy and power production, insurance, and from national and MFN treatment in the case of securities and ownership of real property. In addition, rights to engage in mining on the public domain are dependent on reciprocity.

Poland has identified a comparable list of exceptions, but also has stated its intention to remove some such sectors from the Annex as its process of privatization and demonopolization progresses. Poland further has guaranteed MFN treatment to U.S. nationals and companies in acquiring interests in any governmentally owned enterprise undergoing privatization.

The exceptions relating to securities regulation are intended to mean only that the most-favored-nation and national treatment provisions of the treaty, to the extent applicable, are not inconsistent with the application by either Party of prudential laws and regulations governing the offering and trading of securities and activities related thereto in its territory by nationals and companies of the other Party, and the activities of securities firms (including banks, brokers and dealers), investment advisers, and investment companies.

The treaty also includes a number of general protections that are designed to reinforce the non-discriminatory treatment standard. The Parties agree to accord investments and commercial activities "fair and equitable treatment" and "full protection and security" in no case "less than that required by international law." Parties additionally are obliged to observe their contractual obligations with regard to investments and commercial activities, and to provide effective means of legal recourse for enforcing rights established under the treaty. They also are restricted from imposing performance requirements on investments.

Certain rights relating to the staffing of investments and commercial activities are conferred by the Poland treaty. Nationals and companies engaged in investment or commercial activities are permitted entry to the territory of the other Party, subject to national laws relating to the entry of aliens. Further, companies which are investments have a right

to engage "professional, technical, and managerial personnel of their choice, regardless of nationality."

Expropriation

The U.S.-Poland treaty also confers protection from unlawful interference with property interests and ensures compensation in accordance with international law standards. It provides that any direct or indirect taking must be: for a public purpose; non-discriminatory; accompanied by the payment of prompt, adequate and effective compensation; and in accordance with due process of law and the general standards of treatment discussed above. Thus covered are any measures, regardless of their form, which have the effect of depriving an investor of his interest. Compensation, which must be equivalent to the "fair market value of the expropriated investment immediately before the expropriatory action was taken or became publicly known, whichever is earlier," must be paid "without delay," include interest "at a commercially reasonable rate . . . from the date of expropriation," be "fully realizable," "freely transferable," and "calculated on the basis of the prevailing market rate of exchange for commercial transactions on the date of expropriation." (The treaty does not, however, provide a specific valuation method for compensating such losses.) The treaty grants the right to "prompt review" by appropriate judicial or administrative authorities in order to determine whether the compensation offered is in conformity with these principles. It also extends non-discriminatory treatment to investments in cases of loss due to war or other civil disturbance.

Transfers

The U.S.-Poland treaty provides for transfers "related to an investment or commercial activity," specifically of returns, compensation for expropriation, payments under contract, proceeds from sale of an investment, and contributions to capital for maintenance or development of an investment. Such transfers are to be made "freely and without delay," and in a "freely usable currency at the prevailing market rate of exchange for commercial transactions on the date of transfer with respect to spot transactions in the currency to be transferred." (The sole exception to this principle, relating to the transferability of profits earned in Poland in local currency, is discussed further below.) However, Parties may maintain laws and regulations, or fulfill court-imposed obligations which require reports of currency transfer or impose income taxes by means of a withholding tax applicable to dividends.

Dispute settlement

The U.S.-Poland treaty provides that where certain defined investment disputes arise between a Party and a national or company of the other Party, including those relating to rights conferred under the treaty or involving the interpretation of an investment authorization, they may be submitted to arbitration after six months. Exhaustion of local remedies is not required. Permissible arbitral fora include the International Centre for the Settlement of Investment Disputes ("ICSID"), the Additional Facility of the Centre, a tribunal established under the arbitration rules of the United Nations Commission on International Trade Law ("UNCITRAL"), and any mutually agreed arbitral

institution. The treaty specifies the availability of the Additional Facility or of *ad hoc* arbitration because Poland has not adhered to the ICSID Convention. During the negotiations Poland did indicate, however, its intent to do so in the near future.

The treaty also provides for state-to-state arbitration between the Parties in case of a dispute regarding the interpretation or application of the treaty. UNCITRAL arbitration rules shall govern such cases, unless the Parties otherwise agree. The treaty also outlines the procedures for the creation of the arbitral tribunal.

Other provisions

The U.S.-Poland treaty urges Parties to apply their tax policies fairly and equitably. Because the United States specifically addresses tax matters in tax treaties, this treaty generally excludes such matters, addressing them only to the extent that they relate to expropriation, transfers, or investment authorizations, and are not covered by the bilateral tax treaty. Another provision exempts from the scope of this treaty's dispute resolution provisions disputes arising under Export-Import Bank programs or other credit guarantee or insurance arrangements. The treaty also does not serve to derogate from existing obligations that require more favorable treatment of investments and commercial activities, nor does it apply to GATT-related multilateral obligations entered into subsequently. Also expressly reserved is a Party's right to take any measures that are necessary to protect public order or essential security interests.

The treaty enters into force 30 days after exchange of instruments of ratification, and continues in force for at least ten years. Either Party may terminate the treaty at the end of the initial ten-year term or thereafter, subject to one year's written notice. The Annex, Protocol, and related letters on assistance to investors, tourism, intellectual property, and entry of investments (discussed further below) form an integral part of the treaty. The treaty applies to investments and commercial activities existing at the time of entry into force, as well as those undertaken thereafter.

New features

The U.S.-Poland treaty includes a number of significant provisions that have no counterpart in prior BIT practice. These features are designed to resolve particular problems that U.S. business traditionally has faced in centrally-controlled, non-market Eastern European economies, and which may continue to be impediments to investment and commerce during the period of Poland's transition to a free-market system.

One such provision is a guarantee that nationals and companies receive non-discriminatory treatment with respect to a specified list of operational measures related to their investments and commercial activities. These include: the issuance of registrations, licenses and permits; access to financial institutions and credit markets; access to their funds held in financial institutions; the importation and installation of business-related equipment; advertising and the conduct of market studies; the appointment of commercial representatives; direct marketing; access to public utilities; and access to raw materials. It should be noted that the right to non-discriminatory treatment may require that U.S.

nationals and companies receive treatment no less favorable than that granted by Poland to enterprises that remain under state ownership or control.

Particular attention also has been paid to overcoming bureaucratic obstacles and transparency problems that may continue to exist in Poland in the immediate future. In a side letter to the treaty, Poland has undertaken to designate within its Agency for Foreign Investments a Deputy President who shall assist U.S. nationals and companies in deriving full benefits from the treaty. The Deputy President's tasks include serving as the Polish government coordinator and problem solver for U.S. investors facing regulatory difficulties, as well as functioning as a clearinghouse for information pertinent to foreign investors. The treaty itself also contains provisions designed to increase transparency about government regulation affecting foreign investment.

The Poland treaty additionally contains extensive protections for intellectual property rights that are not ordinarily addressed in BITs. In agreeing to adhere to key international agreements and promptly to enact a comprehensive set of national laws governing intellectual property, Poland has signalled its readiness to improve a critical element of its foreign investment climate. Poland has undertaken, *inter alia*: to extend copyright protection to computer programs; to provide product as well as process patent protection for pharmaceuticals and chemicals; and to protect integrated circuit layout designs (mask works). National legislation implementing these obligations will be enacted during 1991 and 1992, as provided in a side letter to the treaty. In that context Poland also has stated that it will adhere in 1990 to the Paris Act of the Berne Convention for the Protection of Literary and Artistic Works.

A further side letter to the treaty clarifies the relation of the Treaty on Business and Economic Relations to the U.S.-Poland Agreement on the Development and Facilitation of Tourism, signed on September 20, 1989. In this side letter Poland has provided an assurance that its government-controlled tourism enterprises will provide service to U.S. nationals and companies on a fair and equitable basis.

Modifications of BIT-based provisions

Two provisions of the U.S.-Poland treaty—those relating to the entry of investments and to the repatriation of profits—differ in substance from the U.S. negotiating text. Both issues clearly are among the most difficult to address for a country making a rapid transition from a closed, non-market economic system to an open, free-enterprise model. While the United States agreed to accommodate these Polish concerns within the framework of the treaty, neither provision represents a major departure from previous BIT practice.

U.S. nationals and companies seeking to invest in Poland are subject to Polish law governing the entry of foreign investment, which permits denial only if the proposed investment presents a threat to state economic interests, to national security, or to the environment. According to the Government of Poland, in recent practice, this law has been applied to preclude investments only very rarely. In a side letter to the treaty, Poland has committed to reviewing these requirements with the United States within two years, with a view to narrowing and subse-

quently phasing them out. Poland further has undertaken a series of commitments that will ease the existing screening process for prospective U.S. investors. It will: issue a permit to a U.S. investment automatically within sixty days unless notice of, and reasons for, denial are provided; utilize the "state economic interests" criterion only exceptionally and not for the purpose of protecting domestic enterprise from competition; apply to foreign investors the same environmental standards applied to Polish nationals; and accord U.S. nationals treatment at least as favorable as that accorded to prospective investors from other states.

The treaty provides U.S. investors substantially more favorable conditions with respect to the transfer of returns than provided under current Polish law. The Polish exchange law provides that a company may obtain foreign currency for transferring profits earned in a calendar year only up to the amount of the surplus of its exports in that year over its import expenditures. In addition, it may obtain foreign currency for 15 percent of any profits it may have had for that year in excess of the export surplus. No provision is made for transferring the remaining 85 percent, except that reinvested profits may in effect be transferred after the investment is sold for convertible currency. If the investor receives zlotys in payment for the sold or liquidated investment, he may not obtain foreign currency for transferring the proceeds until ten years after the investment is registered.

The treaty requires progressively more favorable treatment for U.S. investors with respect to transfers of surplus profit than that provided for under the above law. Thus the protocol to the treaty provides as follows: as of January 1, 1992, 20 percent of untransferred surplus profits earned in 1990 and 1991 may be transferred; as of January 1, 1993, 35 percent of untransferred surplus profits earned in 1990 through 1992 may be transferred; as of January 1, 1994, 50 percent of untransferred surplus profits earned in 1990 through 1993 may be transferred; as of January 1, 1995, 80 percent of untransferred surplus profits earned in 1990 through 1994 may be transferred; and as of January 1 of each year after 1995, all untransferred surplus profits earned from 1990 through the preceding year may be transferred. The application of this progressive scale to accumulated untransferred profits earned in 1990 and subsequently assures that U.S. investors will be able to transfer substantial amounts of their profits even before 100 percent transferability is achieved in 1995. The treaty also provides more favorable treatment than current law in that it does not permit transfers of proceeds from sales or liquidations to be delayed.

In only one other treaty has Poland agreed to an analogous arrangement for permitting foreign investors to repatriate local currency earnings at a rate beyond that permitted by domestic law. That treaty, however, provides for phased-in full repatriation over a seven-year rather than a four-year period, and also permits delays in transfers of proceeds from sales and liquidations.

Submission of this treaty marks a significant development in our international investment policy and in our bilateral relationship with Poland. I am joined by the United States Trade Representative, the Secretary of Commerce, and the Secretary of the Treasury in supporting this treaty and favor its transmittal to the Senate at an early date.¹

¹ S. TREATY DOC. NO. 18, 101st Cong., 2d Sess., at V-XII (1990).

FOREIGN ASSETS CONTROL AND ECONOMIC SANCTIONS

(U.S. *Digest*, Ch. 10, §§5, 12)*Kuwait and Iraq*

Following the invasion of Kuwait by Iraqi forces on August 2, 1990, President George Bush issued Executive Order No. 12,722, which declared a national emergency to deal with the threat to U.S. national security and foreign policy caused by the policies and actions of the Government of Iraq, blocked all property and interests in property of that Government, and prohibited imports from and exports to Iraq. The text of Executive Order No. 12,722 follows:

By the authority vested in me as President by the Constitution and laws of the United States of America, including the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.), the National Emergencies Act (50 U.S.C. 1601 et seq.), and section 301 of title 3 of the United States Code,

I, GEORGE BUSH, President of the United States of America, find that the policies and actions of the Government of Iraq constitute an unusual and extraordinary threat to the national security and foreign policy of the United States and hereby declare a national emergency to deal with that threat.

I hereby order:

Section 1. All property and interests in property of the Government of Iraq, its agencies, instrumentalities and controlled entities and the Central Bank of Iraq that are in the United States, that hereafter come within the United States or that are or hereafter come within the possession or control of United States persons, including their overseas branches, are hereby blocked.

Section 2. The following are prohibited, except to the extent provided in regulations which may hereafter be issued pursuant to this Order:

(a) The import into the United States of any goods or services of Iraqi origin, other than publications and other informational materials;

(b) The export to Iraq of any goods, technology (including technical data or other information controlled for export pursuant to Section 5 of the Export Administration Act (50 U.S.C. App. 2404)) or services from the United States, except publications and other informational materials, and donations of articles intended to relieve human suffering, such as food, clothing, medicine and medical supplies intended strictly for medical purposes;

(c) Any transaction by a United States person relating to transportation to or from Iraq; the provision of transportation to or from the United States by any Iraqi person or any vessel or aircraft of Iraqi registration; or the sale in the United States by any person holding authority under the Federal Aviation Act of 1958, as amended (49 U.S.C. 1514), of any transportation by air which includes any stop in Iraq;

(d) The purchase by any United States person of goods for export from Iraq to any country;

(e) The performance by any United States person of any contract in support of an industrial or other commercial or governmental project in Iraq;

(f) The grant or extension of credits or loans by any United States person to the Government of Iraq, its instrumentalities and controlled entities;

(g) Any transaction by a United States person relating to travel by any United States citizen or permanent resident alien to Iraq, or to activities by any such person within Iraq, after the date of this Order, other than transactions necessary to effect such person's departure from Iraq, or travel for journalistic activity by persons regularly employed in such capacity by a newsgathering organization; and

(h) Any transaction by any United States person which evades or avoids, or has the purpose of evading or avoiding, any of the prohibitions set forth in this Order.

For purposes of this Order, the term "United States person" means any United States citizen, permanent resident alien, juridical person organized under the laws of the United States, or any person in the United States.

Section 3. This Order is effective immediately.

Section 4. The Secretary of the Treasury, in consultation with the Secretary of State, is hereby authorized to take such actions, including the promulgation of rules and regulations, as may be necessary to carry out the purposes of this Order. Such actions may include prohibiting or regulating payments or transfers of any property or any transactions involving the transfer of anything of economic value by any United States person to the Government of Iraq, its instrumentalities and controlled entities, or to any Iraqi national or entity owned or controlled, directly or indirectly, by Iraq or Iraqi nationals. The Secretary may redelegate any of these functions to other officers and agencies of the Federal government. All agencies of the United States government are directed to take all appropriate measures within their authority to carry out the provisions of this Order, including the suspension or termination of licenses or other authorizations in effect as of the date of this Order.

This Order shall be transmitted to the Congress and published in the Federal Register.¹

The ruler of Kuwait, Sheik Jaber Ahmed Sabah, fled to Saudi Arabia as the invasion began (several members of the Kuwaiti royal family were reportedly killed in the fighting), and Iraqi forces seized complete control of Kuwait, installing a new provisional revolutionary government.

To protect the property of the legitimate Government of Kuwait from possible seizure, diversion or misuse by Iraq, the President, on the same date, August 2, 1990, also issued Executive Order No. 12,723, which read as follows:

By the authority vested in me as President by the Constitution and laws of the United States of America, including the International Emer-

¹ 55 Fed. Reg. 31,803 (1990).

gency Economic Powers Act (50 U.S.C. 1701 et seq.), the National Emergencies Act (50 U.S.C. 1601 et seq.), and 3 U.S.C. 301,

I, GEORGE BUSH, President of the United States, find that the situation caused by the invasion of Kuwait by Iraq constitutes an unusual and extraordinary threat to the national security, foreign policy and economy of the United States and have declared a national emergency to deal with that threat.

I hereby order blocked all property and interests in property of the Government of Kuwait or any entity purporting to be the Government of Kuwait, its agencies, instrumentalities and controlled entities and the Central Bank of Kuwait that are in the United States, that hereafter come within the United States or that are or hereafter come within the possession or control of United States persons, including their overseas branches.

For purposes of this Order, the term "United States person" means any United States citizen, permanent resident alien, juridical person organized under the laws of the United States or any person in the United States.

The Secretary of the Treasury is authorized to employ all powers granted to me by the International Emergency Economic Powers Act to carry out the provisions of this Order.

This Order is effective immediately and shall be transmitted to the Congress and published in the Federal Register.²

On August 6, 1990, the United Nations Security Council, which on August 2, 1990, had adopted SC Resolution 660, condemning Iraq's invasion of Kuwait, calling for the immediate and unconditional withdrawal of Iraqi troops, and calling for Iraq and Kuwait to begin intensive negotiations immediately to resolve their differences, by a vote of 13-0-2 (Cuba, Yemen), adopted SC Resolution 661, which imposed economic sanctions on Iraq. The text follows, in major part:

The Security Council,

Reaffirming its Resolution 660 (1990),

Deeply concerned that this resolution has not been implemented and that the invasion by Iraq against Kuwait continues with further loss of human life and material destruction,

Determined to bring the invasion and occupation of Kuwait by Iraq to an end and to restore the sovereignty, independence and territorial integrity of Kuwait,

Noting that the legitimate government of Kuwait has expressed its readiness to comply with resolution 660 (1990),

Mindful of its responsibilities under the Charter for the maintenance of international peace and security,

² *Id.* at 31,805.



Affirming the inherent right of individual or collective self-defense, in response to the armed attack by Iraq against Kuwait, in accordance with Article 51 of the Charter,

Acting under Chapter 7 of the Charter of the United Nations,

1. *Determines* that Iraq has failed to comply with operative paragraph 2 of Resolution 660 (1990) and has usurped the authority of the legitimate Government of Kuwait;

2. *Decides*, as a consequence, to take the following measures to secure compliance of Iraq with operative paragraph 2 and to restore the authority of the legitimate Government of Kuwait;

3. *Decides* that all states shall prevent:

a. The import into their territories of all commodities and products originating in Iraq or Kuwait exported therefrom after the date of this resolution;

b. Any activities by their nationals or in their territories which would promote or are calculated to promote the export or transshipment of any commodities or products from Iraq or Kuwait; and any dealings by their nationals or their flag vessels or in their territories in any commodities or products originating in Iraq or Kuwait and exported therefrom after the date of this resolution, including in particular any transfer of funds to Iraq or Kuwait for the purpose of such activities or dealings;

c. The sale or supply by their nationals or from their territories or using their flag vessels of any commodities or products, including weapons or any other military equipment, whether or not originating in their territories but not including supplies intended strictly for medical purposes, and, in humanitarian circumstances, foodstuffs, to any person or body in Iraq or Kuwait or to any person or body for the purposes of any business carried on in or operated from Iraq or Kuwait, and any activities by their nationals or in their territories which promote or are calculated to promote such sale, or supply or use of such commodities or products;

4. *Decides* that all states shall not make available to the Government of Iraq or to any commercial, industrial or public utility undertaking in Iraq or Kuwait, any funds or any other financial or economic resources and shall prevent their nationals and any persons within their territories from removing from their territories or otherwise making available to that government or to any such undertaking any such funds or resources and from remitting any other funds to persons or bodies within Iraq or Kuwait, except payments exclusively for strictly medical or humanitarian purposes, and, in humanitarian circumstances, foodstuffs;

5. *Calls upon* all states, including states nonmembers of the United Nations, to act strictly in accordance with the provisions of this resolution notwithstanding any contract entered into or license granted before the date of this resolution;

6. *Decides* to establish, in accordance with Rule 28 of the provisional rules of procedure of the Security Council, a Committee of the Security Council consisting of all the members of the Council, to undertake the following tasks and to report on its work to the Council with its observations and recommendations:

7. *Calls upon* all states to cooperate fully with the Committee . . . including supplying such information as may be sought by the Committee . . . ;

8. *Requests* the Secretary-General to provide all necessary assistance to the Committee . . . ;

9. *Decides* that, notwithstanding paragraphs 4 through 8, nothing in this resolution shall prohibit assistance to the legitimate Government of Kuwait, and *calls upon* all states:

- a. to take appropriate measures to protect assets of the legitimate government of Kuwait and its agencies; and
- b. not to recognize any regime set up by the occupying power;

11. *Decides* to keep this item on its agenda and to continue its efforts to put an early end to the invasion by Iraq.³

ARMS CONTROL AND DISARMAMENT

(U.S. *Digest*, Ch. 14, §7)

Protocols to Test Ban and Nuclear Explosions Treaties

On June 28, 1990, President George Bush transmitted to the Senate for advice and consent to ratification the Protocol to the 1974 Treaty between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Underground Nuclear Weapon Tests,¹ and the Protocol to the 1976 Treaty between the United States of America and the Union of Soviet Socialist Republics on Underground Nuclear Explosions for Peaceful Purposes.² The two Treaties limit the yield of underground nuclear weapon tests and underground nuclear explosions for peaceful purposes to no more than 150 kilotons.

The Protocols were signed on June 1, 1990, at the Washington Summit; they replace and are to be substituted for the protocols to the respective Treaties originally submitted with them to the Senate on July 29, 1976.³ (Committee hearings had been held on the two Treaties during 1976, but at the request of the administration in 1978, they were not reported for consideration by the full Senate.)

In addition, President Bush stated, the administration remains committed to the nuclear testing treaty safeguards that were submitted to the Senate in 1987, which he characterized as "essential to the national security and to the maintenance of a credible nuclear deterrent."

The President's letter of transmittal continued:

The Protocols represent the successful culmination of several years of effort to provide for effective verification of compliance with the

³ SC Res. 661, UN Doc. S/PV.2933 (Aug. 6, 1990) (unofficial transcription). For the vote, see *id.* at 54-55.

¹ July 3, 1974, S. EXEC. DOC. N, 94th Cong., 2d Sess. 1 (1976), *reprinted in* 13 ILM 906 (1974).

² May 28, 1976, S. EXEC. DOC. N, *supra* note 1, at 5, *reprinted in* 15 ILM 891 (1976).

³ See S. EXEC. DOC. N, *supra* note 1 at 3, 9.

Treaties. Negotiations to develop new Protocols to verify compliance with the limits established by the Treaties began in November 1987 and continued until May 1990, when the Protocols were completed. The Protocols provide for a variety of activities related to verification, including the use of the hydrodynamic yield measurement method. Operational changes in the U.S. nuclear test program, including changes at the Nevada Test Site, which implementation of the verification measures will entail were considered carefully and have been judged manageable and therefore acceptable in the interests of effective verification.⁴

CORRECTION

In the *Digest* entry "Proposed Vesting of Vietnamese Assets," which appeared in the April 1990 issue at page 539, the Paris Conference referred to in the second full paragraph on page 540 took place in 1989. It was the International Conference on Cambodia, held at Paris from July 30 to August 30, 1989, not the 1973 International Conference on Vietnam, as stated in footnote 3 on the same page.

⁴ S. TREATY DOC. NO. 19, 101st Cong., 2d Sess. 1 (1990).

On September 14, 1990, the Senate Committee on Foreign Relations unanimously recommended that the Senate give its advice and consent to the two Protocols. S. EXEC. REP. NO. 31, 101st Cong., 2d Sess. (1990).

INTERNATIONAL DECISIONS

KEITH HIGHET AND GEORGE KAHALE III

*Marine delimitation—lateral seaward boundary between two U.S. states—1958
Geneva Convention on the Territorial Sea and Contiguous Zone—original action
between states in U.S. Supreme Court*

GEORGIA v. SOUTH CAROLINA. 110 S.Ct. 2903.
U.S. Supreme Court, June 25, 1990.

In August 1977, the state of Georgia lodged with the Supreme Court of the United States a motion for leave to file a complaint against the state of South Carolina regarding a dispute concerning their mutual boundary along the lower reaches of the Savannah River and into the Atlantic Ocean. The application was subsequently granted, and the matter was referred for a hearing to a Special Master, Senior Judge Walter E. Hoffman of the U.S. District Court for the Eastern District of Virginia.

The Special Master later issued two reports, one in 1986 regarding the boundary in the Savannah River, and the other in 1989 concerning the lateral seaward boundary. Both states filed exceptions to the Special Master's findings and recommendations. In deciding this original action, the Supreme Court (per Blackmun, J.), in a fractured set of opinions, overruled all but one of the exceptions and adopted the Special Master's reports.

This was really two cases in one. Much of the Special Master's and Court's attention was dedicated to drawing a boundary between Georgia and South Carolina in the Savannah River. Although this part of the dispute was ostensibly governed by the 1787 Treaty of Beaufort, an Articles of Confederation-era compact concluded between the two states,¹ it will likely be of little interest to international lawyers. This aspect of the case had already been extensively litigated.² What remained for decision was which state owned certain islands found in the stream of the Savannah River and its mouth. Although the Treaty of Beaufort had reserved these islands to Georgia,³ the Special Master recommended, and the Court (over a vigorous dissent) agreed, not only that the river boundary was unaffected by the 1787 Treaty,

¹ Treaty of Beaufort, Apr. 28, 1787, Ga.-S.C., 33 JOURNALS OF THE CONTINENTAL CONGRESS 467 (1936), *excerpted in* Georgia v. South Carolina, 257 U.S. 516, 519 (1922).

² See South Carolina v. Georgia, 93 U.S. 4 (1876) (in which South Carolina sought an injunction restraining Georgia and federal officials from interrupting navigation in the Savannah River channel); Georgia v. South Carolina, 257 U.S. 516 (1922), and 259 U.S. 572 (1922) (decree); United States v. 450 Acres of Land, 220 F.2d 353 (5th Cir.), *cert. denied*, 350 U.S. 826 (1955) (a condemnation action that the Court in the current case took pains to hold had no effect on the boundary between the two states).

³ Treaty of Beaufort, *supra* note 1, Art. 1 (which said that the boundary was the "most northern branch or stream of the river Savannah . . . , reserving all the islands in the said river[] Savannah . . . to Georgia").

but also that some now-valuable tracts of marsh land had, in fact, accrued to South Carolina through prescription.⁴

The Second Report of the Special Master dealt exclusively with the lateral seaward boundary between Georgia and South Carolina. This dispute was of relatively more recent vintage, arising from a shooting incident involving a South Carolinian trawler illegally shrimping in Georgian waters.⁵ The Treaty of Beaufort did not purport to govern the lateral seaward boundary—in effect, the delimitation of the “territorial seas” of the two states.⁶ After the parties failed to agree on a marine boundary, and the interests of the United States were preserved,⁷ the matter was ripe for adjudication.

There was no dispute, either between the parties or by the Special Master and the Court, that international law provided the relevant principles for drawing the lateral seaward boundary between two states. This proposition was also bolstered by substantial domestic precedent.⁸ The question was, however, which international law principles applied, and how.

The Special Master began with the 1958 Convention on the Territorial Sea and Contiguous Zone and its provision that

[w]here the coasts of two States are opposite or adjacent to each other, neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured. The provisions of this paragraph shall not apply, however, where it is necessary by reason of historic title or other special circumstances to delimit the territorial seas of the two States in a way which is at variance with this provision.⁹

In this case, the Special Master and the Supreme Court were asked to weigh the individual elements of a territorial sea delimitation: equidistance and special circumstances.

⁴ See 110 S.Ct. 2903, 2911–16, as well as Justice Kennedy’s dissent, which Chief Justice Rehnquist joined, *id.* at 2924–26.

⁵ First Report of the Special Master at 101 n.83 (Mar. 20, 1936).

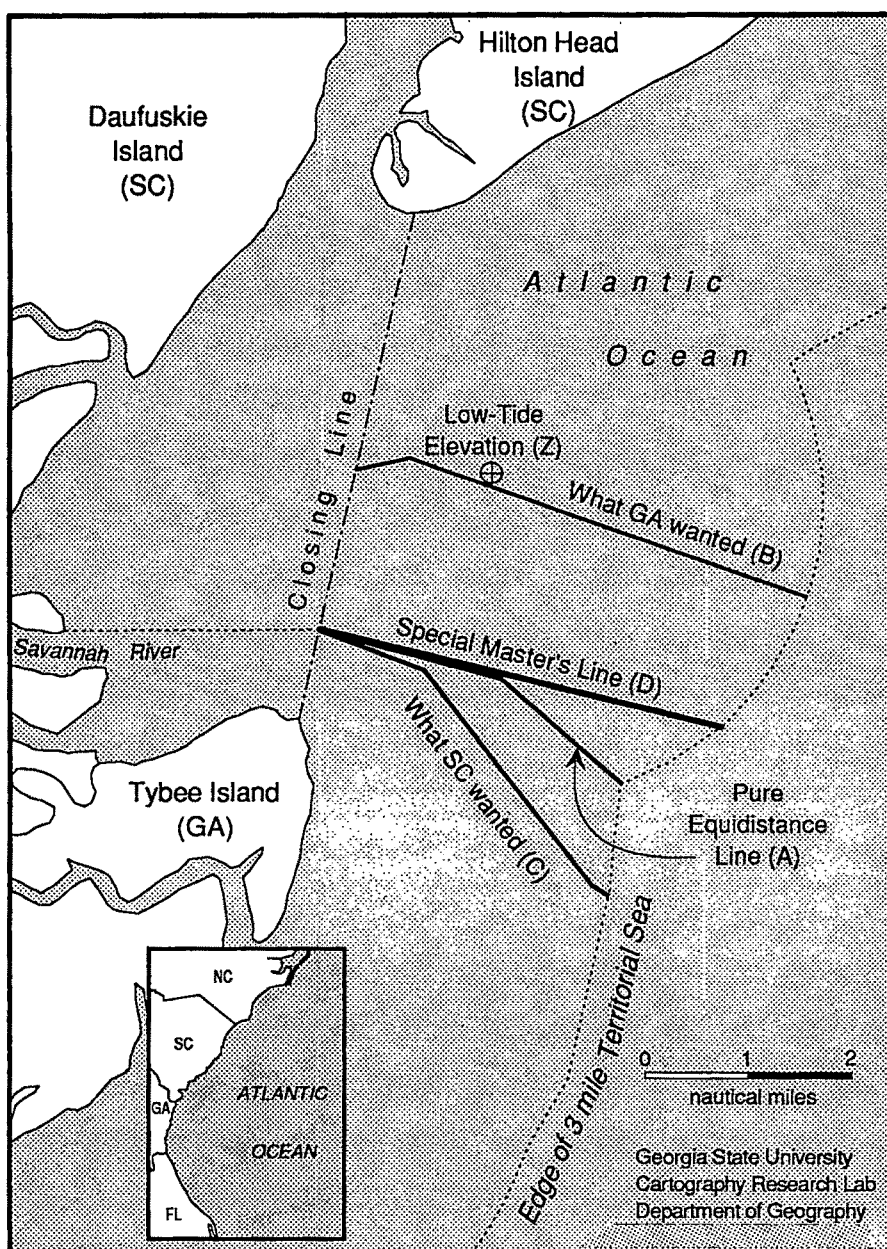
⁶ The phrase “lateral seaward boundary” has apparently become the term of art for marine delimitations between coastal states of the Union. See, e.g., *Texas v. Louisiana*, 426 U.S. 465, 466–67 (1976); 16 U.S.C. §1456a(b)(4)(B) (1988); 15 C.F.R. §§931.80–.85 (1990).

⁷ The parties had agreed in a stipulation with the U.S. Solicitor General that no questions concerning the *outer* limit of the state waters were at issue in this case. Second Report of the Special Master, appendix (Mar. 30, 1989) [hereinafter Second Report]. The United States and the state of Alaska also filed amicus briefs to dispute one assertion made, in dicta, by the Special Master concerning the drawing of straight baselines (Second Report, *supra*, at 12–14), a very contentious matter in another case, *United States v. Alaska*, Orig. No. 84 (U.S. filed Oct. 26, 1979). See *Georgia v. South Carolina*, 110 S.Ct. at 2922 n.7 (discounting the Special Master’s discussion of straight baselines, which was, at any rate, unnecessary for the decision in this case).

⁸ See *Texas v. Louisiana*, 426 U.S. 465, 468–70 (1976); *United States v. California*, 381 U.S. 139, 163–65 (1965); *Wisconsin v. Michigan*, 295 U.S. 455, 461 (1935).

⁹ Apr. 29, 1958; Art. 12, para. 1, 15 UST 1606, TIAS No. 5539, 516 UNTS 205 [hereinafter 1958 Territorial Sea Convention]; see also United Nations Convention on the Law of the Sea, opened for signature Dec. 10, 1982, Art. 15, UN Doc. A/CONF.62/122, reprinted in UNITED NATIONS, OFFICIAL TEXT OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA WITH ANNEXES AND INDEX, UN Sales No. E.83.V.5 (1983) (not yet in force) (where the same language was repeated virtually verbatim).

Not surprisingly, the two parties argued for different applications of equidistance and the accommodation of different "special circumstances," each with a view to capturing more marine territory. The coastline at issue was in the immediate vicinity of the mouth of the Savannah River. Map 1 (below) gives a summary view of the coastal features and the boundary lines proposed by the two parties, as well as the one ultimately adopted by the Special



MAP 1

GEORGIA-SOUTH CAROLINA LATERAL SEAWARD BOUNDARY DISPUTE

Master. The local geography of this stretch of shore is dominated by the Savannah River mouth; this can produce a strict equidistance line (line A) that proceeds nearly at a right angle to the coast for a few miles and then bends (to Georgia's detriment) to the south because of the effect of a low-tide elevation (Z on the map) and South Carolina's Hilton Head Island.

Neither side was content with this strict equidistance line. Georgia argued before the Special Master that low-tide elevation Z was an ephemeral feature and that under the relevant international precedents¹⁰ it should be utterly ignored. Georgia, unhappy with the Special Master's earlier ruling concerning the location of the mouth of the Savannah River, suggested that the starting point for the lateral seaward boundary be adjusted north along the closing line of the river mouth and that the line of delimitation then proceed seaward along line B. For its part, South Carolina urged the adoption of a line following the approximate center of the Savannah River channel (line C). In fact, the Special Master did decide to give no effect to low-tide elevation Z. However, he rejected Georgia's suggestion that the starting point of the delimitation line be adjusted.¹¹

The remainder of the Special Master's Second Report was devoted to considering South Carolina's justifications for using the navigation channel. The Special Master dismissed any suggestion that the *thalweg*, or the deepest part of the channel, was a decisive factor in a marine delimitation.¹² Nevertheless, he did in principle accept the notion that the general direction of the coast was a factor to be considered.¹³ South Carolina argued, however, that the general configuration of the coast—from Cape Hatteras in the north to Cape Canaveral in the south—was relevant to the construction of a lateral seaward boundary. The Special Master did not accept this proposition and, instead, constructed an equidistance boundary approximately at a right angle to the closing line as far as the edge of the territorial sea (line D).¹⁴

¹⁰ See 1958 Territorial Sea Convention, *supra* note 9, Art. 11:

A low-tide elevation is a naturally-formed area of land which is surrounded by and above water at low-tide but submerged at high tide. Where a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the mainland or an island, the low-water line on that elevation may be used as the baseline for measuring the breadth of the territorial sea.

See also *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, 1985 ICJ REP. 13, 48 (Judgment of June 3) (discounting Maltese island of Filfla); *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.)*, 1984 ICJ REP. 246, 329–30 (Judgment of Oct. 12); *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, 1982 ICJ REP. 18, 62–64, 88–89 (Judgment of Feb. 24) (where half effect was given to Kerkennah Islands); *Delimitation of the Continental Shelf (UK v. Fr.)*, HMSO Misc. No. 15, Cmd. 7438, 18 R. Int'l Arb. Awards 3, paras. 122–44, 215–49 (June 30, 1977, and Mar. 14, 1978) (use of Eddystone Rocks as base point; effect of Scilly Isles and Ushant Island on delimitation).

¹¹ Second Report, *supra* note 7, at 9–12. This proposal suggests a comparison with the adjustment of the intersection point along the "closing line" across the Gulf of Maine, in the second segment of the delimitation by the Chamber in that case. 1984 ICJ REP. at 338, para. 226.

¹² Second Report, *supra* note 7, at 15.

¹³ *Id.* at 14–15.

¹⁴ *Id.* at 18. Although President Reagan extended the U.S. territorial sea to 12 nautical miles, Proclamation No. 5928 (Dec. 27, 1988), 54 Fed. Reg. 777 (1989), the Special Master stretched his boundary to only 3 nautical miles. Second Report, *supra* note 7, at 27–28.

Upon exceptions before the Supreme Court, South Carolina renewed this "coastal front" theory as a justification for using the navigation channel of the Savannah River.¹⁵ The Supreme Court overruled this exception, and held that the Special Master had correctly applied the relevant international law standard of balancing equidistance with special circumstances. The Court concluded that the Special Master's line "gives equitable balance and recognition to the so-called equidistant principle and to the inland boundary between the two States, and does so with the least possible offense to any claimed parallel between off-shore territory and the coast itself."¹⁶

Justice Stevens, joined by Justice Scalia, disagreed and indicated in dissent that he would have adopted South Carolina's theory. "I am persuaded," he wrote, "that a boundary drawn in reference to the full coastlines of the respective States, rather than one drawn perpendicular to the line connecting Hilton Head and Tybee Islands, is more equitable and consistent with the equidistant principle of *Texas v. Louisiana*"¹⁷ Justice Stevens then illustrated South Carolina's point by showing a map of the two states with their overlapping coastal fronts and by drawing a boundary line that bisected the disputed territory.

Georgia v. South Carolina is the first case in domestic jurisprudence to apply rigorously the formula for territorial sea delimitations in the 1958 Convention. Although a lateral seaward boundary was at issue in *Texas v. Louisiana*,¹⁸ the dispositive question in that case was the treatment of jetties extending from the coast.¹⁹ In delimiting the mouth of the Savannah River, a whole host of "special circumstances" had to be considered. The Special Master's treatment of such issues as the low-tide elevation, the use of the *thalweg*, the regional and local configurations of the coast, and the concern for proportionality between the coastal frontage and offshore areas was supple and sensible.

Nonetheless, one has the sense that the rule of equidistance was too quickly jettisoned for a consideration of special circumstances. The clear demand of Article 12 of the Territorial Sea Convention (as with Article 15 of the 1982 Convention on the Law of the Sea) is that equidistance is the first principle of territorial sea delimitation, to be modified only where necessary by special circumstances. Indeed, this requirement contrasts sharply with the rules for delimiting the exclusive economic zone (EEZ) and the continental shelf contained in Articles 74 and 83 of the 1982 Convention, which emphasize an "equitable solution."²⁰ One might think, particularly in reading Justice Stevens's dissent endorsing South Carolina's coastal front theory and its explicit use of regional geography, that this was an EEZ or continental shelf delimitation extending to 200 nautical miles, instead of a lateral seaward boundary to only 3. The Special Master's solution of drawing a line right-an-

¹⁵ Exceptions of the State of South Carolina at 17-30, *Georgia v. South Carolina*, 110 S.Ct. 2903 (1990) (Orig. No. 74).

¹⁶ 110 S.Ct. at 2922.

¹⁸ 426 U.S. 465 (1976).

¹⁷ *Id.* at 2923 (Stevens, J., dissenting).

¹⁹ *Id.* at 469-70.

²⁰ See also *Gulf of Maine*, 1984 ICJ REP. at 288-95; *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, 1982 ICJ REP. at 78-82.

gled to the closing line of the river mouth is nothing more than a reprise of the approach taken by the Permanent Court of Arbitration in the *Grisbadarna* case between Sweden and Norway in the first decade of this century.²¹

Not much was at stake in the marine portion of this territorial dispute except state sovereignty and pride. Although rights to dredge-spoil grounds and jurisdiction over shrimpers were affected, only a few square miles of ocean space changed hands. And even though concerns were raised that the lateral seaward boundary could be extended to 200 nautical miles for the purposes of the yet-to-be-funded Coastal Energy Impact Program,²² that phase of the case remains undecided. As territorial sea delimitations go, *Georgia v. South Carolina* will likely be remembered for its straightforward solution to a limited geographic problem.

DAVID J. BEDERMAN*
Of the District of Columbia Bar

National Guard training missions outside United States—federal control over National Guard—"Militia" Clauses of U.S. Constitution—"Montgomery Amendment"

PERPICH v. DEPARTMENT OF DEFENSE. 110 S.Ct. 2418.
U.S. Supreme Court, June 11, 1990.

The Governor of Minnesota, Rudy Perpich, claimed that federal law unconstitutionally denies state governors the power to withhold their consent to federal training missions of state National Guard members outside the United States during peacetime. The district court dismissed the governor's action on three grounds: Congress created the federal National Guard pursuant to its Article I, section 8 power to raise and support armies; the separate identity of state guard units does not limit Congress's plenary authority to train the units as it sees fit when the guard is called into active federal service; and the Constitution neither requires gubernatorial consent for federal training nor prohibits Congress from withdrawing it.¹

The Court of Appeals for the Eighth Circuit initially reversed and held (2-1) (per Heaney, J.) that the federal law in question violated the constitutional reservation of state authority to train the militia and that state National Guard personnel could not be ordered to federal active duty for train-

²¹ *Grisbadarna Case* (Nor. v. Swed.), 11 R. Int'l Arb. Awards 147, 160 (Perm. Ct. Arb. 1909), reprinted in 4 AJIL 226, 232 (1910).

²² See 16 U.S.C. §1456a (1988). For more on this program, see Barmeyer, *Litigation of State Maritime Boundary Disputes*, in RIGHTS TO OCEANIC RESOURCES 53, 57-58 (D. Dallmeyer & L. DeVorey eds. 1989); Charney, *The Delimitation of Lateral Seaward Boundaries Between States in a Domestic Context*, 75 AJIL 28, 28-33 (1981).

* The writer was an unpaid legal adviser to the state of Georgia in this litigation. The views expressed here, however, are solely his own.

¹ 666 F.Supp. 1319 (D. Minn. 1987).

ing without the consent of the states unless Congress or the President first declared a national security emergency or exigency.² An *en banc* ruling by the court of appeals rejected this reasoning and affirmed (7-2) (per Magill, J.) the district court's decision.³ On appeal to the Supreme Court, the Court (per Stevens, J.) unanimously affirmed the circuit court's *en banc* judgment.⁴

In 1985 and 1986, the Defense Department faced a serious challenge to federal authority over the National Guard. Several governors withheld, or indicated that they would withhold, their consent to federal training missions in Central America for members of their state National Guard.⁵ There was concern about the safety, necessity and political wisdom of peacetime training missions in Honduras at the same time that the contra war bridged that country's border with Nicaragua. Federal law explicitly reserved to state governors the power to prevent their respective state National Guard units and members from being ordered by the Defense Department into federal active duty for peacetime training.⁶ In response to the governors' real and anticipated exercise of their veto power, Representative "Sonny" Montgomery (D., Miss.) introduced legislation in Congress to deny governors any power to withhold their consent for federal peacetime training "outside the United States, its territories, and its possessions, because of any objection to the location, purpose, type, or schedule of such active duty." The "Montgomery Amendment" was enacted into law in the autumn of 1986.⁷ Shortly thereafter, the Defense Department ordered members of the Minnesota National Guard to active duty for training in Honduras. Governor Perpich consented to the mission because of the constraints imposed by the Montgomery Amendment, but challenged its constitutionality.

The Constitution provides for two distinct military organizations that can become a functional whole under certain circumstances. The Army Clause empowers Congress to "raise and support Armies," namely, a standing national army.⁸ The two Militia Clauses empower Congress:

² No. 87-5345, slip op. (8th Cir. Dec. 6, 1988). The majority decision is largely restated in the dissent of Judges Heaney and McMillian to the *en banc* decision, 880 F.2d 11, 13-39 (8th Cir. 1989).

³ 880 F.2d 11 (8th Cir. 1989).

⁴ Prior to this *en banc* judgment, the Supreme Court refused to review a similar appeal from the First Circuit by the Governor of Massachusetts. See *Dukakis v. United States Department of Defense*, 686 F.Supp. 30 (D. Mass.), *aff'd*, 859 F.2d 1066 (1st Cir. 1988), *cert. denied*, 109 S.Ct. 1743 (1989).

⁵ See 132 CONG. REC. 21,660-63 (1986). By July 1986, the governors of California, Maine and Ohio had refused to permit National Guard participation in training in Honduras. The governors of Massachusetts, Vermont and Washington indicated that if the issue arose, they would deny permission to participate in training in Honduras. Six other governors reserved judgment on a case-by-case basis. The Iowa House of Representatives and the California Senate passed nonbinding resolutions urging their respective governors to withhold consent to such training. See Brief for Appellees at 37-38, *Perpich v. Department of Defense*, No. 87-5345, slip op. (8th Cir. Dec. 6, 1988).

⁶ 10 U.S.C. §672(b), (d) (1988) (originally enacted in 1952; see note 23 *infra*).

⁷ National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, §522, 100 Stat. 3871 (codified at 10 U.S.C. §672(f) (1988)); see also 132 CONG. REC. 21,660-63 (1986).

⁸ U.S. CONST. Art. I, §8, cl. 12.

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.⁹

At the time of the Constitutional Convention, the state militia lacked any common organization among the thirteen states. Nonetheless, they were the mainstay of the new nation's defense.¹⁰ The Army and Militia Clauses reflect the Framers' concern that there be a limited national army coexisting with a large body of state militia that would be uniformly organized, armed and disciplined so that they would be effective fighting forces when called into federal service.¹¹ State power over the militia would be guaranteed by the express grant of authority to states over the appointment of militia officers and the training of the militia.

The Supreme Court concluded that the plain language of Article I, read as a whole, required its affirmance of the appeals court's judgment.¹² But the Court examined the evolution of the federal statutory scheme, which has transformed the state militia into the state National Guard and the federal National Guard and has authorized the Defense Department to exercise near-total control today over the training of guard units and members. This legislative odyssey reached its first significant marker in 1903, when the Dick Act created the "organized militia" (known as the National Guard of the various states) and the "reserve militia," later termed the "unorganized militia."¹³ Today, the organized militia comprises all able-bodied male citizens between 17 and 45 years of age who have enlisted in their state National Guard and those female citizens who are commissioned officers of their state National Guard. The unorganized militia comprises all other male citizens of such age who have not enlisted in their state National Guard.¹⁴

In the National Defense Act of 1916,¹⁵ Congress "federalized" the National Guard, or organized militia, by requiring every member of a state's National Guard to pledge support to the nation and to the state, as well as to obey the President and the governor.¹⁶ The U.S. Army was organized to include the regular army and the National Guard while in the service of the United States. Guard members drafted into federal service were perma-

⁹ *Id.*, cls. 15, 16.

¹⁰ See Hirsch, *The Militia Clauses of the Constitution and the National Guard*, 56 U. CIN. L. REV. 919, 924, 943-44 (1988); and *United States v. Miller*, 307 U.S. 174, 179 (1939) ("The sentiment of the time [of the ratification of the Constitution] strongly disfavored standing armies; the common view was that adequate defense of country and laws could be secured through the Militia—civilians primarily, soldiers on occasion").

¹¹ See *Perpich*, 110 S.Ct. 2418, 2422-23; and 880 F.2d at 19-23 (Heaney, J., dissenting).

¹² 110 S.Ct. at 2422.

¹³ Act of Jan. 21, 1903, ch. 196, 32 Stat. 775.

¹⁴ See 10 U.S.C. §311 (1988); 32 U.S.C. §313 (1988). An individual who is both under 64 years of age and a former member of the regular armed forces also is eligible for original enlistment. *Id.*

¹⁵ Ch. 134, 39 Stat. 166.

¹⁶ See 32 U.S.C. §304 (1988).

nently discharged from their state National Guard.¹⁷ When it examined the constitutionality of this law two years later, the Supreme Court ruled that the Militia Clauses do not constrain Congress's powers under Article I, section 8 to provide for the common defense, raise and support armies, make rules for the governance of the armed forces, and enact necessary and proper laws for executing those powers, but that these clauses in fact provide additional grants of power to Congress.¹⁸

The National Defense Act Amendments of 1933¹⁹ created the "dual enlistment" program, which requires everyone who enlists in a state National Guard to enlist concurrently in the National Guard of the United States (NGUS), a reserve component of the national armed forces established by the 1933 Act.²⁰ State guard members retain their state identities until ordered into federal active duty in the NGUS.²¹ Once their federal service is completed, their status reverts to membership in the state guard.²² This provision of the 1933 Act overcame the irreversible federal status mandated by the 1916 Act. Significantly, the 1933 Act permitted the order to federal active duty only during periods of national emergency.

In 1952 Congress extended federal control over the National Guard beyond emergency situations by authorizing the Defense Department to order any state guard unit or member into federal active duty in the NGUS for training during peacetime, provided the consent of the state governor was obtained.²³ This gubernatorial consent requirement satisfied critics who questioned the constitutionality of initial drafts of the bill that omitted the requirement.²⁴ Such consent apparently was routinely obtained until the Central American training missions of the mid-1980s. The Montgomery Amendment resulted.

The Supreme Court ruled that the gubernatorial consent requirement of the 1952 Act was not constitutionally required and that its partial repeal by the Montgomery Amendment was therefore constitutionally valid. The Court observed that the dual enlistment system, unchallenged by Governor Perpich, means that when members of the National Guard of Minnesota are ordered into federal service with the NGUS, they lose their status as members of the state militia during their period of federal service. The Court explained that "[i]f that duty is a training mission, the training is performed by the Army in which the trainee is serving, not by the militia from which the member has been temporarily disassociated."²⁵ When the state National Guard member is ordered to put on his or her federal hat, the Court concluded, "the Militia Clause is no longer applicable."²⁶ The require-

¹⁷ Sec. 111, 39 Stat. at 211.

¹⁸ *Selective Draft Law Cases*, 245 U.S. 366, 377 (1918); see also *Cox v. Wood*, 247 U.S. 3, 6 (1918) (the plenary power to raise armies was "not qualified or restricted by the provisions of the militia clause").

¹⁹ Ch. 87, 48 Stat. 153.

²⁰ See 10 U.S.C. §§591(a), 3261, 8261 (1988).

²¹ See 10 U.S.C. §§3079, 8079 (1988).

²² 32 U.S.C. §325 (1988).

²³ Armed Forces Reserve Act of 1952, ch. 608, §233(c), (d), 66 Stat. 481, 490 (codified as amended at 10 U.S.C. §672(b), (d) (1988)).

²⁴ See *Perpich*, 880 F.2d at 33 n.26 (Heaney, J., dissenting).

²⁵ 110 S.Ct. at 2426.

²⁶ *Id.* at 2427.

ment of the first Militia Clause—that federal service be mandatory in three extraordinary situations—thus becomes nonexclusive. Much of the Court's reasoning is grounded in this view of the dual enlistment system.

The Court also observed that the authority of the states to train the militia is limited in the second Militia Clause by "the discipline prescribed by the Congress." The Court interpreted this to mean that "[i]f the discipline required for effective service in the Armed Forces of a global power requires training in distant lands, or distant skies, Congress has the authority to provide it."²⁷ Accordingly, once a state National Guard member is on active duty in the NGUS, both the training and the discipline are entirely in federal hands.

Influencing the Court's textual and statutory analysis is the presumption that federal control over the armed forces is exclusive under the Constitution. Drawing upon "the supremacy of federal power in the area of military affairs," the Court noted that the federal Government "provides virtually all of the funding, the materiel, and the leadership for the state Guard units."²⁸ At any one time, relatively small numbers of Minnesota's guard members are on federal active duty for brief training missions. The Court found that a state governor retains the power, in spite of the Montgomery Amendment, to veto state guard participation in a proposed federal training mission if it were to interfere with the state guard's capacity to respond to local emergencies.²⁹ Since 1955, federal law has entitled each state to establish and maintain at its own expense a defense force (separate from the state National Guard), whose members would be exempt from being drafted into the U.S. Armed Forces or having to enlist in the NGUS.³⁰ This softens the sharp edges of the federal statutory scheme because, the Court observed, federal law does not deprive Minnesota of any constitutional entitlement to a separate militia of its own.³¹

Shakespeare's Archbishop of Canterbury, whose convoluted justification for the invasion of France induced Henry V to wage a glorious foreign war, would have admired the Supreme Court's puzzling logic in this case.³² In the

²⁷ *Id.* at 2428.

²⁸ *Id.*

²⁹ *Id.*

³⁰ 69 Stat. 686 (codified as amended at 32 U.S.C. §109(c) (1988)). At least 30 states have enacted statutes providing for the organization of such defense forces. It has been reported that at least 10,000 individuals are enrolled in these organizations. See Brief for Respondents at 7–8, *Perpich*, 110 S.Ct. 2418.

³¹ 110 S.Ct. at 2429.

³² W. SHAKESPEARE, *Henry V*, act 1, sc. 2, lines 33–95, in THE OXFORD SHAKESPEARE 472 (1978). At the close of Solicitor General Kenneth W. Starr's oral argument before the Supreme Court in *Perpich v. Department of Defense*, Justice Blackmun leaned forward and remarked:

General Starr, as an old buck private in the rear rank of a Minnesota Guard, I can say that not a one of us in the rear rank would understand this argument today. [Laughter] We—we knew that we had to go to Camp Ripley—you won't know where that is, but Mr. Tunheim [counsel for petitioner] will. Or to, indeed, Lake City. But the thought of this dichotomy would be too much for the ignoramuses, such as I, that were in that rear rank.

Official Transcript, Proceedings before the Supreme Court of the United States, *Perpich v. Department of Defense*, Case No. 89-542, at 49 (Mar. 27, 1990, Alderson Reporting Co., Washington, D.C.).

beginning—1789—the national Government was constitutionally empowered to order the state militia into federal service only in times of national emergency. Two centuries later, the Court inverted the Framers' intent. It interpreted the Constitution as investing the national Government with the power to order the members of a state National Guard into active duty in the federal National Guard for any reason authorized by federal statute (such as peacetime training overseas) and, by grace of the conference report on the Montgomery Amendment, to reserve to the state governor only the power to defy such an order if those members of the state National Guard are needed for a local emergency.³³ The Court's reasoning offers no constitutional protection to state governors if Congress decides in the future to deny them that remaining emergency power explicitly.

The Court equates the state "defense forces" that have been permitted under federal law since 1955 with a state's "constitutional entitlement to a separate militia of its own." Yet federal law expressly prohibits a state's defense forces from conforming with the requirements of the Militia Clauses. A member of a state defense force cannot be a member of the state National Guard or of the NGUS; therefore, the federal Government at best has limited authority to order defense forces into federal duty.³⁴ The federal Government cannot organize, arm or discipline state defense forces, as it does with the state National Guard. Such defense forces hold the potential for disparate organization, dangerously diverse weaponry, disciplinary chaos and vigilante justice. The fundamental purpose of the Militia Clauses was to preserve state militia and prepare them for emergency federal service as uniformly organized, armed and disciplined fighting forces, attributes that would be reflected as well in their state militia service.³⁵ State defense forces—whatever their independent merit—defeat that purpose.

Despite its reliance upon the "plain language of Article I," the Court's reading of the second Militia Clause is unconvincing. The Court recognized

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The Conferees reiterate that under [the Montgomery Amendment], the governor still will have the authority to block the training if he or she thinks the guardsmen are needed at home for local emergencies. The conferees intend that nothing about the words "location, purpose, type, and schedule" should constrain a governor in according appropriate priority to a state or local emergency, such as a flood or other natural disaster.

H.R. CONF. REP. NO. 1001, 99th Cong., 2d Sess. 475 (1986), *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 6413, 6534.

³⁴ See 32 U.S.C. §109(e) (1988). The dual enlistment system requires concurrent enlistment in both the state National Guard and the NGUS. The Court offers the fragile argument that 10 U.S.C. §§331–333 *possibly* subject state defense forces to call for federal active service. See 110 S.Ct. at 2429 n.25. But these provisions of federal law, which authorize federal use of state militia to suppress insurrection or to enforce federal laws or to suppress rebellion against the authority of the United States, do not address all of the circumstances (such as invasions) covered by the first Militia Clause. They were enacted during and immediately after the Civil War, when neither the National Guard nor state defense forces existed. In recent decades, the federal Government has relied exclusively on state and federal National Guard units when resorting to its authority under these provisions. See 10 U.S.C. §§331–333 (1988).

³⁵ The purpose of the Militia Clauses is well tended by title 32 of the U.S. Code, which sets forth the federal organization, arming and discipline of the state National Guard. With the exception of 32 U.S.C. §109, which authorizes creation of state defense forces independent of the state National Guard, none of these carefully drawn provisions govern state defense forces.

the dual enlistment system as the current method by which Congress organizes, arms and disciplines the state National Guard. But when the federal Government actually exercises that constitutional power through the dual enlistment system, the Court concluded, the second Militia Clause "is no longer applicable." That is, while the Court looked to one provision of the second Militia Clause to justify the dual enlistment system, it dismissed the other conditions of that clause as irrelevant. This interpretation breeds confusion, to say the least, because the second Militia Clause in plain language further empowers Congress to govern such part of the Militia "as may be employed in the Service of the United States." The NGUS is a reserve component of the U.S. Armed Forces composed of state National Guard members employed in federal service. Upending its own logic, the Court acknowledged the application of this provision to the NGUS when it stated, "Surely this authority encompasses continued training while on [federal] active duty."³⁶ Yet these congressional powers are qualified by two explicit state reservations: the power of appointment of officers and the authority over training according to the discipline prescribed by Congress. The Court dismissed these reservations by equating "discipline" with "training" (the distinction between them had been appreciated by the Framers³⁷) and by ignoring altogether state power over the appointment of state National Guard officers, who in effect constitute the officer corps of the NGUS (a power still recognized under federal law).

By ruling that the gubernatorial consent requirement of the 1952 Act was not constitutionally compelled, the Court cast doubt on the constitutional basis of numerous appointment and training provisions of federal law governing the National Guard,³⁸ as well as rulings of the U.S. Court of Military Appeals.³⁹ Even the Montgomery Amendment does not impair the power of a governor to withhold consent for federal training of state guard members in another state of the Union, a decidedly incongruous result. The Court could have relied exclusively upon the joint foreign policy and military affairs powers of the national Government to prohibit governors from meddling with NGUS foreign training missions during peacetime. But even that argument raises troublesome questions about using the NGUS as a subterfuge for deploying the state National Guard on foreign adventures. At a time of shrinking federal defense budgets and increasing dependence on the NGUS to fill out the ranks of the reserves of the U.S. Armed Forces, there are great temptations to use NGUS peacetime training as an instrument of U.S. foreign policy. The Court's decision, clearly influenced by these realities, unfortunately encourages two outcomes the Framers sought to avoid:

³⁶ 110 S.Ct. at 2428.

³⁷ See *Perpich*, 880 F.2d at 21 n.12 (Heaney, J., dissenting).

³⁸ These include 10 U.S.C. §§269(g), 270(c), 591(a), 672, 3259, 3352(a), 3364(g) & (i), 3370, 3390, 8259, 8352, and 8376(b) (1988).

³⁹ See *United States v. Peel*, 4 M.J. 28, 29 (C.M.A. 1977) (the gubernatorial consent procedure "has constitutional underpinnings in Article I, §8, of the Constitution of the United States"); accord *United States v. Self*, 13 M.J. 132, 135 (C.M.A. 1982); *United States v. Hudson*, 5 M.J. 413, 418 (C.M.A. 1978).

federal abuse of the militia⁴⁰ and the creation of unorganized armed units (i.e., state defense forces) operating outside the grasp of the federal Government.

The Montgomery Amendment, conceived in the heat of a national debate over American involvement in the contra war, was a hurried legislative affair.⁴¹ Over the years, more carefully deliberated federal law has reflected a keen (albeit sometimes superficial) appreciation of the requirements of the Militia Clauses. Nonetheless, the Court viewed the Militia Clauses as merely additional powers granted to Congress under the Constitution that are expendable when challenged by other Article I powers. The great fiction underpinning the Court's analysis is the presumption that the dual enlistment system preempts a state government's reserved powers under the Constitution. The fact that Congress, pursuant to the Army Clause, has deemed it expedient to draw recruits for the U.S. Army and Air Force reserves from each state's National Guard should not magically erase either the Militia Clauses or the corpus of federal law that conforms with them.

Now that the Cold War has ended and superpower stand-offs in regional conflicts have largely abated, the politically molded foundation of the Montgomery Amendment is rotting. Congress could therefore remedy the Court's decision by repealing the Montgomery Amendment and returning to the pre-1986 regime for training the NGUS during peacetime.⁴²

DAVID J. SCHEFFER

Senior Associate

Carnegie Endowment for International Peace

⁴⁰ See *Perpich*, 880 F.2d at 20 (Heaney, J., dissenting) ("[States rights] delegates voiced fears that powerful federal authority over the state militia would, like the existence of a large standing army, lead to military abuses by the new government").

⁴¹ See *id.* at 33-35. During hearings on earlier legislation that was never reported out of the Subcommittee on Manpower and Personnel of the Senate Committee on Armed Services, 23 state governors objected to abolishing the consent requirement. Among them was New Hampshire Governor John H. Sununu, who would become Chief of Staff to President George Bush in 1989. Sununu stated: "I want to go on record as opposed to . . . any legislative attempt to remove the authority or control of the National Guard from the states. This legislative initiative is directly contrary to the language and intent of the U.S. Constitution." *Id.* at 34.

One month after Senate inaction, Rep. Montgomery introduced on the House floor his amendment to the Defense Authorization Act of 1987. No committee hearings had been held on it. During only 10 minutes of debate, the constitutionality of the amendment was questioned, in response to which Rep. Montgomery threatened to cut off federal funding to states whose governors withheld consent to overseas training assignments. The House then approved the amendment 261-159. *Id.* at 34-35. The amendment was accepted by the Senate conferees with the proviso that gubernatorial consent could be withheld to handle local emergencies. See note 33 *supra*.

⁴² This assessment denies neither the need to train the NGUS overseas to ensure its capabilities in an increasingly complex and unpredictable world (reaffirmed by the Persian Gulf crisis of 1990), nor the fact that only in rare instances would governors actually withhold consent and forgo such training opportunities for their state National Guard units. But the Court left in the hands of Congress the clear authority to restore a more constitutionally credible balance of power between states and the federal Government.

Sovereign immunity—separate legal personality of state entities—waiver and commercial activity exceptions to immunity

FOREMOST-MCKESSON, INC. v. ISLAMIC REPUBLIC OF IRAN. 905 F.2d 438. U.S. Court of Appeals, D.C. Cir., June 15, 1990.

The action was brought in 1982 by Foremost-McKesson, Inc., and several of its wholly owned subsidiaries (collectively, Foremost), and the Overseas Private Investment Corporation against the Government of Iran and several Iranian entities. Plaintiffs alleged that Iran, acting through its codefendant agencies, illegally divested Foremost of its investment in an Iranian dairy company by using its majority ownership and board membership to lock Foremost out of management and deny it a share of the company's earnings. Iran filed an "Answer to Complaint," which did not address the facts alleged in the complaint or raise any legal defense other than that the suit was barred by the 1981 Algiers Accords. Plaintiffs in fact presented their claims to the Iran-United States Claims Tribunal in The Hague, leaving the district court proceedings suspended in accordance with Executive Order No. 12,294 (Executive Order).¹ In 1986 the Claims Tribunal ruled in favor of plaintiffs on some issues, but concluded that no expropriation had taken place by January 19, 1981, the date on which a claim must have been outstanding for the Tribunal to have jurisdiction.²

In 1988 plaintiffs revived the suit in the district court, alleging that an expropriation occurred subsequent to January 19, 1981. Iran moved to strike its original Answer to Complaint. That motion was denied, but without prejudice to a motion by Iran for leave to file an amended answer. Over the plaintiffs' objections, Iran was permitted to amend its answer and raise jurisdictional defenses under the Foreign Sovereign Immunities Act of 1976 (FSIA).³ However, the district court denied Iran's motion to dismiss, holding that the commercial activity exception to jurisdictional immunity in the FSIA provided a basis for jurisdiction. On appeal, the Court of Appeals for the District of Columbia Circuit (per Edwards, J.) held that the case should be remanded to the district court for further proceedings to determine whether the acts of the Iranian agencies concerned could be attributed to Iran for purposes of establishing jurisdiction under the FSIA.

The circuit court's decision touched upon several important points under the FSIA, as well as the critical issue of the circumstances under which the acts of one foreign state entity may be attributed to another. Under consideration were two of the exceptions to immunity set forth in the FSIA: waiver and commercial activity.⁴ If either exception applied to the case, immunity would have to be denied and subject matter jurisdiction would automatically

¹ 46 Fed. Reg. 14,111 (1981). While claims against Iran were suspended, the Executive Order did not divest the courts of jurisdiction. *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

² *Foremost Tehran, Inc. v. Islamic Republic of Iran*, 10 IRAN-U.S. CLAIMS TRIBUNAL REP. 228 (1985 III).

³ Pub. L. No. 94-583, 90 Stat. 2891 (1976) (codified at 28 U.S.C. §§1330, 1332(a)(2)-(4), 1391(f), 1441(d), 1602-1611 (1988)).

⁴ 28 U.S.C. §1605(a)(1)-(2).

exist under the terms of the FSIA.⁵ Personal jurisdiction could then be acquired by service of process in accordance with the FSIA.⁶

The first of the plaintiffs' waiver arguments, which the district court rejected, was that Iran had waived immunity by filing its original responsive pleading without raising the immunity defense. The FSIA provides that a foreign state may waive its jurisdictional immunity either explicitly or by implication, and the legislative history lists the filing of a responsive pleading without invoking immunity as an example of an implied waiver.⁷ Pointing to precedent construing the provision on implied waiver narrowly,⁸ the circuit court rejected what it termed a "mechanistic" application of the statute and applied the general principle that an implied waiver requires, at a minimum, a conscious decision by the foreign state to take part in the litigation and a failure to raise immunity despite the opportunity to do so.

According to the circuit court, the pleading filed by Iran in 1982 did not meet the above-mentioned requirement. Iran had merely contended that the complaint had no legal effect other than to toll the statute of limitations⁹ and therefore required no substantive response. The 1982 answer was designed to remove the case to another forum, rather than to litigate the case in a U.S. court. Under the unusual circumstances of the case, including the Algiers Accords, the Executive Order and the resulting suspension of claims, the court refused to draw the normal inference of waiver from the filing of a responsive pleading.

A second waiver argument advanced by plaintiffs was based on the Treaty of Amity, Economic Relations, and Consular Rights between the United States and Iran.¹⁰ Since the FSIA is expressly subject to international agreements existing at the time of its enactment,¹¹ plaintiffs argued that the Treaty took precedence over the FSIA and precluded any assertion of immunity. However, the substantive guaranties set forth in the Treaty regarding the treatment of nationals and companies of one contracting party doing business in the territory of the other do not relate specifically to the question of immunity of the contracting states in an action to enforce those guaranties. Because no express conflict with the FSIA existed, the substantive provisions of the Treaty were held not to preclude application of the immunity defense under the FSIA.¹²

The only provision of the Treaty of Amity directly relevant to the issue of waiver is paragraph 4 of Article XI, which waives immunity of enterprises of the contracting parties. Under the terms of that provision, the scope of the waiver is limited to cases where the defendant enterprise of a contracting

⁵ 28 U.S.C. §1330(a).

⁶ 28 U.S.C. §§1330(b), 1608.

⁷ 28 U.S.C. §1605(a)(1); H.R. REP. NO. 1487, 94th Cong., 2d Sess. 18 (1976) [hereinafter HOUSE REPORT], reprinted in [1976] U.S. CODE CONG. & ADMIN. NEWS 6604, 6617.

⁸ See, e.g., *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370 (7th Cir. 1985); *Canadian Overseas Ores Ltd. v. Compania de Aceró del Pacífico*, 727 F.2d 274 (2d Cir. 1984).

⁹ The Executive Order, *supra* note 1, permitted the filing of claims in federal court for such purposes.

¹⁰ Aug. 15, 1955, 8 UST 899, TIAS No. 3853, 284 UNTS 93.

¹¹ 28 U.S.C. §1604.

¹² See *Argentine Republic v. Amerasia Shipping Corp.*, 109 S.Ct. 683 (1989).

state is doing business in the other state. In addition, the provision does not refer to the contracting parties themselves, but only to their enterprises. Thus, the court found that the Treaty did not constitute a waiver of Iran's immunity in the case and that the waiver exception in the FSIA did not provide a basis for jurisdiction over Iran.

The court of appeals also agreed with the district court's conclusion that jurisdiction could exist under the commercial activity exception to jurisdictional immunity provided for in the FSIA, assuming that the acts of the Iranian entities could be attributed to Iran. Under the third clause of the commercial activity exception, the "direct effect" clause, immunity is denied where the claim is based on a commercial act of the foreign state outside the United States causing a direct effect in the United States.¹³ The court dealt separately with the commercial activity and direct effect requirements of the direct effect clause and found that both could be satisfied under the facts of the case.

"Commercial activity" is defined in the FSIA as "either a regular course of commercial conduct or a particular commercial transaction or act."¹⁴ While the various types of commercial activity are not enumerated in the statute, further guidance is provided by the statement appearing at the end of the definition that the commercial character of an act is to be determined by reference to its nature, and not its purpose.¹⁵ Under the "nature of the act" test, an act is sovereign in nature if it is one that only a government can perform; acts that can be performed by private parties as well as governments are not classified as sovereign acts.¹⁶

Iran had contended that the plaintiffs' claims were in the nature of expropriation claims and, as such, were beyond the purview of the commercial activity exception. In fact, there is substantial precedent for the proposition that expropriation is the classic example of sovereign activity.¹⁷ However, in *Foremost's* claims against Iran, no formal expropriation decree or other governmental act was at issue. The conduct complained of appeared to the district court to be more in the nature of commercial conduct by a majority shareholder in the context of an ordinary shareholders' dispute. Since at least part of the conduct forming the basis for the claims was commercial in nature, the court of appeals did not disturb the district court's ruling on the commercial activity issue.

With respect to the alleged effect on *Foremost* in the United States, the circuit court found it to be at least as direct as the "direct effect" found in earlier cases.¹⁸ Plaintiffs were U.S. entities suffering financial loss, and the investment at issue allegedly involved substantial interaction between the

¹³ 28 U.S.C. §1605(a)(2).

¹⁴ 28 U.S.C. §1603(d).

¹⁵ *Id.*

¹⁶ See *Victory Transp. Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965).

¹⁷ See, e.g., *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964); *Hunt v. Mobil Oil Corp.*, 550 F.2d 68 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977).

¹⁸ See *Callejo v. Bancomer S.A.*, 764 F.2d 1101 (5th Cir. 1985); *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982).

United States and Iran. In the court's view, these facts satisfied the jurisdictional nexus requirement of the direct effect clause since the effects alleged were substantial, foreseeable and direct.¹⁹ The court refused to entertain Iran's additional contacts argument, that the exercise of jurisdiction would not be consistent with the constitutional "minimum contacts" standard,²⁰ because the argument had not been made to the district court.

Thus, although no waiver of immunity existed, jurisdiction over Iran could still be found through application of the commercial activity exception to immunity. Yet the case had to be remanded to the district court for determination of the key factual issue: whether the commercial acts upon which jurisdiction was to be based were the acts of Iran.

On the latter issue, the district court had relied heavily on the determination by the Claims Tribunal that the Iranian entities were controlled by Iran and that Iran was therefore responsible for their acts in accordance with the Algiers Accords. Under the Algiers Accords, Iran assumed responsibility for compensating U.S. nationals for claims against agencies, instrumentalities or entities controlled by Iran. The court of appeals held that reliance upon the Claims Tribunal's findings on this issue was incorrect because the standard for attributing the agencies' acts to Iran under the FSIA was different from the standard applied by the Claims Tribunal.

In *First National City Bank v. Banco para el Comercio Exterior de Cuba (Bancec)*,²¹ the Supreme Court articulated a presumption of separateness for state entities, under which their separate legal personalities are to be recognized unless applicable equitable principles mandate otherwise or the parent entity so completely dominates the subsidiary as to render it an agent of the parent. The circuit court in *Foremost-McKesson* indicated that the burden is on the plaintiff to prove the facts required to rebut the presumption of separateness, and that such proof should be presented early in the case to avoid subjecting foreign states to protracted litigation from which they may be immune under the FSIA.

In applying the *Bancec* presumption of separateness, the circuit court avoided the potential confusion created by the definition of the term "foreign state" in the FSIA.²² For the jurisdictional purposes of the FSIA, "foreign state" includes an "agency or instrumentality of a foreign state." The definition obviates intricate analyses of the internal structure and legal status of a defendant governmental entity to ascertain its eligibility for immunity, as all foreign state entities, even those taking corporate form and enjoying legal personality, are covered by the FSIA (provided that they are not organized under the laws of another country).²³

¹⁹ See RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §18 (1965).

²⁰ *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). According to the House Report, the contacts requirements built into the immunity exceptions themselves ensure that the necessary contacts with the United States will exist before U.S. courts exercise jurisdiction. HOUSE REPORT, *supra* note 7, at 13-14.

²¹ 462 U.S. 611 (1983).

²² 28 U.S.C. §1603(a).

²³ 28 U.S.C. §1603(a)-(b). The impact of the expansive definition of "foreign state" is significantly offset later in the statute by the denial of immunity in commercial cases having the

Nevertheless, the inclusion of agencies or instrumentalities of foreign states within the scope of the FSIA was not intended to abrogate the separate legal personalities of state entities for substantive purposes.²⁴ As explained in the legislative history, any other interpretation might encourage foreign jurisdictions to disregard the separate legal personality of U.S. corporations.²⁵ The court in *Foremost-McKesson* made clear that the *Bancec* presumption applies with equal force in the jurisdictional context and that the acts of one foreign state entity may not be attributed to another for purposes of establishing jurisdiction under the FSIA, absent facts sufficient to overcome the presumption.

Under the facts of *Foremost-McKesson*, the showing required to overcome the *Bancec* presumption of separateness had not been made. Rather, the district court had relied on the Claims Tribunal's finding of control by Iran by virtue of majority ownership and majority control of the dairy company's board of directors. The circuit court indicated that the level of control required to establish a claim in the Claims Tribunal may be sufficient to qualify the agencies as "foreign states" for purposes of the FSIA; but such ownership and control was held insufficient under *Bancec* to render the entities mere agents acting for and on behalf of Iran as principal. The case was therefore remanded for development of the facts relevant to this controlling issue, to be followed by another decision on Iran's jurisdictional motions under the FSIA.

GEORGE KAHALE III

EUROPEAN COMMUNITY CASE NOTE

Freedom of movement within the Community—de facto impediments—social security benefits

BRONZINO v. KINDERGELDKASSE. Case No. 228/38.*

GATTO v. BUNDESANSTALT FÜR ARBEIT. Case No. 12/89.*

Court of Justice of the European Communities, February 22, 1990.

Italian migrant workers in the Federal Republic of Germany requested children's benefits for their grown-up children who were unemployed and resided in Italy. According to German legislation, children's allowances can be paid for children between sixteen and twenty-one years of age "if, in the territory where this law applies, they 1. cannot begin or continue profes-

requisite jurisdictional nexus with the United States, whether the defendant be the state itself or a corporate entity owned by the state.

²⁴ See HOUSE REPORT, *supra* note 7, at 12, 29-30.

²⁵ *Id.* at 29-30.

* This summary is based on the French translations of the slip opinions, written originally in German, issued by the Court.

sional training due to lack of available places or 2. are unemployed and available to the placement office.”¹

The German authorities denied the payment of children's benefits to plaintiffs because their children were not at the disposal of the German placement agencies. The issue was whether this practice of denying payments for nonresident family members is compatible with European antidiscrimination and freedom of movement law (Articles 7 and 48 of the Treaty Establishing the European Communities (EEC Treaty)), in particular Article 51 of the EEC Treaty concerning freedom of movement and social security benefits and Council Regulation No. 1408/71 of June 14, 1971 (Regulation), adopted on the basis of Article 51. The Regulation ensures the payment of family allowances for family members resident in other member states.² The Bundessozialgericht in *Gatto* and the Bayerische Landessozialgericht in *Bronzino* requested preliminary rulings by the European Court of Justice pursuant to Article 177 of the EEC Treaty.³ The Court found that the children's payments in question were family benefits under the Regulation and were therefore covered by its provisions.

The Federal Republic of Germany had maintained that the Regulation concerns only “typical” family benefits, which are exclusively based on the financial burdens of maintaining a family. The allowances for unemployed children between the ages of sixteen and twenty-one, however, were considered to be a response to the difficult situation of the German labor market. Therefore, according to the German Government, these children must be available for placement in Germany. Moreover, Germany should be in a

¹ Bundeskindergeldgesetz (BKGG), Art. 2, para. 4, 1986 Bundesgesetzblatt, Teil 1, at 223 (translated by author).

² Articles 73 and 74 of the Regulation, as amended by Council Regulation No. 3427/89 (Oct. 30, 1989), 32 O.J. EUR. COMM. (No. L 331) 1 (1989), read as follows:

Article 73

Employed or self-employed persons the members of whose families reside in a Member State other than the competent State

An employed or self-employed person subject to the legislation of a Member State shall be entitled, in respect of the members of his family who are residing in another Member State, to the family benefits provided for by the legislation of the former State, as if they were residing in that State, subject to the provisions of Annex VI.

Article 74

Unemployed persons the members of whose families reside in a Member State other than the competent State

An unemployed person who was formerly employed or self-employed and who draws unemployment benefits under the legislation of a Member State shall be entitled, in respect of the members of his family residing in another Member State, to the family benefits provided for by the legislation of the former State, as if they were residing in that State, subject to the provisions of Annex VI.

Id. at 2.

³ Under Article 177 of the EEC Treaty, Mar. 25, 1957, 1973 Gr. Brit. TS No. 1, pt. II (Cmd. 5179 II), 298 UNTS 11, lower national courts may request a preliminary ruling from the European Court on a question of Community law. See further text at note 5 *infra*.

position to free itself from the obligation to pay by providing a work place, which would require that the plaintiffs' children reside in Germany. The Federal Government did not consider such a residency requirement as de facto discrimination against the nationals of other member states, even though a far lesser percentage of German parents with unemployed children lived abroad.

The European Court of Justice's rulings in these two cases underline that allowances for unemployed children are designed to compensate for financial burdens on families and are therefore family benefits as defined in the Regulation (Art. 1(u)(i)). Family benefits must not be denied if the worker's family members reside in other member states (Arts. 73 and 74 of the Regulation⁴). Otherwise, workers might be inhibited from exercising their right to freedom of movement. The payment of unemployment benefits may require that workers be available to the placement agencies of the state concerned. But this reasoning does not apply to payments of benefits to parents whose unemployed grown-up children reside in other member states. Therefore, according to the European Court of Justice, Articles 73 and 74 of the Regulation are to be understood as follows: if the domestic legislation of a member state requires, as a condition for payment, that the family member of a worker be available for placement as an unemployed person within the reach of that legislation, this condition must be considered as fulfilled if the family member is available for placement in the member state where he or she resides.⁵

The two judgments, besides being of some practical and economic importance to the German social security system, show the degree to which domestic law meshes with Community law in the framework of preliminary proceedings pursuant to Article 177 of the EEC Treaty. In these two cases, the European Court of Justice defined the term "family benefits" under the law of the European Communities. At the same time, the Court said how the scope of the German statute on children's allowances must be understood. According to the operative part of the judgments, the clause "in the territory where this law applies," read together with Articles 73 and 74 of the Regulation, covers all member states.

Article 177 of the EEC Treaty only entitles the Court to make preliminary decisions concerning "(a) the interpretation of this Treaty; (b) the validity and interpretation of acts of the institutions of the Community; and (c) the

⁴ See note 2 *supra*.

⁵ The Court stated in *Bronzino*:

L'article 73 du règlement n° 1408/71 du Conseil, du 14 juin 1971, relatif à l'application des régimes de sécurité sociale aux travailleurs salariés et à leur famille qui se déplacent à l'intérieur de la Communauté, doit être interprété en ce sens que lorsque la législation de l'Etat membre prestataire de certaines allocations familiales exige, comme condition de l'octroi de ces allocations, que le membre de la famille du travailleur se tienne à la disposition, comme chômeur, de l'agence pour l'emploi du territoire où cette législation s'applique, une telle condition doit être considérée comme remplie lorsque le membre de la famille se tient à la disposition, comme chômeur, de l'agence pour l'emploi de l'Etat membre où il réside.

interpretation of the statutes of any bodies set up by an act of the Council, where such statutes so provide." Article 177 gives the European Court no competence to interpret or judge the validity of national legislation or its consistency with the law of the European Communities.⁶ In this respect, one could argue that the Court should have limited itself to ruling that payments based on the fact that the children are available to the placement service are "family benefits" in the sense of EEC law and, as such, must not depend upon their availability to a domestic service. Formulating the operative part of the judgments along these lines would have been more consistent with the principle that it rests with the national courts to interpret and apply the national law.

JULIANE KOKOTT

*Max Planck Institute for Comparative Public Law
and International Law, Heidelberg*

⁶ Compare Wohlfahrt, *Article 177*, in KOMMENTAR ZUM EWG-VERTRAG, paras. 24-25 (loose-leaf ed. 1988), with numerous references to the case law of the Court.

CURRENT DEVELOPMENTS

THE FORTY-SECOND SESSION OF THE INTERNATIONAL LAW COMMISSION

The International Law Commission of the United Nations held its forty-second session from May 1 to July 20, 1990, under the Chairmanship of Professor Shi Jiuyong. In the context of its work on the Draft Code of Crimes against the Peace and Security of Mankind, the Commission considered the establishment of an international criminal court and adopted three articles of the code. Also at the forty-second session, the Commission adopted six articles on the law of the non-navigational uses of international watercourses and discussed reports on state responsibility, relations between states and international organizations, international liability for injurious consequences arising out of acts not prohibited by international law and jurisdictional immunities of states and their property.

Draft Code of Crimes against the Peace and Security of Mankind

At its 1990 session, the Commission adopted three articles that reflect its efforts to update the 1954 version of the code. Before these provisions are considered, however, brief mention should be made of a development that is of particular interest in connection with the code, other international crimes, and the Commission's methods of work. This development is the Commission's response to the request of the General Assembly that the ILC

address the question of establishing an international criminal court or other international criminal trial mechanism with jurisdiction over persons alleged to have committed crimes which may be covered under [the draft code], including persons engaged in illicit trafficking in narcotic drugs across national frontiers, and . . . devote attention to that question in its report on [its forty-second] session.¹

The General Assembly made its "request" in the fall of 1989. It was thus asking the Commission to consider and prepare a report in the space of one session. This is a procedure with few precedents in the annals of the Commission,² but it is one that could be resorted to with increasing frequency as the Commission completes work on the last of the traditional subjects of international law. The Commission's response to the Assembly's request,

¹ GA Res. 44/39, para. 1 (Dec. 4, 1989).

² Perhaps the most outstanding example of a rapid response by the Commission to a request of the General Assembly is the set of twelve draft articles on the protection of diplomats prepared and adopted by the Commission at its 1972 session and submitted to the Assembly in that year. The draft articles formed the basis of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, Annex to GA Res. 3166 (XXVIII) (Dec. 14, 1973). See UNITED NATIONS, *THE WORK OF THE INTERNATIONAL LAW COMMISSION* 72 (4th ed. 1988).

which is based on a draft prepared by a special working group,³ is contained in the chapter of its report that deals with the draft code.⁴ After surveying previous United Nations efforts concerning the establishment of an international criminal court,⁵ the response takes note of certain general considerations and discusses five categories of issues: jurisdiction and competence of the court; structure of the court; legal force of the court's judgments; certain other questions, including penalties, implementation of judgments and financing; and possible international trial mechanisms other than a court.

The general considerations examined by the Commission included the need to avoid disrupting the existing system of universal jurisdiction, the "possible curtailment of national sovereignty" that an international criminal court might be viewed as representing, the contribution that an international criminal court could make to the prevention and settlement of international conflicts, and the independence and integrity of such a court.

With regard to the jurisdiction and competence of an international criminal tribunal, the Commission identified, first, three options with regard to subject matter jurisdiction: the court could exercise jurisdiction over crimes defined in the draft code; its jurisdiction could be limited to some of those crimes; or the court could be established independently of the code, with such jurisdiction as states would confer upon it. With regard to competence and jurisdiction over persons, the code currently being elaborated by the Commission, like the 1954 draft code and the Nuremberg Principles,⁶ is addressed to individuals, not states. Thus, the competence of the court *ratione personae* would also be restricted to individuals. However, the Com-

³ The report of the working group was adopted by the Commission without substantial change. Its work was based in part on a discussion in the Commission of part III of the eighth report of the special rapporteur on the draft code, Minister Doudou Thiam, entitled "Statute of an International Criminal Court."

⁴ Report of the International Law Commission on the work of its forty-second session, ch. II, 45 UN GAOR Supp. (No. 10), UN Doc. A/45/10 (1990) (unpublished as of this writing).

⁵ The first effort within the context of the United Nations to examine the possibility of creating an international criminal court was made by the Commission itself. This project was undertaken pursuant to General Assembly Resolution 260 B (III) (Dec. 9, 1948), which invited the Commission "to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by international conventions." The Commission concluded, after studying the matter at its first (1949) and second (1950) sessions, that the establishment of such an organ would be both desirable and possible. However, the Commission recommended against accomplishing this objective by establishing a criminal chamber of the International Court of Justice. Report of the Commission to the General Assembly, 1949 Y.B. INT'L L. COMM'N 277, paras. 32-34; and Report of the Commission to the General Assembly, [1950] 2 *id.* at 364, paras. 128-45, esp. paras. 140 and 145, UN Doc. A/CN.4/SER.A/1950/Add.1. After considering these reports, the General Assembly established a committee that prepared a draft statute for an international criminal court. A revised statute was subsequently prepared by a second committee, but the project became moribund, along with the draft code, purportedly because of the lack of a definition of aggression.

⁶ Principle I of the Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, text adopted by the International Law Commission at its second session in 1950 and submitted to the General Assembly, [1950] 2 Y.B. INT'L L. COMM'N, *supra* note 5, pt. 2 at 374, reproduced in THE WORK OF THE INTERNATIONAL LAW COMMISSION, *supra* note 2, at 140.

mission did discuss the possibility of extending the court's competence to legal entities other than individuals and states in respect of certain crimes such as drug trafficking.

As for the nature of the court's jurisdiction, the Commission identified three options: exclusive jurisdiction, jurisdiction that would be concurrent with that of national courts, and competence to review decisions of national courts concerning international crimes. The Commission also discussed the possibility of conferring competence upon the court to issue legal opinions on questions of international criminal law. Such opinions could be issued pursuant to requests for binding opinions from national courts or requests for advisory opinions from an organ of the United Nations. In addition, the Commission noted that the court could be entrusted with the harmonization of international criminal law, leaving national courts to try cases on the merits.

The final jurisdictional matter considered was who may submit a case to the court. Here, the possibilities examined by the Commission included, first, all states; second, all states parties to the court's statute; third, any state having an interest in the case; fourth, intergovernmental organizations of a universal or regional character; fifth, nongovernmental organizations; and sixth, individuals. In the third case just mentioned, the "interest" of a state could result from any of the following facts: the crime was alleged to have been committed on its territory or directed against it; the victim was its national; the accused was its national; or the accused was found on its territory. The Commission also considered two possible restrictions on the right to submit cases, namely, a requirement of the consent of all interested states (as defined above), and a requirement of authorization by either the General Assembly or the Security Council.

The second broad topic discussed was that of the structure of the court. Included under this rubric were the issues of the court's institutional structure (whether permanent or ad hoc), including the relationship between the court and the United Nations, the composition of the court, the election of judges, the organ to be charged with prosecution, and methods of pretrial examination. With regard to the third topic, the legal force of judgments, the Commission weighed the relationship between judgments of national courts and those of the international criminal court, under a system of concurrent jurisdiction. If the international court rendered its decision first, it was considered that a national court could not reexamine or further examine the case. If, on the other hand, the national court's judgment was the first to be handed down, the Commission concluded that reexamination by the international tribunal might be envisaged in such cases as the following: where an interested state has grounds for believing that the national court's decision was not based on a proper appraisal of the law or facts; where the acts in question were improperly characterized as ordinary crimes rather than crimes falling under the jurisdiction of the court; or where there had been an appeal to the international court by the convicted individual.

The final topic relating to the establishment of an international criminal court included the questions of penalties, implementation of judgments and financing. The Commission recognized that some provision would have to

be made for penalties, probably in the code, to satisfy the rule *nulla poena sine lege*. While no specific conclusions were reached on this subject, the Commission considered the alternatives of either providing a general description of penalties, or prescribing a specific penalty for each crime. In addition, the possibility of excluding the death penalty was discussed, and it was generally agreed that the penalty should be proportionate to the gravity of the crime. As to implementation of judgments, two options were identified: implementation through an international detention facility, or through national systems. Finally, the Commission discussed two options for financing the court, namely, by the parties to its statute, or by the United Nations. The latter option would presuppose general adherence by members of the United Nations to the court's statute.

As requested by the General Assembly, the Commission also gave consideration, albeit briefly, to the possibility of establishing an international criminal trial mechanism other than an international criminal court. The ILC expressed a preference for a single organ for international criminal justice, rather than separate courts for different categories of crimes. It considered the possibility of entrusting the International Court of Justice with jurisdiction over international criminal matters but recognized that this would entail amendments to the Court's Statute. Finally, it took note of a proposal to complement national courts with judges from other legal systems in international criminal cases. This possibility was suggested as a transitional step that might help to overcome certain difficulties in the application of universal jurisdiction by national courts.

In its report to the General Assembly, the Commission concludes that its examination of the question reflects broad agreement, in principle, on the desirability of establishing a permanent international criminal court within the United Nations system. The Commission's report recognizes, however, that divergent views were expressed about the structure and scope of jurisdiction of an international criminal court and that such a court will be successful only if it is widely supported by the international community. The Commission's report on this question will be discussed in the Sixth (Legal) Committee of the General Assembly in the fall of 1990. It is to be hoped that the General Assembly will give the Commission a clear mandate to proceed with the elaboration of the statute of an international criminal court, and that it will go further by indicating its preferences among the various options identified by the Commission. The international climate now appears particularly favorable for the establishment of such a court, at least one with limited subject matter jurisdiction, and it would be unfortunate if this opportunity were lost.

The following articles adopted at the 1990 session form part of the chapter of the code on crimes against peace.

Article 16

International terrorism

1. The undertaking, organizing, assisting, financing, encouraging or tolerating by the agents or representatives of a State of acts against

another State directed at persons or property and of such a nature as to create a state of terror in the minds of public figures, groups of persons or the general public.

2. The participation by individuals other than agents or representatives of a State in the commission of any of the acts referred to in paragraph 1.

Article 18⁷

Recruitment, use, financing and training of mercenaries

1. The recruitment, use, financing or training of mercenaries by agents or representatives of a State for activities directed against another State or for the purpose of opposing the legitimate exercise of the inalienable right of peoples to self-determination as recognized under international law.

2. A mercenary is any person who:

- (a) Is specially recruited locally or abroad in order to fight in an armed conflict;
- (b) Is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised by or on behalf of a party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar rank and functions in the armed forces of that party;
- (c) Is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict;
- (d) Is not a member of the armed forces of a party to the conflict; and
- (e) Has not been sent by a State which is not a party to the conflict on official duty as a member of its armed forces.

3. A mercenary is also any person who, in any other situation:

- (a) Is specially recruited locally or abroad for the purpose of participating in a concerted act of violence aimed at:
 - (i) Overthrowing a Government or otherwise undermining the constitutional order of a State; or
 - (ii) Undermining the territorial integrity of a State;
- (b) Is motivated to take part therein essentially by the desire for significant private gain and is prompted by the promise or payment of material compensation;
- (c) Is neither a national nor a resident of the State against which such an act is directed;
- (d) Has not been sent by a State on official duty; and
- (e) Is not a member of the armed forces of the State on whose territory the act is undertaken.

⁷ The special rapporteur had proposed an Article 17 on the breach of a treaty designed to ensure international peace and security. The Commission's Drafting Committee has been unsuccessful, during the 1989 and 1990 sessions, in reaching agreement on the text of such an article, or even on whether this subject should be dealt with in the code. These divergencies of views in the Drafting Committee, which appear irreconcilable, are indicative of the situation in the Commission as a whole. A decision on the fate of the draft article has been postponed to a future session.

The Commission also adopted an article, provisionally designated Article X, which will be included in the chapter of the code on crimes against humanity.

Article X

Illicit traffic in narcotic drugs

1. The undertaking, organizing, facilitating, financing or encouraging, by the agents or representatives of a State, or by other individuals, of illicit traffic in narcotic drugs on a large scale, whether within the confines of a State or in a transboundary context.

2. For the purposes of paragraph 1, facilitating or encouraging illicit traffic in narcotic drugs shall include the acquisition, holding, conversion or transfer of property by a person who knows that such property is derived from the crime defined in the present article in order to conceal or disguise the illicit origin of the property.

3. Illicit traffic in narcotic drugs means any production, manufacture, extraction, preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of any narcotic drug or any psychotropic substance contrary to internal or international law.

Article 16 takes on the difficult task of defining terrorism. It should be noted, however, that the definition contained in paragraph 1 is limited in two respects: first, it defines only international, as distinguished from internal, terrorism; and second, its object is to define international terrorism not in general but as a crime against peace. The definition may seem somewhat tautological, as it refers to "acts . . . of such a nature as to create a state of terror." But the Commission did not consider it necessary to define the term "terror," since it is the other aspects of the definition, rather than the term "terror" itself, that have given rise to difficulty. Perhaps the most controversial aspect of the article is its failure to include acts of terrorism committed by individuals having no link with a state. Some members believed that terrorist acts by private groups, often motivated by the desire for financial gain, posed a serious threat to international peace and thus merited inclusion in the article. But at this stage of its work on the code, the Commission was prepared to include in the article only those activities that are attributable to a state.

Article 18 is based on the International Convention against the Recruitment, Use, Financing and Training of Mercenaries of 1989,⁸ and, to a lesser extent, on Additional Protocol I to the 1949 Geneva Conventions. Since the former Convention is newly concluded and was the result of painstaking negotiations, the Commission did not deem it wise to deviate significantly from its provisions. The Commission's commentaries to the article are quite lean, presumably because detailed explanations might be regarded as interpretations of the 1989 Convention, which the Commission wished to avoid.

⁸ Annex to GA Res. 44/34 (Dec. 4, 1989). Paragraph 1 of Article 18 is based upon Article 5, paragraph 2 of the Convention, whose wording it follows very closely. Paragraphs 2 and 3 of Article 18 are identical to paragraphs 1 and 2, respectively, of Article 1 of the Convention.

Article X deals with the serious contemporary problem of drug trafficking. As noted above, the Commission has decided to treat this offense as a crime against humanity, in view of the danger it poses to all mankind. In its commentary to the article, the Commission stresses that the phenomenon is a threat not only to the public order of the country where it occurs, but also to mankind as a whole. Thus, the article provides that "illicit traffic in narcotic drugs on a large scale" is an international crime, whether the traffic occurs wholly "within the confines of a State or in a transboundary context." Unlike Article 16, the present article contemplates commission of the crime in question both by agents and representatives of a state and by private individuals. The justification given by the Commission for this distinction is that Article X characterizes drug trafficking as a crime against humanity, while international terrorism is treated as a crime against peace. As used in Article X, the term "individuals" covers the organizations, such as "cartels," through which drug traffickers operate, as well as financial institutions they use. The latter are dealt with in paragraph 2. Finally, paragraph 3 explains that the crime defined in paragraph 1 includes illicit traffic in psychotropic substances as well as in narcotic drugs.

Non-Navigational Uses of International Watercourses

The six articles adopted at the 1990 session deal with two subtopics. Articles 22 to 25 form part IV of the watercourses draft, "Protection and Preservation." They provide as follows:

Article 22

Protection and preservation of ecosystems

Watercourse States shall, individually or jointly, protect and preserve the ecosystems of international watercourse[s] [systems].⁹

Article 23

Prevention, reduction and control of pollution

1. For the purposes of the present draft articles, "pollution of an international watercourse [system]" means any detrimental alteration in the composition or quality of the waters of an international watercourse [system] which results directly or indirectly from human conduct.

2. Watercourse States shall, individually or jointly, prevent, reduce and control pollution of an international watercourse [system] that may cause appreciable harm to other watercourse States or to their environment, including harm to human health or safety, to the use of the waters for any beneficial purpose or to the living resources of the international watercourse [system]. Watercourse States shall take steps to harmonize their policies in this connection.

3. Watercourse States shall, at the request of any of them, consult with a view to establishing lists of substances, the introduction of which

⁹ The brackets result from the Commission's having deferred a decision on whether to base the draft articles on the concept of the international watercourse "system." This decision will be taken at the Commission's 1991 session.

into the waters of an international watercourse [system] is to be prohibited, limited, investigated or monitored.

Article 24

Introduction of alien or new species

Watercourse States shall take all measures necessary to prevent the introduction of species, alien or new, into an international watercourse [system], which may have effects detrimental to the ecosystem of the international watercourse [system] resulting in appreciable harm to other watercourse States.

Article 25

Protection and preservation of the marine environment

Watercourse States shall, individually or jointly, take all measures with respect to an international watercourse [system] that are necessary to protect and preserve the marine environment, including estuaries, taking into account generally accepted international rules and standards.

Articles 26 and 27 form part V of the draft, which is entitled "Harmful Conditions and Emergency Situations." They provide as follows:

Article 26

Prevention and mitigation of harmful conditions

Watercourse States shall, individually or jointly, take all appropriate measures to prevent or mitigate conditions that may be harmful to other watercourse States, whether resulting from natural causes or human conduct, such as flood or ice conditions, water-borne diseases, siltation, erosion, salt-water intrusion, drought or desertification.

Article 27

Emergency situations

1. For the purpose of the present draft article, "emergency" means a situation that causes, or poses an imminent threat of causing, serious harm to watercourse States or other States and that results suddenly from natural causes, such as floods, the breaking up of ice, landslides or earthquakes, or from human conduct, as for example in the case of industrial accidents.

2. A watercourse State shall, without delay and by the most expeditious means available, notify other potentially affected States and competent international organizations of any emergency originating within its territory.

3. A watercourse State within whose territory an emergency originates shall, in co-operation with potentially affected States and, where appropriate, competent international organizations, immediately take all practicable measures necessitated by the circumstances to prevent, mitigate and eliminate harmful effects of the emergency.

4. When necessary, watercourse States shall jointly develop contingency plans for responding to emergencies in co-operation, where appropriate, with other potentially affected States and competent international organizations.

Article 22 lays down a broad obligation to protect and preserve the "ecosystems" of international watercourses. While the obligation is a progressive one, the commentary points out that there is ample precedent for it in the practice of states and the work of international organizations. The term "ecosystems" is not defined in the article itself because the Commission believed that its meaning is generally understood. The commentary explains that the term refers to an ecological unit consisting of living and nonliving components that are interdependent and function as a community. The inclusion of this article in the draft reflects the international community's increasing awareness of the interdependence of all living systems. Destabilized freshwater ecosystems not only can hamper sustainable development but also may threaten human life itself.

Article 23 is addressed to the growing problem of pollution of international watercourses. It follows the formula utilized in Article 194 of the 1982 United Nations Convention on the Law of the Sea,¹⁰ requiring watercourse states to "prevent, reduce and control" such pollution. The obligation applies only to the extent that the pollution "may cause appreciable harm to other watercourse States or to their environment." The Commission decided to use the "prevent, reduce and control" formula, rather than one that would prohibit any pollution that might cause appreciable harm to other watercourse states, in recognition of the practical consideration that some international watercourses are already polluted to varying degrees. The obligation to "prevent" relates to new or increased pollution, while the obligations to "reduce" and "control" relate to existing pollution. Paragraph 3 of the article deals with substances such as those that are toxic, persistent or bioaccumulative and that, because of their dangerous nature, should be subjected to special regulation. The practice of formulating "black" and "gray" lists of such substances is now well established but cannot be regarded as an international obligation. The Commission therefore confined itself to providing for an obligation to consult, upon request, with a view to drawing up such lists.

Article 24 deals with the potentially serious problems that may be created by the introduction into watercourses of alien or new species of flora or fauna. Foreign organisms can upset the ecological balance of a watercourse, resulting in such harmful effects as the clogging of intakes and machinery, the spoiling of recreation, the acceleration of eutrophication, the disruption of food webs, the elimination of other species, and the transmission of diseases. A provision similar to Article 24 is contained in the 1982 Convention on the Law of the Sea.¹¹ The obligation to "take all measures necessary" is one of due diligence, requiring that watercourse states do all that can reasonably be expected to prevent the introduction of alien or new species by public authorities or private persons.

¹⁰ United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, UN Doc. A/CONF.62/122, *reprinted in* UNITED NATIONS, OFFICIAL TEXT OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA WITH ANNEXES AND INDEX, UN Sales No. E.83.V.5 (1983).

¹¹ *Id.*, Art. 196, para. 1.

Article 25 lays down an obligation that is separate from, and additional to, those contained in Articles 22–24. In fact, it may seem to go somewhat beyond the scope of a draft on international watercourses, since the object of the article is the protection of spaces outside the watercourse system itself. But, strictly speaking, the article does not require watercourse states to protect the marine environment *per se*, but rather to take the measures “with respect to an international watercourse [system]” that are necessary to protect that environment. It is now accepted that much of the most serious damage to the marine environment is caused by pollution from land-based sources, including rivers. The need to protect the marine environment from such pollution has been recognized in a number of recent treaties, including the Law of the Sea Convention and various regional seas conventions, and the Commission considered that its watercourses draft should contain a counterpart to those provisions.

Part V of the draft contains two articles; the first deals with the prevention of harmful conditions, while the second is principally concerned with responses to emergencies. Article 26 requires watercourse states to “take all appropriate measures” to prevent or mitigate conditions, such as floods, siltation, erosion and water-borne diseases, that may be harmful to other watercourse states. Again, the obligation is one of due diligence, and requires that watercourse states exercise their best efforts to prevent or mitigate the conditions in question. For example, they must take measures that are reasonable, under the circumstances, to control deforestation that may result in downstream siltation, flooding and erosion. The conditions in question may result from natural causes, human conduct or a combination of the two. States cannot prevent phenomena resulting entirely from natural causes, but they can do much to prevent and mitigate harmful conditions that are consequent upon such phenomena. For example, the construction of reservoirs, afforestation and improved range-management practices may prevent or mitigate the severity of floods.

Article 27 provides for the state in which a water-related emergency originates to so notify other potentially affected states and competent international organizations and to prevent, mitigate and eliminate the harmful effects of that emergency. It also calls upon watercourse states to develop contingency plans for responding to water-related emergencies. Similar obligations are contained in conventions concerning international watercourses,¹² the Law of the Sea Convention¹³ and the 1986 Convention on Early Notification of a Nuclear Accident.¹⁴ As in other articles on watercourses adopted at the 1990 session, the “competent international organizations” referred to in paragraphs 2–4 would normally be ones established by the watercourse states concerned, such as joint commissions. But organizations of a more global character may be able to render valuable assistance in

¹² See, e.g., Convention on the Protection of the Rhine against Chemical Pollution, Dec. 3, 1976, Art. 11, 1124 UNTS 375.

¹³ Convention on the Law of the Sea, *supra* note 10, Art. 198.

¹⁴ *Opened for signature* Sept. 26, 1986, Art. 2, 25 ILM 1370, 1371 (1986).

such ways as establishing warning systems and could therefore play an important role in the development of contingency plans under paragraph 4.

The remaining provisions of the draft were submitted to the Commission in the fifth¹⁵ and sixth¹⁶ reports of the special rapporteur, the author. They consist of five articles¹⁷ and two annexes.¹⁸ All but the second annex were discussed by the Commission at the 1990 session. The adoption at the 1990 session of the six articles discussed above leaves the Commission in a good position to attain its goal of completing the adoption of the entire draft on first reading in 1991, the end of the ILC's current term of office.

State Responsibility

The Commission discussed the second report of the special rapporteur, Professor Gaetano Arangio-Ruiz, which contained articles on "Reparation by equivalent" (Article 8), "Interest" (Article 9) and "Satisfaction and guarantees of non-repetition" (Article 10). The report dealt with the substantive consequences arising from an internationally wrongful act other than cessation and *naturalis restitutio* (restitution in kind), which had been examined in the first report. Draft Article 8, as proposed by the special rapporteur, concerns the form of restitution that is most common, namely, pecuniary compensation. It provides that the injured state is entitled to claim such compensation, which covers, inter alia, lost profits deriving from the internationally wrongful act. Article 9 elaborates further on the restitution to be provided under Article 8 by specifying the extent to which interest is to be paid where compensation for loss of profits consists of interest on a sum of money. Article 10 deals with situations in which remedies under Articles 7 (restitution in kind) and 8 are inadequate. It requires the author state to provide adequate satisfaction to the injured state in the form of apologies, nominal or punitive damages, punishment of the responsible individuals, assurances or safeguards against repetition, or any combination of these remedies. The special rapporteur expressed the view that satisfaction performed a distinct function within the general framework of reparation and pointed to the recent decision in the *Rainbow Warrior* case¹⁹ as evidence in support of this

¹⁵ UN Doc. A/CN.4/421/Add.2 (1989).

¹⁶ UN Docs. A/CN.4/427 and Corr.1, and A/CN.4/427/Add.1 (1990).

¹⁷ The titles of the articles are as follows (the numbering will be changed to correspond to their final place in the draft): Article 24, Relationship between navigational and non-navigational uses; absence of priority among uses; Article 25, Regulation of international watercourses; Article 26, Joint institutional management; Article 27, Protection of water resources and installations; and Article 28, Status of international watercourses and water installations in time of armed conflict.

¹⁸ Annex I is entitled "Implementation of the draft articles" and contains the following articles: Article 1, Definition (defining the term "watercourse State of origin"); Article 2, Non-discrimination; Article 3, Recourse under domestic law; Article 4, Equal right of access; Article 5, Provision of information; Article 6, Jurisdictional immunity; Article 7, Conference of the Parties; and Article 8, Amendment of the draft articles. Annex II is entitled "Fact-finding and settlement of disputes" and contains the following articles: Article 1, Fact-finding; Article 2, Obligation to settle disputes by peaceful means; Article 3, Consultations and negotiations; Article 4, Conciliation; and Article 5, Arbitration.

¹⁹ Award of Apr. 30, 1990, 19 R. Int'l Arb. Awards (forthcoming).

proposition. After a lively debate, these articles were referred to the Drafting Committee. The Drafting Committee is now charged with Articles 6–10 on state responsibility, which cover the basic substantive consequences arising from the breach of an international obligation. In view of the other work pending before it,²⁰ however, it seems unlikely that the committee will make significant progress on those articles before the end of the current term of office (1991).

Relations between States and International Organizations

The Commission discussed the fourth report of the special rapporteur, Ambassador Leonardo Díaz González, which contained eleven draft articles, concerning use of terms (Article 1); scope of the draft articles (Article 2); relationship between the draft articles and the relevant rules of international organizations (Article 3); relationship between the articles and other international agreements (Article 4); legal personality of international organizations (Articles 5 and 6); and property, funds and assets of international organizations (Articles 9–11). Many of these articles reproduce or follow closely the provisions of the Convention on the Privileges and Immunities of the United Nations of 1946 and the corresponding Convention of 1947 concerning the specialized agencies. As in past sessions, a significant number of members expressed uncertainty about the purpose of, or need for, the project or questioned the usefulness of proceeding with work on the topic. The Commission nonetheless decided, at the conclusion of the debate, to refer draft Articles 1–11 to the Drafting Committee. Owing to the backlog of articles before the committee,²¹ it appears doubtful that it will be able to take up these articles before the 1992 session.

International Liability

In his sixth report, the special rapporteur, Ambassador Julio Barboza, submitted a complete set of thirty-three draft articles on international liability for injurious consequences arising out of acts not prohibited by international law. The special rapporteur characterized the articles as an outline of the subject, submitted to provide the Commission with a panoramic view of the topic and to indicate how the various parts of the draft relate to each other. While the Commission devoted considerable time to examining the report, it was not able to complete discussing it and decided to continue the discussion at the next session.

The articles proposed by the special rapporteur are divided into five chapters, as follows: Chapter I, General Provisions; Chapter II, Principles; Chapter III, Prevention; Chapter IV, Liability; and Chapter V, Civil Liability. One of the principal innovations in the report is the introduction of a list

²⁰ The articles currently before the Drafting Committee include, in addition to the 5 on state responsibility, 12 on jurisdictional immunities, 6 on the draft code, 8 on international watercourses, 9 on international liability, and 11 on relations between states and international organizations. The Commission has assigned priority to jurisdictional immunities, the code, and watercourses.

²¹ See note 20 *supra*.

of inherently dangerous substances. The special rapporteur included the list in response to requests by some members of the Commission and delegations in the Sixth Committee. According to the special rapporteur, the list was intended to clarify the scope of the topic still further by indicating the kinds of activities that would be regarded for the purposes of the draft as involving risk. A second new element is the chapter on civil liability. The special rapporteur pointed out that there was nothing to prevent an individual who had suffered harm from pursuing a claim before the courts of the state of origin, and that a certain degree of uniformity of treatment of such claims would be desirable. Further, if a state decided not to bring a claim against the state of origin for harm that the former had suffered, civil law procedures would be the only channel through which individuals could seek redress. The special rapporteur therefore proposed a set of six draft articles covering private law remedies for transboundary pollution and similar injuries. In view of the similarities of the two topics, it is perhaps not surprising that a similar set of articles had been proposed, in Annex I, by the special rapporteur on water-courses.

Jurisdictional Immunities of States and Their Property

The Commission is currently undertaking the second reading (final adoption) of the draft articles on jurisdictional immunities. At the 1990 session, the Drafting Committee completed work on sixteen of the draft articles, but the Commission took no action on them, having decided to await the conclusion of the Drafting Committee's work on the entire set of articles. Twelve articles remain for consideration at the 1991 session, at which time the Commission expects to complete its work on the draft and to submit it to the General Assembly.

Long-Term Program of Work and Methods of Work

The working group established at the Commission's forty-first session continued to consider possible new topics for inclusion on the Commission's agenda. The working group submitted a progress report that contained, inter alia, a description of some of the specific topics under discussion by members of the group. These topics range from the protection of the environment to the international law of economic relations; from the refugee problem to extraterritorial jurisdiction. It should be emphasized that no recommendations have been made by the group, much less accepted by the Commission. Some recommendations, however, may be forthcoming at the Commission's next session. Another interesting feature of the progress report is the suggestion that the Commission might indicate to the General Assembly its readiness to respond quickly to requests from the Assembly for legal opinions on pressing legal issues of importance to the international community. While the Commission has performed similar tasks in the past—indeed, its response at the 1990 session to the Assembly's request for a report on an international criminal court is an example—making such a function a part of the regular mandate of the Commission could add a new dimension to its work and to its relationship with the General Assembly.

The Commission continued to discuss various proposals for increasing the efficiency of its methods of work, including splitting the twelve-week session, holding special meetings outside its regular annual sessions, and allocating more time to the Drafting Committee. It decided as an exceptional measure to allow for two weeks of concentrated work by the Drafting Committee at the beginning of the next session to make it possible to meet the objectives that had been set for the current term of office. The Commission also commended to the attention of the General Assembly the possibility of arranging for meetings of the Drafting Committee between the regular sessions of the Commission. It would be most helpful if at least some of these reforms, as well as others,²² were implemented in the near future. The ILC's working methods may have been well suited to a body of fifteen, or even twenty-five, members, but they have not proven particularly effective for the present thirty-four-member Commission.²³

STEPHEN C. MCCAFFREY*

²² One candidate, for example, is the special rapporteur system. The Commission's progress is entirely dependent upon the pace at which its rapporteurs submit draft articles, and the ability of members to conceptualize topics similarly hinges upon the way they are presented by the rapporteurs. Various proposals have been made for streamlining and improving the system, such as appointing a small group of "friends of the special rapporteur" to assist in the preparation of reports and other functions performed by special rapporteurs.

²³ The Commission was originally composed of 15 members. Its membership was enlarged to 21 in 1956, to 25 in 1961, and to the present 34 in 1981. *THE WORK OF THE INTERNATIONAL LAW COMMISSION*, *supra* note 2, at 7.

* Member, International Law Commission; Professor of Law, University of the Pacific, McGeorge School of Law.

BOOK REVIEWS AND NOTES

EDITED BY DETLEV VAGTS

Forty Years International Court of Justice: Jurisdiction, Equity and Equality. Edited by A. Bloed and P. van Dijk. Utrecht: Europa Instituut, 1988. Pp. x, 177. Dfl.65; \$35, cloth; Dfl.45; \$24, paper.

In the foreword the editors explain that the fortieth anniversary of the International Court of Justice (ICJ), and its mixed record, inspired the organizers of the biennial Polish-Dutch colloquia to devote the 1987 colloquium to aspects of the Court's position and actual functioning; to wit: (1) the jurisdiction of the Court and the attitude of states towards it; (2) the interaction between the Court and the states parties before it; and (3) the contribution of the Court to the development of international law. The organizers of the colloquium asked Shabtai Rosenne, as visiting professor in the Netherlands and a leading expert on the Court, to give the Dutch contribution.

The colloquium, in Utrecht on November 18 and 19, was attended by Judge Manfred Lachs and specialists on the Court. The authors drew upon the comments made at the colloquium in preparing their papers for publication. The editors hope that the papers will stimulate discussion and research on the contributions of the ICJ to the development of international law.

Renata Szafarz, in *Changing Attitudes Towards the Jurisdiction of the International Court of Justice*, provides a very good survey and fair evaluation of the work of both the old Permanent Court of International Justice (PCIJ) and the ICJ. She omits advisory opinions, however, and it is in this activity that the two courts differ substantially. In listing cases submitted to the ICJ by special agreements—the most effective method of seizing the Court—she includes those submitted to arbitral chambers introduced in the 1978 revised Rules of Court (p. 4), but does not fully explain this special procedure and the reasons for it (p. 23).

The author is particularly interested in the use of the Optional Clause (Art. 36(2) of the Court's Statute) and notes its decline over the years. According to the *ICJ Yearbook 1988-1989* (p. 60), of the 159 members of the United Nations and members of the international judicial community (under Art. 93(1) of the Charter, as well as 4 states not members of the United Nations, Liechtenstein, Nauru, San Marino and Switzerland), only 50 states have accepted the Optional Clause—slightly more than one-third—and many of their declarations are riddled with crippling reservations. As Szafarz points out, in 1939, 73 percent of the states constituting the "judicial community" (parties to the Court's Statute) were bound by the optional clause; at the time she wrote her essay (June 1987), forty-eight states accepted the Optional Clause—that is, only 28.4 percent of the "judicial community" (p. 24). The decline of the optional clause as a basis of jurisdiction

can be seen from the fact that during the PCIJ's eighteen years of existence, eleven cases were instituted under this clause, and only seventeen during the forty-one years of the ICJ.

It may be noted that the author does not mention the fairly recent practice of including compromissory clauses not in the treaty itself but in an optional protocol that can be signed and ratified separately from the treaty itself. While the number of cases is not impressive, their political significance (hostages, nuclear tests, intervention) is substantial. The author concludes on an optimistic note by referring to statements of President Gorbachev that may indicate a shift in the attitude of the Soviet Union towards the Court (p. 12 and p. 30). At present, only one permanent member of the Security Council, Great Britain, is bound by the Optional Clause. Compromissory clauses in bilateral and multilateral treaties of commerce, friendship and navigation have not been a source of cases for the Court. In view of the use of such a clause in *Nicaragua v. United States*, a prudent government would in my view be justified in terminating such clauses.

In his comments, Professor van Dijk indicates his general agreement with Szafarz but suggests that advisory opinions should have been included and the validity of certain reservations to declarations accepting the Optional Clause should have been examined. He would also like to see examined whether the Court has encouraged states to seek a solution through negotiations (p. 32). He questions the utility of the practice of judges expressing separate or dissenting opinions, which detracts from the authority of the judgment. Consideration should be given to the possibility of authorizing UN organs to request advisory opinions on behalf of private parties on condition that the latter agree to accept the opinion as binding. Van Dijk does not say whether the private parties could argue their case before the Court. In his view, more research is necessary and this should be carried out not merely by lawyers, but by political and social scientists using the study by Szafarz as a starting point.

The problems discussed in the paper by Janusz Stanczyk, *The Equality of Parties before the International Court of Justice in cases of Non-Appearing Respondent States*, have their source in Article 53 of the Statute, which enables the Court, in case of the nonappearance of a party to a dispute, to decide in favor of the applicant, provided it is satisfied that it has jurisdiction and that the claim is well founded in fact and in law. In proceeding in such cases, the Court must respect the principle of equality between the parties (p. 61). In practice, the Registry transmits all relevant documents to the absent party and keeps the nonappearing state informed; that state may appear at any time until the end of oral pleadings and may appoint a judge *ad hoc* (pp. 44-45).

In some instances, as in fixing time limits for the filing of memorials and counter memorials, the Court seems to have acted contrary to the principle of equality, e.g., in the *Hostages* and the *Nicaragua v. United States* cases (pp. 45-46). However, in the author's view:

It does not seem possible to argue . . . that the setting of a symbolic time limit (in the *Hostages* case) can be seen as compromising the principle of

equality of the parties before the ICJ. The absent respondent was not definitely debarred from pleading on the basis of equality with the other party. (p. 46)

In some cases, as the Icelandic *Fisheries Jurisdiction* cases, the Court considered not merely arguments presented by the applicants but also statements made by authorities in Iceland. Furthermore, the Court may receive informal communications from the absent state and "the existence of such informal, unorthodox communications was very important for redressing the initial imbalance between the parties. The disadvantages facing the applicant state were thereby reduced" (p. 49).

Pursuant to Article 53(2), the Court must satisfy itself that the claim is well founded in fact and law. Questions of fact were most important in the *Nicaragua v. United States* case and the handling of this aspect of the case was criticized by Judge Schwebel. In his dissenting opinion, "he deplored the Court's failure to use its authority to determine the facts and its treatment of evidence, which resulted in breaching its avowed duty to ensure equality between the parties" (p. 65). This is a matter of exceptional difficulty and the way this aspect of the case was handled can be, and has been, criticized. Pursuant to its Statute—Articles 48–52—the Court has comprehensive powers to find the facts. In *Nicaragua v. United States*, Nicaragua presented a wide array of facts regarding U.S. activities and policies, whereas the United States presented facts in support of its contention that it had exercised its right of individual and collective self-defense. The factual situation was largely a matter of public record. Still, one could say that in a matter of lesser significance—the *Corfu Channel* case—the Court appointed a committee of experts to determine certain facts relating to Albania's defense.

In concluding, Stanczyk states that in some cases the Court took up points not made by the absent states but this did no harm to the applicant:

To some extent the principle of equality of the parties retains a prominent place among the "general principles of judicial procedure", and forms part and parcel of the more general postulate of the protection of the interests of both parties. However, this duty of the Court finds its limits in the equality of treatment to be afforded to the parties and the equal consideration to be given to their cases. (pp. 68–69)

In his comments *Non-Appearance does not make sense*, Paul J. I. M. de Waart agrees with Stanczyk that an absent state is bound by the judgment on the merits, which, according to Articles 59 and 60, is final. Absence does not affect the equality of the parties and the absent state is bound to comply with the judgment of the Court (Art. 94(1) of the UN Charter). The judgment is final and without appeal (Art. 60 of the Statute).

According to Article 94(1), "each member of the United Nations," not merely the parties, undertakes to comply with "the decision" of the ICJ. Article 94(2) deals with enforcement: if any party "fails to perform the obligations incumbent upon it under a judgment . . . the other party may have recourse to the Security Council." The Council may, "if it deems necessary, make recommendations or decide upon measures to be taken to give

effect to the judgment." So far the Council has never done that. It is not clear whether "recommendations" refer to measures or to the substance of the dispute. De Waart raises the interesting question whether a veto by a permanent member could or would pave the way for proceeding under the Uniting for Peace Resolution of 1950. In any event, it may be well to keep in mind this alternative to enforcement action under chapter VII of the Charter. De Waart concludes with some observations on enforcing a judgment for damages.

In his wide-ranging study, *The Position of the ICJ on the Foundations of the Principle of Equity in International Law*, Rosenne begins by distinguishing the primary from the secondary meaning of equity: according to the first, equity is a synonym for natural justice; according to the second, equity means opposition to the strictness of the law, that is, the *rigor juris*. Rosenne rejects the primary and accepts the secondary meaning—"the application to particular circumstances of the standard of what seems naturally just and right" (p. 88).¹ In discussing the relevant cases, Rosenne finds that Article 38(2) of its Statute did not prevent the Court from applying equity *infra legem*. Any attempt to apply equity *contra legem* would "rapidly lead to anarchy" (p. 96). In deciding cases, the Court has invoked equitable principles and searched for equitable results (p. 97).

The modern phase in the use of equity by the Court begins with the *Diversion of Water from the Meuse* case (Netherlands v. Belgium, June 28, 1937), and in particular Judge Manley O. Hudson's explicit and strong plea in favor of equity.² In this case, both Belgium and the Netherlands diverted waters in violation of the Treaty of 1863, and the question was whether the Court should apply the *exceptio non adimpleti contractus*. In his separate opinion, Judge Hudson argued that, although some arbitral tribunals have been expressly directed to apply "law and equity," the PCIJ "under Article 38 of the Statute, if not independently of that Article, . . . has some freedom to consider principles of equity as part of the international law which it must apply."³

It is worth noting that Judge Anzilotti in his dissenting opinion, reflecting the continental conception of law, reached the same conclusion:

I am convinced that the principle underlying this submission (*inadimplenti non est adimplendum*) is so just, so equitable, so universally recognized, that it must be applied in international relations also. In any case,

¹ Quoting D. WALKER, *THE OXFORD COMPANION TO LAW* 424 (1980).

² It may be noted in passing that in the 1930s there was a good deal of interest in proposals to establish an equity tribunal. See W. FRIEDMANN, *THE CONTRIBUTION OF ENGLISH EQUITY TO THE IDEA OF AN INTERNATIONAL EQUITY TRIBUNAL* (1935); G. SCHWARZENBERGER & W. LADD, *AN EXAMINATION OF AN AMERICAN PROPOSAL FOR AN INTERNATIONAL EQUITY TRIBUNAL* (1935); N. BENTWICH, A. DE BUSTAMANTE, D. MACLEAN, G. RADBRUCH & H. A. SMITH, *JUSTICE AND EQUITY IN THE INTERNATIONAL SPHERE* (1936); Kunz, *The Problem of Revision in International Law*, 33 *AJIL* 33 (1939).

³ 1937 PCIJ (ser. A/B) No. 70, at 77 (Judgment of June 28), 4 *WORLD COURT REPORTS* 172, 232 (M. O. Hudson ed. 1943).

it is one of these "general principles of law recognized by civilized nations" which the Court applies in virtue of Article 38 of its Statute.⁴

This important statement is not mentioned by Rosenne.

Rosenne reviews some cases in which the ICJ placed "the seal of approval" on Hudson's words (p. 98), to wit the *North Sea Continental Shelf Cases*⁵ and provisions related to equity in the 1982 Convention on the Law of the Sea.

In his final conclusion, Rosenne warns against overemphasizing the "principle of equity." As he puts it:

Above all, it is necessary to stop viewing equity as something which is in opposition to the law or is supplying a corrective to the law. That is not its reality. It appears as part of the legal rule, whether the rule is one of strict law relevant to the static factor of international law (such as the calculation of established reparation due), or is one which belongs to the dynamic side of the law, where the law itself is evolving and it is not always fully endorsed by the *opinio juris* of States. (p. 108)

This is indeed a very modest view of equity in international law.

In his comments on Rosenne's paper, Andrzej Wasilkowski (pp. 109-17) starts with the proposition that at present "there is simply no possibility of defining equity" (p. 112), although there is a common element in its use which is "the pursuance to make law just" (*id.*). In this sense, equity comes close to "the functions of natural law" (*id.*) as in the process of forming a new international economic order. There is no doubt, says Wasilkowski, that the creation of certain principles relating to economic law, space law and the law of the sea "was directly inspired by the concept of equity" (p. 115). In these instances "equity played the role of a kind of ideological motive (the conviction of what is advisable and just)" (*id.*).

Reviewing some cases decided by the ICJ, he finds it

symptomatic that the ICJ avoids treating or interpreting equity in *abstracto*. In the opinion of the Court equity (its utility) can be subject to appraisal only in the light of the result achieved. As a matter of fact an equitable solution is one which can be attained not so much by invoking the concept itself but by paying regard to all circumstances essential to the case. (p. 116)

In the opinion of the author, "it is probably impossible to establish what equity exactly is . . . in our heterogeneous contemporary world" (*id.*). It may be added that Rosenne was aware of this factor.

Professor Barbara Kwiatkowska begins her article, *The ICJ Doctrine of Equitable Principles Applicable to Maritime Boundary Delimitation and Its Impact on the International Law of the Sea*, with some observations on equity, the emergence of the 200-mile exclusive economic zone, the twelve-mile territorial sea and issues faced in the Third UN Conference on the Law of the Sea. The doctrine of equitable principles as the fundamental norm for maritime boundary delimitation appeared first in the 1969 Judgment of the ICJ in the *North*

⁴ *Id.* at 50, 4 WORLD COURT REPORTS at 214.

⁵ 1969 ICJ REP. 3, 47 (Judgment of Feb. 20).

Sea Continental Shelf Cases (Netherlands/Denmark/Federal Republic of Germany). The doctrine was further developed in Judgments rendered in 1982 (*Tunisia/Libya*), 1984 (*Canada/U.S.*) and 1985 (*Libya/Malta*). During this period (1977–1985), three boundary disputes were settled by arbitration. This process of development, argues Kwiatkowska, led to confusion in the practice of states and writings of jurists. In order to clarify the problem, Kwiatkowska begins with an analysis of the concept of equitable principles “as a fundamental legal norm” (p. 127). This is done under several headings: (1) the nature and function of equity in maritime delimitation, (2) equitable principles as general guiding principles, (3) the requirement of an equitable result, and (4) the operation of equitable principles within the law. In each segment the relevant judicial pronouncements are considered along with the literature.

Part of the Court’s doctrine of equitable principles is the requirement of drawing maritime boundaries by agreement. Under the heading “substantive aspects of the doctrine of equitable principles,” the author deals with “principles and rules of entitlement,” “the method of a single maritime boundary,” “geological and geomorphological factors” and the equitable method of the median/equidistance line.

Finally, the author offers some general conclusions such as the equitable principle of fixing maritime boundaries by agreement, and the principle of respect due to all relevant circumstances. Hence, “the fact that, apart from the principle of agreement, the principles . . . do not lay down obligations but simply provide guidelines for achieving an equitable result in delimitation, fully conforms with the primary function of equity as a general guiding principle” (p. 158). But the evolution of equitable principles for maritime boundaries is not complete: “It is for the future practice of States and international jurisprudence to contribute further to the development of this important doctrine” (p. 158). In her essay, Kwiatkowska has made such a contribution.

While praising the study by Kwiatkowska, Professor Wojciech Goralczyk finds some omissions. One of them is the interest factor in the delimitation of sea areas. When the territorial sea was three miles, no major economic interest was involved; however, since the 1945 Truman Proclamation on the Continental Shelf, vast economic, military and security interests became involved in the delimitation of sea boundaries. States became interested in less precise rules, and “the need arose to base the delimitation of sea areas on the principle of equity” (p. 163).

Goralczyk disagrees with the holding of the ICJ in the *North Sea Continental Shelf Cases*—that the continental shelf constitutes a natural prolongation of the land territory and is, like the land itself, subject to the sovereignty of the state. Outer space may be regarded as the continuation of airspace but is subject to a different regime. As more and more states followed the American example, the practice supported by an emergent *opinio juris* produced a rule of customary international law (p. 165).

The meaning of “equitable principles” is far from clear, argues Goralczyk. It is extremely interesting to learn that the term appeared for the first time in

the 1945 Truman Proclamation itself, which states: "In cases where the continental shelf extends to the shores of another State, the boundary shall be determined by the United States and the other State concerned in accordance with equitable principles" (p. 166). In any event, that often-repeated term has no inherent meaning. In Goralczyk's view, "the so-called 'equitable principles' are not equitable *per se*; in a concrete situation, in specific circumstances those principles are equitable which lead to an equitable delimitation, i.e., to an equitable result" (p. 166).

Finally, the author wants to make clear that he does not disagree with judgments of the ICJ but only with certain lines of its reasoning. "[T]he Court has emphasized" he writes, "the importance of equity or so-called 'equitable principles' in the delimitation of those areas. In this respect the Court has been consistent and predictable in its judgments" (p. 167).

To sum up, in this reviewer's opinion, the contents of this volume do not constitute four essays accompanied by comments but should be regarded as four books condensed into four closely reasoned essays. They do not make for easy reading and this reviewer suspects that they were not meant to be. But they are worth the effort and it is hoped that the Polish-Dutch collaboration will stimulate further research and publications.

LEO GROSS
Board of Editors

The Pure Concept of Diplomacy. By José Calvet de Magalhães. Translated by Bernardo Futscher Pereira. New York, Westport, Conn., and London: Greenwood Press, 1988. Pp. 150. Index. \$37.95.

This small book falls somewhere between the categories of handbook for young diplomats, historical guide to the art of diplomacy, and defense of the profession against its detractors. Throughout the first half of the book, the author is concerned to stress the fundamental difference between foreign policy and diplomacy. At times the repetition of the theme becomes tedious, especially when the same passages from the same erring authorities are presented over and over again.

Yet there is some point to this reiteration. The traditional American suspicion that diplomacy is one of the black arts results, at least in part, from its confusion with foreign policy. The sloppiness of some serious authors—theoreticians of international politics—adds to the problem. Diplomacy, notes the author, is one manifestation of foreign policy. Woodrow Wilson's rejection of diplomacy as an old world evil badly distorted the picture of what was actually happening at the Paris Peace Conference.

Nations have a foreign policy because of the need to defend their interests in the international arena. This truism becomes warped into a denunciation of the evil intent of a potential enemy (which may or may not be the case), in some measure by strictures against evil men—the diplomats. Wilson's exercise in summitry promoted conflict in this manner. "Wilson's attempts to

create a new diplomatic era, that of *democratic diplomacy*, contributed only to provoking a deplorable confusion between political action and its instrument. This confusion . . . continues to our day to mar American political works and others influenced by them" (p. 45).

One could go further than the author. Wilson's entire world view—a not atypical American outlook—presumed the ability in dealing with corporations and foreign nations to choose between right and wrong, good men and bad. It is really a matter of emphasis. By stressing individual responsibility to excess, Wilson tended both to obscure long-term national interests of other powers and to reduce complicated social questions in the industrial era to a rigid Calvinist form. In addition, the American addiction to the notion that revolutions are simply and always the products of "agents" acting on behalf of some evil empire has led the nation into a series of dubious crusades that serious diplomacy might have averted.

Professional American diplomats Dean Acheson and Dean Rusk have for this reason (and others) come down hard against the usefulness of summitry. The author recites all the basic arguments against Presidents going to conferences in place of diplomats: e.g., the danger of unrealistic expectations, the temptation to please a host, the fear of political repercussions and the dangers of a court of last resort in constant session. "The truth . . . is that the profound, although not readily admitted, reason for most meetings between political chiefs of different states lies in purely domestic considerations and not in foreign policy requirements" (p. 57).

These are all suggestive and controversial points. Much of the rest of the book consists of a discussion of the way diplomats operate and the continued need for their interposition between governments, and a defense of the diplomatic tradition against the notion that contemporary conditions are so changed that diplomacy has (or should) become a lost art.

LLOYD C. GARDNER
Rutgers University

Diplomatic Immunity: Principles, Practices, Problems. By Grant V. McClanahan. New York: St. Martin's Press, 1989. Pp. xvii, 283. Index. \$39.95, cloth; \$15.95, paper.

This book is both lucid and interesting; lucid in its explanation of the law of diplomatic immunity, interesting in its analysis of the associated problems. The scale of diplomatic activity has been on the rise and is likely to continue to increase in the 1990s. This is partly because of the decline of Cold War tensions and partly because of the increasing complexity and scope of global interdependence. For example, the North-South situation has necessitated the hiring of trade and technical experts, often as diplomats, because developed countries seek to reduce the gap between have and have-not nations through economic aid. Additionally, the complexity of twentieth-century technology involves the use of scientists as diplomats to help negotiate and

implement the sharing of innovative high technology. Inevitably, the range of diplomatic immunity is growing to include a number of professionals whose initial education was not primarily in diplomatic practice. For such people, this book would help to explain the immunity that protects the diplomat, while also stressing the real limitations of immunity when a diplomat faces volatile, revolutionary situations in the country of posting. The book contains a postscript from the author advising junior foreign service officers on immunities.

Having grown up in a diplomatic family, I experienced a sense of nostalgia reading this book, a warm remembrance of my late father explaining diplomatic immunity to me and advising me to realize that this privilege carried with it a profound responsibility and obligation to represent our country with dignity.

Anyone who has been a diplomat would doubtless agree with McClanahan that diplomatic immunity is a vital protection given on a reciprocal basis and that no diplomat can function without it. That this concept has been violated, as in the case of American diplomats in Iran, and abused, as in the shooting of an English policewoman by someone in the Libyan People's Bureau (Embassy) in London, cannot in any way justify the restriction of immunity.

McClanahan speculates that the number of persons worldwide who enjoy diplomatic immunity may be 300,000 to 400,000 (p. 141). Explaining the consequent problems, McClanahan states:

This vast postwar expansion of the mass of persons entitled to privileges and immunities, of the numbers of inviolable premises and dwellings, diplomatic and consular bags, official and private vehicles, of duty-free goods, special license plates and identity cards, reserved parking places and, often, priorities for housing, telephones, and various services—all this growth and proliferation have placed a heavy burden of responsibility on the agencies that administer the institution of diplomatic immunity. (p. 142)

As the number of diplomats grows, the consequences in some capitals of having this privileged foreign elite have been largely negative. As McClanahan explains, "the general public [is] . . . convinced that there may be too many diplomats in the world, and in any case that some of their traditional immunities and privileges need to be further trimmed down to essentials, with tougher curbs applied to offenders" (*id.*).

As a guide to diplomatic immunity, the book includes a brief history; a discussion of the significance of the Vienna Conventions; and a look at the varied scope of immunity for embassy personnel, consular officers and UN officials. McClanahan guides new diplomats through the functions of national protocol offices, the role of the dean of the diplomatic corps, and dealings with courts, police and tax departments. The limits of immunity are also explained, as well as the concept of its waiver. Ancillary subjects include state security and the threat of diplomatically instigated terrorism, espionage, and diplomacy as perceived by Communist and revolutionary govern-

ments. The Vienna Conventions are included in the appendixes, as are other relevant documents.

While an experienced diplomat may not find much that is new in this book, the author does make useful suggestions for the increased protection of diplomats. He favors greater enforcement of international instruments such as the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents, passed by the UN General Assembly in 1973 and in force since 1977 (p. 149). There are also a few regional antiterrorist agreements, which, if strongly enforced, would result in fewer attacks on embassy personnel. McClanahan supports the improved security measures being installed in the embassies of some countries. It is significant, however, to remember that if diplomacy involves the art of creating foreign friends for one's nation, caging diplomats behind barbed wire and electronic gadgetry cannot but hinder their pursuit of this profession. One feels nostalgia for the old atmosphere of openness in embassies. Surely, the concept of a securely sealed diplomatic mission is a contradiction in terms, although it is an inevitable concession to the volatile times in which we live. As McClanahan asks: "Can diplomacy be conducted under such siege conditions?" (p. 152).

McClanahan also suggests that crimes against diplomats should carry harsher penalties (*id.*). Events in Iran, Canada and Sweden compel the author to observe "that there is less risk to an assailant who commits a criminal assault on an 'internationally protected' and 'inviolable' diplomat than to one who commits the same crime against a member of the general public" (p. 153). The fact that the revolutionary Government of Iran issued stamps commemorating the takeover of the U.S. Embassy is an indication of the contempt in which long-cherished ideas about diplomatic immunity are held in some societies. While the hostage crisis in Iran was only the most spectacular exhibition of this attitude, the violent death of a number of diplomats indicates the risk involved in representing one's country abroad. This risk is perhaps highest for American diplomats. As McClanahan states:

In the past twenty-five years, diplomats have been in greater physical danger than ever before. The public has often envied their privileges and immunities and deeply resented the abuses of their status by a few. However, the public has also lately become aware through the media that a diplomat's lot with respect to personal security is not a happy one. (p. 146)

Some alleviation might be found, according to McClanahan, in the encouragement of compliance with the Vienna Convention, which might result in isolating a violating state (p. 177). If a number of states combine to inflict such isolation, the result could be dramatic.

Another facet of diplomatic immunity concerns its abuse by some diplomats. These abuses have ranged from minor traffic offenses to assault. While such offenses generate critical media attention (particularly in the United States), McClanahan is careful to point out that their scale is minor. Quoting the *Foreign Service Journal* he explains: "in the year ending 31 May 1987, out

of the 78,855 crimes reported in Washington, D.C., 'no more than five which could be considered serious were committed by persons entitled to criminal immunity' " (p. 171). Washington and New York host more than 10,000 diplomats. Between March 1986 and February 1988, there were 24 cases of traffic violations involving diplomatic automobiles in Washington (*id.*).

Despite evidence that most diplomats take their responsibilities very seriously, the public cannot help questioning the utility of diplomatic immunity when exceptional cases occur such as the shooting of policewoman Yvonne Fletcher on April 17, 1984, from a window of the Libyan People's Bureau. Though Britain severed diplomatic relations with Libya five days later, the public outrage continued. The general reaction to such abuses is inevitably to demand renegotiation of the Vienna Convention (p. 166), a proposal that finds little apparent support from the author, whose preference is for a more stringent commitment to the Convention. McClanahan marshals an impressive array of evidence from British and American government sources opposed to modification of the Vienna Convention and concludes:

In the light of the carefully considered attitudes of the United States and British governments that the Vienna Conventions in their present form are adequate and that any amendment process would be likely either to fail or to have results adverse to the interests of such relatively law-abiding states as themselves, it seems that for at least the next five or ten years, and probably well beyond that period, the international rules governing diplomatic immunity are not likely to change. (p. 174)

This book was sponsored by the Institute for the Study of Diplomacy of Georgetown University and the author has carried out the task of preparing "an updated guide" (p. xv) concerning diplomatic immunity with careful research of the sources and interesting analysis. If his conclusions and suggestions are predictable, this is inevitable, given the nature of his subject and his commitment, as a former diplomat, to the preservation of the concept of diplomatic immunity.

RANEE K. L. PANJABI
Memorial University, Canada

Les Organes intégrés de caractère bureaucratique dans les organisations internationales. By Jacques Schwob. Brussels: Etablissements Emile Bruylant, 1987. Pp. xi, 398. Index. BF 2,840.

This work is an exercise in taxonomy done in the best French tradition. Schwob reduces the great variety of international secretariats to four basic types, each linked to a different type of intergovernmental organization. The organizational types are defined mainly by the goals sought by the member states. The amount of autonomy in both activity and internal structuring attained by the secretariat depends, not surprisingly, on the nature of those goals and the collective desires of member governments.

Despite the care that has gone into preparing the work, it will have only limited appeal. First, it has been superseded in some respects by more recent developments and writings. The main body of writing was completed in late 1985 or early 1986. It thus could not take account of developments in, or the new literature on, secretariats inspired by the European Community's "Project 1992" or the most recent efforts to reform and rationalize the UN system's notorious bureaucratic sprawl. Second, the taxonomical approach, while useful in establishing a framework for thinking about secretariats, is likely to appear unduly static to lawyers, policy makers or social scientists interested in how the organization and activity of a particular secretariat affects, and is affected by, the political context facing the organization of which it is a part. Schwob is aware of these issues and discusses them when elaborating on particular examples, but the framework imposed by a taxonomical approach prevents him from pursuing them in any systematic fashion.

M. J. PETERSON

University of Massachusetts, Amherst

A Unified Theory of Global Development. By Van B. Weigel. New York, Westport, Conn., London: Praeger, 1989. Pp. xix, 263. Index. \$47.95.

What can be said in this short space about a book that utilizes a dozen disciplines to project world history from its beginnings on the African savanna into the twenty-first century, that develops a universal moral imperative, and that along the way proposes a new theory of nuclear deterrence and addresses such profound questions as "when does life begin"? Simply, that this is a serious and original work (despite its paradoxical reliance on out-of-fashion development theory) that warrants careful reading by those concerned with public policy and the future of the planet.

The author makes three significant contributions to the literature of economic development: he comes to grips with the interrelated complexities of the development problem and the interdisciplinary nature of its solution; he puts moral philosophy at the service of public policy; and—echoing Alexander Pope ("the proper study of mankind is man")—he directs the attention of development professionals to the individual human being as the proper object of policy.

One may fairly ask at the outset: do we need a "unified theory"? The author sees an "unfortunate lack of perspective in comprehending and responding to the planetary problems facing humanity" (p. xvii), an inadequacy of institutional machinery for coping with global problems, and a paucity of moral, economic and political ideas to generate workable solutions.

Economics, ethology, sociobiology, neurobiology, anthropology, sociology, game theory, political theory, moral philosophy, international relations, strategic studies, history and international law all contribute to the book's

general theory, but the author relies principally on "three significant breakthroughs" of the seventies: the formulation of the Basic Needs Approach (BNA) to economic development, advances in ethical theory and the development of sociobiology and neurobiology. His linchpin is the Basic Needs Approach, as it was articulated by the International Labour Office in conjunction with the World Employment Conference of 1976. Under the BNA, development policy would accord primary attention to the alleviation of absolute poverty.

Borrowing concepts from John Rawls's *A Theory of Justice* (1971) and Alan Gewirth's *Reason and Morality* (1978), Weigel transforms the BNA into a Basic Needs Mandate (BNM), "all human beings have the right to meet their basic needs" (p. 79), and, ultimately, into a Basic Needs Imperative, "act in accord with basic needs of other human beings as well as yourself" (p. 80). Critical to the development of this essentially moral doctrine is what Weigel calls the "open genetic program of human life," a product of evolutionary growth in the size of the human brain and cultural evolution, which has fostered an expanding circle from kinship and tribal loyalties to identification with the human family. The essence of the open genetic program is humankind's potential for adaptation.

Could it be that future generations will view the BNA, or something like it, as a kind of Magna Charta for an emergent concept of human rights that fully integrates fundamental political rights with basic economic rights? Could it be that observers in the 21st century will view the global maldistribution of resources with the same disdain that we presently hold for the institution of slavery? (p. 19)

What is at stake is more than theory, more than philosophy: it is, in the author's terms, a matter of life and death.

Weigel's typology of basic human needs, deriving from what he calls "core attributes of human life" (existence, intelligence and sociality), translates into three categories of needs: (1) minimum nutrition, safe water/sanitation, primary health care, shelter/clothing/energy/transportation, municipal protection/national defense; (2) basic education/literacy, access to uncensored information media, access to contraceptive technologies; and (3) absence of political repression.

In devising techniques for ranking these needs among themselves and against others, Weigel recognizes that many nonbasic macroeconomic objectives (e.g., balance of payments, inflation and growth) are "critical pillars for the implementation of the BNA in the longterm and will subvert BN policies if left unattended" (p. 55).

Although the author does not guarantee a positive outcome for society, a teleological thread runs through his work. The articulation of a human rights concept in the eighteenth century, the abolition of slavery in the nineteenth, and the proliferation of democratic ideologies and the repudiation of colonialism and racism in the twentieth are to Weigel evidence of moral progress.

In a separate chapter on "The Basic Needs Mandate and International Law," Weigel sees the BNM as enhancing "significantly the scope and regu-

latory machinery of *jus cogens* (compelling law) norms in the international order" (p. 189). Again in a teleological sense, the author witnesses (and applauds) the transition of international law "from state-bound to state-transcendent norms."

It is in the chapter on international law that Weigel departs from the present to conjure up a future of regional and international integration at both economic and political levels and the establishment of an effective international resource management agency. This positive vision is further elaborated in a final chapter entitled "Entering the 21st Century."

If only because of its ambitiousness and unconventionality, the book will doubtless attract criticism. There are elements of "horse and rabbit stew": leaps from tightly woven logic to flights of fancy (as in the twenty-first-century retrospective). There are, as well, some gratuitous arguments, such as Weigel's opinion as to when life begins and his theory of nuclear deterrence. Interesting in themselves, both propositions detract from the central theme. Furthermore, some Cold War references look woefully out of date in the wake of recent events in Eastern Europe.

A development historian might fault the author for choosing as his mainstay a development theory that failed to survive the seventies. Others may say that the demise of the BNA in the eighties was less a matter of logic than of politics: a Republican administration in Washington raising the banner of "private sector development." Interestingly, Weigel postulates the BNA as complementary to structural adjustment and other macroeconomic policy approaches, rather than as a substitute for them. Unfortunately, however, he devotes scant attention to the difficult problem of achieving a proper balance between growth and distribution.

What may be more important than the bold doctrines and detailed analyses in this book is its overall vision: a threshold recognition that a unified theory of global development is important. In that courageous undertaking, Weigel has succeeded admirably.

L. MICHAEL HAGER

International Development Law Institute

Petroleum Investment Policies in Developing Countries. Edited by Nicky Beredjick and Thomas Wälde. London, Dordrecht, Boston: Graham & Trotman, 1988. Pp. xii, 261.

The twelve contributors to this book come from a range of disciplines. More than half are lawyers, while the balance includes engineers, economists, analysts and consultants with varying types of experience in the international arena. What most have in common is that they have collaborated in some way with the UN technical cooperation activities in the energy field. Indeed, many of the "chapters" appear to be based upon reports prepared for the United Nations and adapted, to a greater or lesser degree, for inclu-

sion in this book. The result is less a cohesive treatment of the topic promised by the title than a collection of papers on subjects falling very loosely under the rubric of "petroleum investment policies." The reference to "developing countries" in the title is somewhat misleading: while many papers draw heavily upon examples from developing countries, others draw almost equally from examples elsewhere in the world, frequently without explaining why the policies or practices of countries such as Norway and the United States are relevant to developing countries.

The collection is divided into twelve chapters and includes an introduction by Beredjick and Wälde that attempts to offer an overall view of its contents. This is not an easy task, given their diversity. At page xi, they suggest that one message offered by the book is that "the imagination of the lawyers and the growing sophistication of financial analysis by petroleum economists should produce legal instruments of greater flexibility and greater adaptive capacity than seen before." They underscore the great challenges faced by the industry and by host governments, given uncertain petroleum prices, a theme that is often revisited.

The twelve chapters look at petroleum investment policies from a variety of perspectives and with a focus on many issues. The opening chapter, by Beredjick, briefly offers an insider's view of UN activities in technical assistance. He stresses the importance of an interdisciplinary approach in the UN advisory services, a point that is reflected in the way the book itself is organized. One particularly interesting point relates to the impact of technological change: he stresses that the microcomputer is an increasingly important tool for effectiveness and productivity but that there are many barriers to persuading various professionals to accept these benefits. His suggestion that this is largely a matter of intergenerational adjustment applies, of course, to many contexts other than petroleum development; but it is interesting to consider the special programs being mounted by the United Nations to facilitate broader use of computers in a variety of applications.

Wälde prepared the next chapter, "Investment policies in the international petroleum industry—responses to the current crisis." He traces trends in new petroleum legislation, pointing out that the tendency is for such laws to provide a framework for the negotiation of agreements pursuant to which the activities will be conducted. Price uncertainty leaves host governments with three broad policy options: to do nothing until prices firm up, pursue state enterprise activities with greater vigor, or negotiate contracts that contain adequate incentives for cash-strapped oil companies and that are sufficiently flexible to permit adaptation should the price situation change dramatically.

The closing chapter, by Richard Bentham, is relevant to the second option, as it addresses the legal status of state petroleum companies. It consists primarily of a table that summarizes the corporate form and internal organization of, and the nature of government participation in (by way of supervision, monitoring, decision making, and involvement in marketing, production, investment and financing), seventeen state petroleum companies. This chapter is but one of many that deviate from the coverage suggested in the

book's title by including, without explanation, an analysis of state petroleum companies in countries such as Canada and Norway.

Two chapters are relevant to the third option outlined by Wälde. In chapter 5, petroleum engineer Honoré Le Leuch presents ways in which contracts can be designed with the flexibility to respond to the actual profitability of petroleum operations, the objective being to promote fair sharing between companies and governments, whatever the oil market. This is one of several chapters that discuss the various forms that petroleum contracts may take, although it adds to the material found elsewhere in the book by providing a table illustrating which countries use which type of contract form (pp. 86–88). From an economic point of view, Le Leuch asserts, contract terms should be designed to improve the profitability of marginal fields and to capture part of windfall or excess profits. He examines various techniques that can be used to achieve flexibility, such as progressive royalties, excess profit taxes and investment tax credits. Charts help to demonstrate the likely effect of such flexibility on oil companies' decision making.

Chapter 11, which surveys incentives found in petroleum contracts, also relates to Wälde's third option. The author, Gordon Barrows, is president of the New York-based Barrows Company, which is well-known for its publication and analysis of international petroleum contracts. Barrows opens with yet another description of the available types of petroleum contracts; given the frequency with which this topic appears in the volume, his description is mercifully brief. The chapter mostly consists of a country-by-country analysis of changes in petroleum arrangements from 1980 to 1986, with emphasis upon those that relate to incentives. Oddly, it is not until the end of the chapter, following a description of changes in thirty-eight countries (including several that are not part of the developing world), that Barrows attempts to describe what he means by "incentives." A very short part of the chapter summarizes the country-by-country information by ranking the popularity of various types of incentives and assessing their relative efficiency.

An economic analysis of financial and fiscal arrangements for petroleum development is found in chapter 4. Although the title of the chapter does not indicate this, Pedro Van Meurs's analysis relates to offshore arrangements. An appendix to the chapter contains details about three different offshore 100-million-barrel oil fields (low, medium and high cost), upon which this chapter is based. Van Meurs's evaluation technique is "incremental analysis," which shows how an already-existing cash flow is influenced by new investments. Among the fiscal features that can encourage incremental investment are corporate income taxes, profit sharing, production sharing, carried interests and withholding taxes. Examples of these features are given, often in the context of countries such as the Netherlands and Australia. Contracts from Equatorial Guinea are used to illustrate the use of a rate-of-return formula in regulating the government take. At the end of the chapter, the author points out that the increased complexity of fiscal arrangements requires the establishment of a proper cost control system, something that can be very difficult to achieve in smaller countries.

Three chapters focus on the particular case of natural gas, each emphasizing some of the reasons that the presence of gas can inhibit exploration: gas is not traded on the spot market and requires special transportation arrangements, either through pipelines or in liquefied form. As a result, individual arrangements must be made for each project. In chapter 7, Kamal Hossain identifies common deficiencies in petroleum contracts as they relate to gas and suggests how these deficiencies could be addressed. He draws, in part, upon recent contracts negotiated in the gas-consuming countries of Egypt, Brazil, Ecuador and Pakistan. Chapter 8, by the Washington attorney Gerald Greenwald, considers the development of natural gas exploration policies, among other things utilizing analogies with Indonesian coal and geothermal policies. In one of the book's too-frequent editorial peculiarities, Greenwald includes two quotations from Wälde's chapter but references them to an earlier presentation upon which the Wälde chapter is based. Chapter 9, by the Oxford energy economist Christopher Hurst, reviews the availability of different types of international financing used to fund gas projects, including risk capital from foreign companies, export credit schemes, commercial bank loans, multilateral development banks, official development aid and financial packages.

In chapter 10, Hasan Zakariya, former head of OPEC's legal department, gives an overview of insurance for political risk. After canvassing national insurance schemes in the OECD countries and the United States, he considers international programs available through the World Bank and the recently established Multilateral Investment Guarantee Agency (MIGA). This is the third place where MIGA is discussed (the other two references are in chapters 2 and 9), although Zakariya's treatment is far more thorough than that of the other authors.

The remaining two chapters were both written by lawyers. In chapter 3, Peter Cameron (of the International Institute of Energy Law at the University of Leiden in the Netherlands) examines a series of issues that tend to arise in contract negotiations, using examples from existing contracts to illustrate the range of ways in which they can be resolved. Among the many issues reviewed here are the duration of the exploration period, relinquishment, work program, declaration of commerciality and state participation. Cameron is one of the few contributors who seem to be aware of the contents of the rest of the book; his occasional cross-referencing to other chapters helps to provide a rationale for his coverage, an approach that would have strengthened the book immeasurably had it been pursued by more of the authors.

Chapter 6, by the Canadian law professor Ian Townsend Gault, deals with the legal and contractual issues of offshore petroleum development. At sixty-three pages and with nearly three hundred footnotes, it is by far the lengthiest and most detailed contribution. The bulk of this chapter scans international legal developments concerning the offshore area, ranging from the Truman Proclamation of 1945 to the 1982 Law of the Sea Convention, and pausing frequently in between to consider such diverse subjects as individual state adherence to the 1958 Geneva Convention on the Continental Shelf and the extent of state claims to an exclusive economic zone. Other

topics touched upon are boundary making, boundary delimitation, dispute settlement and the role of the courts. Gault considers joint development of fields lying across an international offshore boundary or in which more than one state has or claims an interest, drawing in part upon the example of the UK-Norway Frigg gas field. Given this rather large view of complex matters that form the basis of innumerable treatises, the chapter ends with the unfortunate addition of a few pages on petroleum licensing. Since, as the author notes, these matters are considered in much more detail in four other chapters, the reader must wonder why this section was even included.

This collection of essays offers a cross-disciplinary look at many issues relating to petroleum development around the world and should be of interest to companies, governments and private consultants. While some of the material has undoubtedly been treated in more specialized texts and journals, the book at least offers insights from disciplines other than one's own, insights that one might be unlikely to consider were they not contained in a single volume. References are drawn from a variety of sources in many languages and examples are given of legislative and contractual approaches adopted in an array of jurisdictions. This information could prove very useful to those looking for new ideas or considering ventures in an unfamiliar country.

Certain shortcomings, however, limit the contribution of this book to the literature on international petroleum development. Mention has already been made of the duplication that plagues the collection and that exacerbates the uneven nature of individual chapters. Sloppy editing (incomplete sentences and references without page numbers, for example) irritates the reader. The absence of an index could have been largely compensated for with a more detailed table of contents. Without this, the reader must plow through each essay in the hope of finding what he or she is looking for, a task made more difficult by the fact that the chapter titles are not always very true to, or explanatory of, the actual substance. Moreover, nowhere in the book is mention made of the importance of environmental policies. This may be more a reflection of the speed with which environmental issues have burst upon the international stage than of a lack of awareness of their importance on the part of the editors; it is almost inconceivable that a book published now with this title would exclude extensive discussion of environmental policies.

Despite these deficiencies, *Petroleum Investment Policies in Developing Countries* deals with topics of considerable importance to the world community and with issues that will continue to be addressed in the future.

CONSTANCE D. HUNT
University of Calgary

Foreign Investment in the Present and a New International Economic Order. Volume 2. Edited by Detlev Chr. Dicke in cooperation with the International Law Association's Committee on Legal Aspects of a New International Economic Order. Fribourg, Switzerland: University Press, 1987. Pp. xii, 356. \$40.

This book is the proceedings of the April 1987 symposium organized by the ILA's Committee on Legal Aspects of a New International Economic Order. The participants (lawyers, economists, academics and government and international organization officials) were invited to identify deficiencies in the old economic order and suggest improvements for a new economic order. Unfortunately, the real experts on the new economic order, a euphemism for economic and political *dirigisme*, would not have their say until 1989, when freedom broke out in Eastern Europe and a leader like Czech Finance Minister Vaclav Klaus could declare that prosperity is the result of human action, not human design.

The editor of this volume, Professor Detlev Chr. Dicke, states in his preface that "the ground is prepared for us lawyers to set up just and reasonable rules regarding foreign investment," a goal the symposium is meant to help implement. The result, however, is more modest. This is not the stuff of brave new worlds but of the fairly prosaic workaday world of trade law. The papers presented cover such issues as foreign investment and transnational corporations, foreign investment insurance systems, reasonable expectations of the investor and the host government, unjust enrichment and compensation, sovereignty, international law and the UN Code of Conduct for Transnational Corporations, lump sum agreements and state responsibility toward foreign investors. There are also discussions of the papers by participants.

At the risk of slighting participants who presented papers on more technical issues, I will single out the papers of Ernst-Ulrich Petersmann of GATT and Hermann Meyer of Nestlé's. The Petersmann paper is valuable for demonstrating a simple, but sometimes overlooked, fact: less-developed countries compete on a worldwide scale for scarce private investment capital, and that capital will not come unless there is security and a good chance of profit making. The Meyer paper defines what investors mean by security and profitability. All the enlightened investment codes and laws are just so much paper until they are put into operation and convince the investors. That is reality.

It is hard to get too excited about a symposium that took place three years ago, especially since the world of 1990 is fundamentally changed from that of 1987. But apart from the march of time, there is also a problem of readability. In E. C. Bentley's *Trent's Last Case*, a certain Mrs. Manderson is very hard on lawyer talk. "I have had a great many letters from lawyers, and they always begin," she says, "with reference to our communication," or some such mouthful, and go on like that all the way through. Yet when I see them they don't talk like that. It seems ridiculous to me." Well, they are still writing like that, Mrs. Manderson, if the Vienna symposium is any guide.

Now that economic as well as political freedom is winning the day, the time has come for an ILA symposium on how to expand free trade in a world becoming freer. And that symposium should not be given by an anachronism like the Committee on Legal Aspects of a New International Economic Order, but by a committee in tune with the times, a new committee that I respectfully suggest be named the Committee for a Free Economic Order.

FRANK RUDDY
Chevy Chase, Md.

Foreign Investment in the United States: Law, Taxation, Finance. Edited by Marc M. Levey. New York, Chichester, Brisbane, Toronto, Singapore: John Wiley and Sons, 1989. Pp. xlix, 766. Index. \$95.

This collection of articles on various aspects of foreign investment in the United States was edited by a principal of one of the big accounting firms with considerable practice in international taxation. About thirty specialists contributed to the seventeen chapters and the foreword; consequently, while each chapter offers some insight into, or at least a general overview of, the relevant topic, it was probably preordained that the book as a whole does not cover quite as wide a field as its title may suggest.

In particular, it came as a surprise to this practitioner that one handbook would attempt to cover, in depth, both foreign investments in U.S. business enterprises and foreign investments in U.S. real estate. Hands-off investment in U.S. real estate seems to be quite different from the purchase of an interest in, or the takeover of, an American company. However, a number of considerations are naturally common to both sorts of investment. There are some chapters that would be useful to the passive foreign real estate investor, as well as the foreign company actively engaging in U.S. business.

Chapter 1 considers the criteria for identifying and exploiting value in the U.S. economy. Chapter 2 caters specifically to foreign investors from Canada, the Federal Republic of Germany, the Netherlands, the United Kingdom and Japan. There are five subchapters, each devoted to issues particularly relevant to investors from one of these countries, the top five in foreign investment in the United States.

Chapters 3 to 7 deal with the most pertinent U.S. tax issues. Chapter 3 describes some general tax issues relevant to the choice of a certain structure. Chapter 4 is devoted to U.S. acquisitions by foreign investors. Chapters 5 and 6 deal with the earnings of U.S. branches and subsidiaries, respectively. Finally, chapter 7 treats U.S. taxation of partnerships and joint ventures.

Chapter 8 addresses the obligations of disclosure and compliance arising from securities law. In chapter 9, transfer pricing is discussed, i.e., in the most common situation, the sale of tangible property between a domestic corporation and its foreign affiliates. Chapter 10 presents methods of financing U.S. business or real estate transactions. Chapter 11 deals with taxation by the United States of foreign investment in U.S. real estate. Chapter 12 sets out some legal aspects of U.S. real estate development and construction. In chapter 13, various issues regarding the management of U.S. real estate are raised.

In chapter 14, the foreign investor is alerted to state and local tax considerations. Chapter 15 sets out the importance of estate and income-tax planning for foreign nationals (incidentally, this term, used by the author of the chapter, sounds much friendlier than the term "immigrating non-resident alien," used by the editor in his preface).

Chapter 16 describes the very considerable reporting and disclosure requirements applicable to foreign investments. The last chapter is devoted to employment and compensation practices in the United States.

The foreword indicates that the book is aimed at all sorts of investors, beginners and veterans, and their advisers. Not many books succeed in serving such diverse audiences well, and this one certainly does not. For example, the subchapter on foreign investors from the Netherlands (or rather, third-country investors using the Netherlands as a conduit) gives an interesting overview, but not more than that, of the most important topics. One certainly expects the veteran investor and, one hopes, his professional advisers, to be apprised of this information already. On the other hand, for a first-time investor or a prospective adviser, this level of information may serve as a guideline and a brief inventory of issues. However, if the book is directed primarily to the first-time investor, a serious shortcoming is the lack of cross-references and of a clear, systematic structure, which makes the material less accessible. Unfortunately, the failure to clearly define the audience and the scope of the book limits its practicality.

Many of the chapters, by themselves, make excellent reading for those investors or practitioners who have a general interest in the particular topic. Each author is clearly an expert in his or her field. Because of the quality of the individual chapters, an interest in a few of them may well warrant the considerable cost of purchasing the whole volume. Nevertheless, the book would have been more useful if its scope had been limited to a clearly defined field, for instance foreign ownership of U.S. business operations, and if that field had been covered more thoroughly. As it is, few readers will be interested both in legal aspects of U.S. real estate development and construction and in securities laws. There is no real bond between the chapters; each stands separately and covers its subject matter without reference or connection to the others. In this manner, the book highlights certain interesting topics of law, taxation and finance concerning foreign investment in the United States, but does not succeed in treating its subject matter comprehensively. In fact, many of the chapters contain, at their conclusion, a disclaimer on the depth and range with which the particular topic has been described. One wonders what precipitated these, as there is a blanket disclaimer in the front.

Although the book certainly has its merits and many chapters are worth reading individually, it falls somewhat short of the goal stated in the editor's preface: to offer foreign investors and their advisers a comprehensive and meaningful guide to the critical issues surrounding U.S. investments.

WYBE J. K. VONK
Amsterdam

Developing Countries in the GATT Legal System. By Robert E. Hudec. Aldershot, Eng., and Brookfield, Vt.: Gower, 1987. Published for the Trade Policy Research Centre, London. Pp. xix, 259. £12.95.

In this thoughtful and readable book, Robert Hudec, professor of law at the University of Minnesota and an eminent expert on the General Agreement on Tariffs and Trade (GATT), has drawn on his decades of scholarly

and practical experience in international trade law to provide us with useful, and sometimes provocative, insights that could hardly be more timely as we approach the culmination of the massive Uruguay Round trade negotiations.

The basic thrust of Hudec's argument is that the traditional policy assumptions of the GATT towards less-developed countries (LDCs) are seriously flawed and probably cause more harm than good. Many scholars and policy leaders will undoubtedly agree, but will differ strongly about what the remedy should be. But first, some background.

The GATT is perhaps the most curious of the most important international organizations today. Although it was never intended to be an organization, when the draft charter for the International Trade Organization failed to receive approval, the GATT was left to fill the gap and to become the principal international institution for regulating international trade. Even today, the GATT as such has never come into force—its legal obligations are applied (and modified) by the 1947 Protocol of Provisional Application.

Perhaps partly for this reason, but also because of "disdain" for "common commercial matters," traditional international law scholarship has not appreciated the wealth of practice and "precedent" of the GATT system; nor has it integrated it adequately into the generalizations of traditional international law. Yet there are perplexing and complicated issues, particularly relating to treaty law, to which the experience and influence of the GATT practice should be applied. The dispute settlement system of GATT, for example, has evolved mostly by piecemeal increments of practice into a reasonably elaborate set of procedures (soon likely to be more elaborate). More cases have been accommodated (for better or worse) in the GATT system than in the World Court, yet seldom is a GATT dispute panel opinion cited outside the "elite priesthood" of GATT specialists.

Hudec's book speaks from and to the priesthood, but has insights that are extremely significant for the modern study of general international law (particularly during times of relative peace). For example, the book has what this reviewer regards as brilliantly written passages on the relationship of national constitutional and political systems to the international legal order, emphasizing the role of GATT international rules in supporting necessary, but unpopular, policy objectives for national governments and their officials. Noting that government officials in many countries, including developing countries, as well as most economists, believe that liberal trade policies are to be preferred to interventionist or protectionist ones, Hudec says:

The role that GATT obligations play is to augment the political power of these interests. The expectation is not that GATT obligations will enable these interests to prevail in every case but that they will make a difference at the margin—that they will help to achieve some greater degree of liberal trade policy behavior (or avoid some greater degree of trade restriction) than would exist without them. (p. 162)

This book is divided into two parts of six chapters each. In the first part, Hudec develops his view of the "History of the Legal Relationship" of devel-

oping countries to the GATT. In the second part, Hudec exposes his "Legal Critique of the GATT's Current Policy" regarding developing countries. Despite its title, this second part is a more general criticism of GATT policies (not just a "legal critique") towards developing countries, and here he sets forth his own ideas for possible (gradual) change. A brief word about each of these parts follows.

In part I, Hudec deftly outlines the troubled origins and history of GATT, from 1947 to the present. A central policy dispute for GATT has always been the troublesome question whether its rules should be uniform for all nations, or whether there should be different rules for those that are poorer. As Hudec puts it:

The history begins with a legal relationship based essentially on parity of obligation, with only very limited, almost token, exceptions. Over the years the relationship has gravitated, in seemingly inexorable fashion, towards the one-sided welfare relationship demanded by the developing countries. This relationship is one in which developing countries are excused from legal discipline while developed countries are asked to recognize a series of unilateral obligations, based on economic need, to promote the exports of developing countries. (p. 4)

Noting the more recent attempts to bring advanced developing countries into a normal GATT "disciplined relationship," he says, "it is just as easy to make developed-country positions look rapacious or insensitive, or to make GATT obligations resemble Anatole France's law that prohibits rich as well as poor from sleeping under bridges" (p. 5). These arguments, Hudec believes, "rest on fundamentally wrong perceptions about the economic and legal character of" the GATT relationships.

Thus, Hudec outlines the four decades of GATT history. It began with the immediate post-World War II era with its colonial and wartime legacy of government intervention and control of trade with developing countries. This was followed by decades of LDC accessions to GATT, partly a result of Cold War competition for the friendship of these countries. Very soon the LDC membership became a majority, and the trend toward relaxing the GATT rules for these countries appeared. This trend in the 1960s and 1970s resulted in the Generalized System of Preferences (GSP), which has been perpetuated by a 1979 Tokyo Round Understanding, and allows developed countries to depart from the most-favored-nation (MFN) clause to give tariff advantages to developing countries.

In part II, Hudec explores the policy implications of this history. He points out that the ideal of "one rule for all" was never truly achieved, and that even the developed countries that (hypocritically) urged LDCs to submit to the same GATT discipline as others did not live up to those disciplines themselves. But, Hudec notes, there are three sets of economic assumptions involved in the LDC relationship to GATT (p. 141), and each of these is suspect.

First is "mercantilism" or the notion that exports are good but imports bad. Hudec later describes this as "voodoo economics rejected by virtually

every professional economist" but nevertheless often embraced by government officials either out of "GATT habit" or through the influence of domestic special producer interests.

Second is the "infant industry" argument for restraining imports to allow a new industry to develop, which, Hudec notes, is undermined by, *inter alia*, the "average government's own ineptitude" in identifying the appropriate recipients of such a benefit, the slowness of governments to adapt to change and the skewed reward structure for government officials.

Third is the argument that preferences will assist the welfare of the beneficiary developing countries. This assumption is undercut by the instability of preference measures, as well as their inadequate implementation, and suffers overall because of the damage done to the more important policy of MFN.

In short, Hudec concludes, the "GATT's current policy is harming developing countries more than it is helping them" (p. 59). His argument largely follows the reasoning of economists who say that trade intervention distorts national and world economies and reduces welfare, and that therefore GATT policies of liberal trade are generally superior. Conceding that even developed countries do not fully follow these policies, he suggests that, nevertheless, the GATT needs to support those officials in all countries, especially in LDCs, that might wish to pursue liberal trade approaches. A firm GATT discipline can be one way to support such officials, who can then better use the GATT rule in internal debates. Another way to support such officials is through the traditional GATT concepts of "reciprocity," which have largely been relaxed for developing countries. Again, conceding that "reciprocity" ideas are not essentially valid and partake of "mercantilist" notions (he calls them a "bargain with the devil" (p. 165)), he believes that these ideas do help in political persuasion, and that the "trick in using the reciprocity doctrine . . . is to obtain its political benefits without paying the cost of following its mercantilist precepts to the letter" (p. 164).

In his final chapter, Hudec sums up by reviewing his conclusion that none of the GATT policies currently available to developing countries offers much help to them, and that the GATT's current approach "cannot promise any significant improvement" (p. 227). In his view, the "main factor limiting further improvements in market access is the relative lack of economic power of developing countries," and he "continues to believe that the MFN obligation is the only foundation on which can be built a legal policy that will be effective in promoting and protecting" LDC market access. His second major conclusion is that "developing countries are wrong to think of GATT legal policy primarily in terms of its impact on the behavior of developed countries and instead should start paying careful attention to its impact on their own trade-policy decisions." Finally, he notes that it will be difficult to change GATT's policy. Like the "momentum of a fully laden supertanker under way at full speed . . . [i]t will take many miles of ocean just to slow it down, much less to begin making a complete turn" (p. 230). However, more optimistically, Hudec notes that GATT has within its legal structure some possibilities—tariff bindings, the code mechanisms (special side agree-

ments), the reciprocity-negotiation traditions, and the recent push for LDC "graduation"—all of which can help.

Hudec makes a persuasive case for his conclusions, but of course a reviewer cannot resist the temptation to voice a few quibbles. It appears to this reviewer that Hudec's part I is much stronger than his part II, although the latter has a number of very perceptive observations. And although the general thrust of his conclusions remains persuasive, there are several problems with his policy analysis in part II.

Hudec seems to try to distinguish "economic issues" from "legal issues" (p. 138), and to discuss "legal policy" as if there were some inherent policy direction of legal rules, as such, rather than viewing legal rules as merely "tools of policy" whose policy content must be sought outside the framework of the rule system. He is not clear about these concepts, and thus his distinction between "economic issues" and "legal issues" is not always apparent. Perhaps what he is suggesting is that human institutions and legal rules are faulty and thus operate in various ways and with various levels of efficiency in implementing the basic policy goals (which may be economic, but also may be "distributive" or "political," etc.).

Likewise, Hudec blurs a number of subordinate issues when he embraces so wholeheartedly the principle of MFN nondiscrimination (p. 228). Although he does not always make this explicit, he seems to be embracing MFN primarily in the "safeguards" context, of temporary measures to limit imports when domestic industries are hurt. He is correct that MFN treatment can operate in this context to aggregate foreign opposition to restraint measures and thus reinforce the otherwise weak power of developing countries. But there are many other dimensions to MFN treatment, including the problem it poses to the development of new rules. When negotiators seek to establish new rules (to face fast-paced economic developments, or to correct a deficiency in existing GATT rules), MFN treatment often pushes them to a "least common denominator" approach, or plays into the hands of the "foot dragger holdout." Thus, the Tokyo Round Codes mechanism was developed, partly (but not totally) to get around this problem. MFN treatment is not always the great benefactor of liberal trade policies that some of Hudec's prose might lead one to believe.

Yet in the end, this book is impressive indeed. Its ability to identify the essential ingredients of LDC-GATT relationships in the context of a broad overview of forty-plus years of history is an important strength. Its analysis of the relationship of GATT international rules to domestic policy debates is very important. And its forthright and somewhat blunt criticism of the hollowness of the GATT policy assumptions for LDCs is refreshing. Presented in an effective writing style that uses conceptual analogies with great aplomb, the book is a splendid accomplishment and should be read not only by the GATT priesthood, but by international law scholars who have any intention of empirically understanding the real operation of international rules today.

JOHN H. JACKSON
Board of Editors

Economía mundial e integración de América Latina. By Alfredo Fuentes and Javier Villanueva. Instituto para la Integración de América Latina/BIS-INTAL. Buenos Aires: Editorial Tesis, 1989. Pp. xxii, 277.

"World Economy and the Integration of Latin America" was presented for review in the original Spanish. While its main message is directed to a Hispanic readership, its sponsorship by the Inter-American Development Bank and its Institute for the Integration of Latin America (INTAL), and the general utility of the book's subject matter, might well have made it worth translating into the other working languages of the international organizations concerned.¹

The authors have impressive credentials, many of them related to economic studies in their own countries and at high graduate levels in the United States. Professor Fuentes once headed the political economy department of the Centre for the (Cartagena) Accord of the Andes, the South American effort toward a free trade area; later he was chief of the economic section of INTAL. Dr. Villanueva (Ph.D. in economics, Columbia University) has taught in universities in the old and new worlds, and done professional work in international institutions and think tanks, including the Brookings Institution, the Organization of American States and the United Nations. He holds an economics chair at an Argentinean university.

In a prologue by Eduardo A. Zalduendo, director of INTAL, and an overview (*presentación*) by Juan Mario Vacchino, a major theme is sounded, which the authors develop in their introduction: the revival of Latin America's capacity to participate in a rapidly evolving global economy, after economic disasters that led to a massive private sector debt overhang in the seventies, and to inability to keep up with the world as a whole in the eighties. In the authors' words:

What (after the disintegration of trends toward convergencies of development policies, in the 1980s) should be the mechanism (or modality) to drive economic advance in countries still in development? Should they (in Latin America) continue to hold to the concept of a "central locomotive" for the globe or should they turn to formulas and mechanisms of their own? (pp. 5-6)

The authors then introduce what they call a "Third Model" of development, but without making entirely clear what the first two were. The first seems to be an indistinct typecasting of pre-World War II responses to the Great Depression. The second is referred to as "a joint economic restructuring of developed and developing countries." This inferentially post-World War II paradigm probably includes Bretton Woods (the World Bank and the International Monetary Fund), Marshall Plan and Alliance for Progress initiatives.

The rest of the book, parts 2, 3 and 4, is built around the Third Model, which the authors believe is taking form, but whose conceptual identity differs among the various observers. The authors describe their perception

¹ All translations are the reviewer's.

of it thus: "[I]t is within an evolving but still variable global context that Latin America should find the roads best suited to growth and integration, both within itself and on a world level . . ." (p. 10).

They continue, in the introduction, to bring on stage the Latin American private sector debt problem; the area's marked loss of negotiating capacity vis-à-vis the rest of the world, developed and developing; and, inferentially, the withdrawal by Latin American states from goals of integration. The authors end the introduction with a restrained call for the reanimation of Latin America toward effective development and modernization, with revival of sectoral economic unity as a necessary first stage.

The second part consists of a useful description of the three decades of development just closing, which the reviewer—not quoting from, but influenced by, the text—would call the Hopeful Sixties, the Unfocused Seventies, and the Failed Eighties. There is rich material here, although almost entirely restricted to economic factors in the development process. Thus, a complete picture is lacking for each of the three decades, viz., issues and challenges of institutional, social and political development. Development economists tend, naturally, to stick to their lasts, but here they have so emphasized the economic aspects of development as to suggest that unquantifiable, nonwealth variables are not relevant to, or decisive in, that process.

The noneconomic aspects of development were incorporated into the model for the Kennedy-Johnson Alliance for Progress, but often, even in the sixties, they were subordinated to the point of obscurity in actual operations, which economists dominated. The Nixon-Ford era was ideologically and politically opposed to the whole Alliance concept, including, a fortiori, the "softer" elements. Carter partially revived them, on the limited platform of human rights. In Reagan's time, the whole concept of nonmilitary development assistance fell upon the ash heap of history; and throughout the seventies and eighties, uncontrolled, irresponsible private lending took the place of declining inputs from bilateral and multilateral development assistance grants and loans. The authors suggest that the 1980s mark the bankruptcy of development in Latin America. This part, "Crisis or Transformation?," is particularly useful and well-balanced, given the authors' "economic" approach, between crises and possible prospects linked to new technologies and emerging forms of economic organization.

The theme of part 3 is "Three Decades of Integration—Advances and Limitations." Here, market integration is put forward as an essential ingredient in the revival of the region. These analyses are worthy additions to regional efforts toward market broadening in less-developed countries. These economists also tend to understate noneconomic factors as impediments to development. These factors include nationalistic prejudices, ideological differences (often very muddled), governmental inefficiency, ignorance and, above all, corruption. These Latin American authors do not seem to come to grips with the inability of Latin Americans to achieve what some Asian developing countries have, even though they are at least as well endowed with basic human and other resources. One of the most puzzling

realities about the Latin American countries is that, though free of colonialism almost as long as the United States, they demonstrate incapacities for social organization similar to those of African states only freed after World War II.

The fourth and final part, "The Integration of Latin America and an Opening to the World: Two Complementary Strategies," is the call for action. Goals are professionally presented, especially the need to link intraregional economic rearrangements with global commerce and capital movements. There is no grand design, à la Monnet-Schuman, or a Central American Common Market or Andean Community. Rather, the focus is on presenting economic policies and structures that should be common to all Latin American and Caribbean nations. This notion evokes a reaction like President de Gaulle's response to the suggestion, after the May 1958 coup in France, that all the fools be removed from the French bureaucracy: "Oh, my God, what a vast project!"

The economic aspects of this vastness are revealed by the excellent presentation of statistics in tables and annexes. Salient facts emerge: (1) from 1981 to 1985 flows of hard money into Latin America from public and private sources fell from \$57 billion to slightly less than \$10 billion; (2) imports of extraregional manufactures rose between 1973 and 1983, only to fall decidedly as foreign exchange resources dwindled and inflation surged; (3) Latin American exports in all categories have fallen, except for the special case of Mexican petroleum; (4) prices of exported commodities are not keeping pace with the rising costs of imports; (5) developed-country generalized trade preferences for certain (never all) exports to developing countries have eroded. Thus, the authors emphasize, the capacities of all Latin American and Caribbean countries to compete through their exports in hard-currency markets are urgently challenged. These challenges (and possibly opportunities) are sharply etched in the present Uruguay Round, which, the authors note, has an agenda unique in the forty years of the General Agreement on Tariffs and Trade.

Effective and coordinated import substitution within the Latin American-Caribbean trade area is seen as a *sine qua non*, and within the area a common export promotion strategy that takes into account subregional "specializations" must be worked out.

The broad goals with which the authors open part 4 seem to be a convenient summing up of their message:

Latin America must move from a recessive position to an expanding one, under which it would increase its access to new, external financial resources and generate export surpluses (over imports), not only to confront the obligations of external debt, but also to recover a level of imports essential to the functioning of domestic production and the reduction of unemployment. The generation of these trade surpluses would be based, above all, on an accelerated expansion of exports, both outside the area and intraregionally, which, in the latter case, implies the need for efficient import substitution, both at regional and subregional levels (p. 165)

There is, as might be expected, a renunciation of protectionism as such, but the possibilities for it are latent in the quoted prescription. Nonetheless, the stark necessity of doing something to improve the human conditions of over 200 million people in Latin America and the Caribbean cannot be gainsaid.

Space limitations prevent detailed presentation of specific steps toward the above goals. Those related to the financial aspects of trade, particularly those calling for intraregional financial and monetary cooperation (pp. 197–203), seem sound enough on paper, but one wonders what the International Monetary Fund might have to say as to area, as distinguished from country-by-country, performance standards for the management of foreign exchange resources.

COVEY T. OLIVER
Board of Editors

Land-Based Marine Pollution: International Law Development. By Meng Qing-nan. London, Dordrecht, Boston: Graham & Trotman/Martinus Nijhoff, 1987. Pp. xvi, 254. Index. Dfl.135; \$66.50; £46.50.

This book is a dissertation for the J.S.D. degree at Dalhousie Law School. Its subject is just as topical today as at the time of its publication: most marine pollution results from land-based sources. The author, quite correctly, notes the complexity of the issue. Besides legal questions, there are many scientific, economic and social factors to be taken into account. Accordingly, the author has had to balance legal discussion with extralegal considerations. In my view, the book would have fared better with some reduction in the latter component.

Meng's approach is comprehensive. He starts with an introductory discussion of the regulatory environment of land-based pollution control, continues with a review of the relevant law, both global and regional, and ends with "Prospect and Recommendations." The discussion gives proof of conscientious scholarship—but also takes a rather formalistic course, including a point-by-point analysis of the 1985 Montreal (UNEP) Guidelines for the Protection of the Marine Environment against Pollution from Land-Based Sources.

One would have wished for further discussion of the institutional arrangements in the existing regional conventions. For instance, the Helsinki Commission established by the Convention on the Protection of the Marine Environment of the Baltic Sea Area has been active for a number of years. The work of the Third UN Conference on the Law of the Sea could also have been analyzed in more detail, although other materials (not necessarily noted by the author) exist on the subject. The bibliography, as a whole, is rather modest. On the other hand, the reader is attracted by the efforts of the author to present suggestions and visions for the future. A distinction is made between "positive obligations of the 'what to do' and 'how to do it' variety" and "negative obligations on 'what not to do'" (p. 158), with the

conclusion that most of the existing treaty rules on land-based pollution fall in the "positive" category. Obviously, both types of regulation are needed, but the trend of "positive" regulation may more readily respond to the requirements of an interdependent world where promotion of cooperation should be a principal aim of international lawmaking.

KARI HAKAPÄÄ
University of Lapland

Rights to Oceanic Resources: Deciding and Drawing Maritime Boundaries. Edited by Dorinda G. Dallmeyer and Louis DeVorse, Jr. A Dean Rusk Center Monograph. Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1989. Pp. xiii, 207. Index. Dfl.125; \$67.50; £39.

The book under review is based on sea grant research and a 1987 conference at the University of Georgia, where the papers it includes were presented and discussed by the authors and thirty other participants. The authors are many—apart from the two editors, thirteen authors contributed twelve articles, and one author, two appendixes. The theme, however, is single and uniform, namely, the appraisal of technical, legal and practical problems of maritime boundary delimitation for an equitable solution. The source material covered is both domestic and international, as is its utility. The approach is also uniform, namely, multidisciplinary and case or problem oriented.

In the preface, the editors summarize the approach and conclusions of the contributors; they then recommend that services be provided to the developing countries concerning hydrography, charts and the handling of litigation to promote their ability to identify their delimitation problems and resolve them equitably (p. xii).

In this review, I propose to summarize briefly the contents of the contributions, and to discuss both the particular contribution and the book as a whole. Following the preface and acknowledgments, the book is organized into four parts, each consisting of three contributions. Part 1 deals with maritime boundary delimitations, part 2 with litigation, part 3 with special problems in delimitation, and part 4 with dispute settlement. At the end, there are two appendixes, the first on bilateral agreements and the second a bibliography, followed by an index.

The first article in part 1 is *Geographic Considerations in Maritime Boundary Delimitations* (pp. 3–14), by Robert W. Smith, a well-known geographer with wide experience in maritime boundary delimitation. By highlighting geographic considerations concerning the delimitation area, such as the configuration of the coast (concave or convex), the impact of headlands on an equidistance line, and the nature of straight lines joining the turning points and constituting the maritime boundary, Smith intended to facilitate a full appreciation of the delimitation area and the difficulties involved in reaching equitable solutions. He was also trying to show how to avoid possible problems, such as the one faced by the United Kingdom in the Atlantic segment

of its maritime boundary with France (*UK-France* arbitration, 1977-1978), and the one caused by the Tunisian assertion that the westernmost point of the Gulf of Gabes was five miles south of where the International Court of Justice had drawn it in 1982.

The second article, *Charts in the Law of the Sea* (pp. 15-24), by U.S. State Department technical experts Sandra H. Shaw and Daniel J. Dzurek, explains the meanings of charts and scales, and their use for navigation, for national claims concerning straight baselines and the outer limits of maritime zones, and for drawing maritime boundaries between states with opposite or adjacent coasts, as well as for some other purposes. The authors refer to the latest developments in computerized charting. For precision in locating the relevant features and points in the drawing of an accurate maritime boundary, the chart must be based on the common geodetic datum and the spheroid. The authors also point out the difficulties in using navigational charts for drawing maritime boundaries in certain areas.

The technical aspects highlighted in these two articles are of extreme importance and utility to all states, and in particular to the developing countries of the Pacific, Africa and the Caribbean. It is fortunate that such technical advice is made available to them by experts from the United States, Canada, the United Kingdom, Australia and elsewhere through assisting agencies such as the International Centre for Ocean Development (Canada) and the Commonwealth Secretariat (London). The UN Office for Ocean Affairs and the Law of the Sea (New York), which also renders assistance to states, published a volume on *Maritime Boundary Agreements* (1974-1984) in 1987, and on *Baselines* in 1989.

The third article, *The Delimitation of Ocean Boundaries* (pp. 25-49), is by Jonathan I. Charney, the well-known professor and expert on U.S. and international ocean boundaries.¹ The article deals intensively with U.S. coastal boundaries, five of which (delimited in response to the Coastal Energy Impact Program) were based on the recommendations of a team of three consultants, including Charney, as well as with international ocean boundaries, covering international conventions, state practice and judicial and arbitral decisions up to the 1985 *Libya / Malta* case, and the 1986 *Guinea / Guinea-Bissau* arbitration. The applicable law in the local U.S. cases is international law, including the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone, to which the U.S. is a party. International ocean boundary law has followed the equidistance line, modified where necessary, in state practice, as well as equitable principles, particularly in case law. The article exhaustively reviews the elements of these principles in state practice and case law, including aspects of geography, the location of islands, proportionality, nongeographic factors in delimiting both continental shelf and a single maritime boundary, and tacit agreement and *modus vivendi* theories. Charney concludes that "[w]hile many ocean boundary disputes have been resolved, the law is not settled. Nor does it permit ready resolution of extant boundary disputes. Recent decisions have begun to refine that law and remove some

¹ This article was also published in 18 OCEAN DEV. & INT'L L. 497 (1987).

uncertainties, but much remains unresolved" (p. 42). This conclusion is similar to the one reached by Lewis Alexander later in the book, while Keith Highet gives a more positive projection and Louis Sohn is neutral.

Part 2 of the book deals with litigation, and contains three contributions, the first two on domestic U.S. cases, and the third on international litigation. The first article, *Litigation of State Maritime Boundary Disputes* (pp. 53-59), is by Patricia T. Barmeyer, assistant attorney general for the state of Georgia. She reviews three types of state maritime boundary disputes: they involve the settlement of baselines and outer limits of the territorial sea under the 1953 Submerged Lands Act (the parties to such a dispute being a state and the federal Government), the establishment of lateral seaward boundaries between neighboring states (the parties being the concerned coastal states only), and the extension of lateral seaward boundaries for specific purposes, e.g., for funding under the Coastal Energy Impact Program under the 1976 amendment to the 1972 Coastal Zone Management Act.

Reviewing the case law, particularly concerning the second and third categories of disputes, she feels that rather than resolve such disputes through international law, it would be simpler to resort to federal legislation, and she supports her argument with the example of coastal states that share a part of the federal oil revenues from areas between three and six miles off their coasts (p. 58).

The second article, *Litigating Maritime Boundary Disputes: The Federal Perspective* (pp. 61-73), is by Michael W. Reed, senior trial attorney, U.S. Department of Justice. He reviews the U.S. case law on maritime boundaries where the U.S. Government was a party, namely, the "tidelands cases." The issues involved include the status of islands as part of the mainland, and the status of sounds or bays, such as Mississippi Sound, Long Island and Long Island Sound, and the Dinkum Sands in Alaska. So far some 20 percent of the coastline of the United States has been established by litigation. The author concludes that the case law, although divergent despite the application of international law, holds interest for the coastline cases that are bound to arise.

The impact of the twelve-nautical-mile territorial sea, proclaimed by the U.S. President on December 28, 1988, on the ten-mile rule for retaining the status of islands as headlands for bays or for drawing straight baselines is not examined, since this occurred after the 1987 conference on which the book is based.

The third article, *Litigating Maritime Boundary Disputes at the International Level—One Perspective* (pp. 75-84), is by David A. Colson of the U.S. State Department's Office of the Legal Adviser, a well-known expert on maritime boundary law and practice who has written a number of much-appreciated articles. He was directly involved in the U.S.-Canada *Gulf of Maine* case (1984), and his present brief article deals with some practical aspects arising from that case.

The points of special interest to Colson are the U.S. expediency in opting for a "single maritime boundary" in the case (the implications of which have turned out to be a major development in maritime delimitation law), the

pioneering choice of a Chamber of the International Court of Justice as the forum, and the practical aspects of international litigation, especially whether the testimony and examination of experts takes on the characteristics of "just another piece of advocacy by counsel" (p. 84).

Part 3 of the book deals with special problems in delimitation, and contains three contributions: the first on the decline/disappearance of "natural prolongation," the second on international straits, and the third on islands. The first article, *Whatever Became of Natural Prolongation?* (pp. 87–100), is by Keith Highet, a practitioner who participated in the ICJ maritime boundary cases between Libya and Tunisia (1982) and Libya and Malta (1985) as counsel for Libya. He reviews the jurisprudence concerning continental shelf boundaries and explains how the concept of "natural prolongation," which had been highlighted in the *North Sea Continental Shelf Cases* (1969) and excessively used in the pleadings in the *Tunisia / Libya* and *Gulf of Maine* cases, was given the go-by in the *Libya / Malta* case. In that case, the Court said that recognition of geophysical or geological factors as a source of title to the continental shelf and for maritime delimitation belongs to the past, "insofar as seabed areas less than 200 miles from the coast are concerned" (quoted in this article at p. 92). The author supports this conclusion. He sees some positive trends, including the promotion of compromises between the parties without going to court and a consequent reduction in court cases, particularly "big" ones, but a wider use of courts or arbitration by the developing countries (pp. 96–99).

The second article, *Demarcation of International Straits* (pp. 101–13), is by Gerard J. Mangone, editor of the *International Straits of the World* (1982). This article contains an excellent review, in historical perspective, of the straits used for international navigation and includes a brief analysis of the provisions of the 1982 UN Convention on the Law of the Sea on "transit passage." As to issues of delimitation or demarcation of straits, the applicable principles and interests are briefly referred to. Perhaps an analysis of the relevant agreements, such as those concerning the Malacca Straits (1971–1974) and the Strait of Magellan (1984), might have been added. The Malacca Straits agreements are included in Appendix I to the book.

The third article, *The Use of Islands in International Maritime Boundary Delimitation* (pp. 115–46), is by John Briscoe, a witty island lawyer who ends his piece by citing an imp who entered his study and said, "The tidal wave devours the shore: There are no islands any more" (p. 142). The article, however, is not on climate change and sea-level rise and their impact on islands, although that discussion, together with possible remedies, would be welcome. The present article is on the definition of an island, its entitlement to maritime zones, and its effect on baselines, bay-closing lines and maritime delimitation between states with opposite or adjacent coasts. The island may be an isolated one, or a group or fringe of islands, or an archipelagic state, or an island state.

On delimitation, the author concludes that the "trend in continental shelf and exclusive economic zone delimitation is to accord less than full weight to islands in the vicinity of larger states, either by reducing their weight by a

percentage, or by creating enclaves" (p. 141), and he justifies the trend on the ground of the islands' small size or closeness to the opposing party's coastline. This, however, is less appropriate when the islands are larger or closely connected with the mainland of one of the parties (*Tunisia / Libya* case) and, the author adds, it is wholly inappropriate when an island is a state party, like Malta (*id.*).²

Part 4 of the book is on dispute settlement; it contains three contributions, the first two on *Exploring New Potentials for Maritime Boundary Dispute Settlement*, and the third on the Arctic regions. The first is a short article (pp. 149–52) by the geographer Lewis Alexander. He criticizes the jurisprudence on the settlement of maritime boundary disputes according to "equitable principles," taking account of the "relevant circumstances" so as to reach or produce an equitable solution, because of its lack of clarity despite voluminous pleadings and expensive litigation. The situation has been further complicated by the new orientation towards the single maritime boundary. To promote clarity, Alexander suggests the preparation of "a manual of the maritime boundary dispute settlement process" (p. 152), which would highlight the impacts of the various settlements on evolving international law, the various interpretations of equitable principles and relevant circumstances, and the new evolving principles concerning disputes relating to midocean islands and the Arctic.

The second article on dispute settlement (pp. 153–65) is by Louis B. Sohn, professor and participant in the Third UN Conference on the Law of the Sea. He reviews the judicial and arbitral decisions delivered between 1969 and 1986, and in a way performs part of the role contemplated by Lewis Alexander in suggesting the manual referred to above. Sohn's summary of the case law is excellent, even though, taken as a whole, the trends arising from it are not elaborated. He concludes that "equity has become an important factor in the determination of a maritime boundary, and new rules are slowly emerging, which are likely to crystallize soon, especially if the anticipated numerous disputes find their way into international tribunals" (p. 163).

The third article, *Resource Development in the Arctic Regions: Environmental and Legal Issues* (pp. 167–74), by Louis Rey of Switzerland, is very informative. He highlights the distinctive features of the Arctic, which, unlike Antarctica, is an enclosed sea—"a polar Mediterranean" (p. 167)—and elaborates the security, environmental, resource, jurisdictional, and political aspects of the region. He refers to the emergence since 1980 of the Inuit Circumpolar Conference, representing the local inhabitants of different nationalities, which may play a major role in the future concerning the preservation of the Arctic environment and the orderly exploitation of Arctic mineral and other resources. "How this will affect the development of law in the area, the litigation of the different issues, and the allocation of resources development by private companies," he concludes, "remains to be seen" (p. 174).

² The article, in substance, was also published in 7 OCEAN Y.B. 14 (1989).

Finally, an excellent feature of the book is that it contains two appendixes by Bill Blagg of the University of Georgia. Appendix I refers to over fifty agreements on maritime boundaries selected from the Limits in the Sea series, and has a useful introduction, explanatory notes and a brief summary of each agreement. Appendix II contains a comprehensive bibliography with some 246 items arranged alphabetically by author. At the end, there is a useful topical index.

The book as a whole thus covers almost all technical and practical aspects of maritime delimitation. Anyone involved in a delimitation matter or controversy has to be familiar with the characteristics of the relevant coastlines and the ocean space. As to the conflicting interests of the parties and the need for an equitable solution acceptable to all, one has to be familiar with the precedents in state practice and case law, and the options available. The book supplies a lot of concise material on these aspects of the subject.

Certain aspects that require further study include the implications of a *single* maritime boundary (both for negotiations and in litigation), the removal or reduction of the cut-off effect in delimitation facing open seas, the simplification of the alignment of the maritime boundary line, and the options and modalities of a joint zone as an intermediate, or even a long-term, solution.

The book is a useful addition to the literature on maritime boundaries, with contributions from eminent authors with practical experience. Although several chapters deal mainly with U.S. domestic cases, the subject matter of the controversy and the applicable law are of wider interest. The chapters on islands, international straits and the Arctic will be very useful to those involved in such issues. The book as a whole thus will be a good reference for U.S. scholars and practitioners, as well as for others, including those from the developing countries. Since state practice and case law are growing (by now some 130 agreements on maritime boundaries appear to have been concluded, and the pending cases in the ICJ and for arbitration include delimitations between El Salvador and Honduras, Denmark and Norway, Canada and France, and Guinea-Bissau and Senegal), the lessons from the present book should be kept up-to-date.

S. P. JAGOTA
Gurgaon, India

The Law of the Sea (rev. 2d ed.). By R. R. Churchill and A. V. Lowe. Manchester: Manchester University Press, 1988. Pp. xxxviii, 370. Index.

This admirable book, first published in 1983, now appears in a new revised edition in which account is taken of the many (the authors say, "essentially minor") developments that have taken place since then. The format of the original edition was retained, except that material on maritime boundary delimitation has been collected into a separate chapter. Although the au-

thors do not say so, they also appear to have taken account of minor criticisms made by reviews of the book when it first appeared.¹

Churchill and Lowe can now be regarded as the authors of the leading one-volume, comprehensive work on the public international law of the sea in English. They do not purport to give an exhaustive account of the development of customary law, for which readers may be referred to the two volumes of O'Connell (1982, 1984) and a number of specialized monographs. Nor do they deal with the private law aspects of the law of the sea. Their work focuses on the 1982 UN Convention on the Law of the Sea, other relevant conventions, and on the crystallization of norms of customary international law.

It would not be possible in a work of this nature to examine at length the political, economic, strategic and even philosophic considerations underlying the failure of the major powers to ratify the Convention thus far, but it is difficult to accept the authors' statement that "the unacceptability of some of these details" (of the deep seabed regime) was the main cause of the abstentions from the Convention by such states as the United Kingdom, the United States and the Federal Republic of Germany (p. 15). However, the authors rightly emphasize the significance of the Preparatory Commission in leading the way toward possible solutions that would enable these powers to reconsider their positions (ch. 12).

The treatment of baselines (ch. 2) is typically clear and informative. The authors do not shrink from identifying examples of state practice that depart from the conventional rules (which have also become customary law), although they avoid taking a direct stance on the issue of Rockall. The treatment of the territorial sea (ch. 4) is excellent and informed by balanced historical insights. Dealing with submerged passage by foreign submarines in territorial waters, the authors appear to accept that the use by Sweden of depth charges was a "necessary measure," without discussing the relevance of necessity and proportion. The manner and degree of enforcement measures under the 1982 Convention were largely ignored by the Third Law of the Sea Conference; these omissions suggest the need for separate and more comprehensive treatment in the light of customary law on the use of force.

Straits and archipelagos are two controversial arenas that raise important strategic and economic questions. The authors conclude that transit passage through and over straits, and archipelagic regimes, do not yet constitute customary international law, but may be opposable as between parties to the 1982 Convention or recognizing parties. Of equal importance is the issue, dealt with in chapter 9 on the exclusive economic zone (EEZ), whether a presumption of residual high seas freedoms arises from the Convention text defining the EEZ as a zone *sui generis*. The authors side on this point with those who deny such a presumption, without adverting to contrary opinions.

In the new separate chapter on delimitation of maritime boundaries, the authors confess that "it is extremely difficult to offer any precise account of the principles of delimitation" on the basis of the Convention or the judicial

¹ Reviewed at 79 AJIL 488 (1985).

decisions given so far. They give a brief review, however, which must be supplemented by reference to the flow of specialized treatments, in journals and monographs, appearing in recent years.

The chapters on the high seas, the international seabed area, navigation, fishing, marine pollution, marine scientific research, the military uses of the sea, landlocked and geographically disadvantaged states, and the settlement of disputes maintain the high standards of comprehensiveness, conciseness and readability of the rest of the book.

Two minor points of necessary supplementation noted by the present reviewer are the omission of Australia from the list of countries objecting to the declaration of the Philippines on archipelagic waters under Article 310 of the Convention, and the response of the Philippines (p. 107); and the action taken by Kiribati to recalculate the land/water ratio in respect of the Gilbert group of islands to bring them within the Convention formula on archipelagic baselines (p. 106).

This book can be recommended with confidence to the general reader, as well as to the more versed. For the benefit of the former, a knowledge of basic principles of international law is not taken for granted; while for the latter, the book is full of useful insights and perspectives. A helpful bibliography and suggestions for further reading are appended to each chapter. The book would be well suited as a prescribed text for courses on the international law of the sea.

I. A. SHEARER

University of New South Wales

Maritime Boundaries and Ocean Resources. Edited by Gerald Blake. International Geographical Union Study Group on The World Political Map. Totowa, N.J.: Barnes & Noble Books, 1987. Pp. 284. Index. \$33.50.

This volume serves two worthwhile purposes: (1) it does an admirable job of introducing a highly technical area in a manner that is quite comprehensible to students and other nonspecialists; and (2) it shows clearly and cogently just how multidisciplinary many aspects of international law have become. In addition, much to the credit of all concerned, it manages to avoid a major pitfall facing any "book by committee"—it maintains its coherence.

The authors are an eclectic group, to say the least. Academic lawyers and geographers of various persuasions (including a geomorphologist, as well as specialists in historical geography, geopolitics and mineral resources, to name a few) are brought together to set the stage, provide legal perspectives and analysis, and then, by turns, to explore various key issues and problems of the day. With few exceptions, these conference-papers-turned-chapters are enhanced by illustrative figures that are quite helpful.

The more strictly legal contributions deserve a few additional comments. Patricia Birnie's discussion of emergent legal principles and problems pro-

vides a fine introductory overview, together with clear and concise analyses of recent landmark cases. Piers Gardiner's discussion of limits of the area beyond national jurisdiction, while necessarily highly theoretical, is clearly stated and offers quite useful concluding remarks.

Other chapters, where topics covered combine considerations of law with those of other disciplines, are equally well-done. For example, Hance Smith's piece on emerging regional bases of world ocean management could well serve as an archetype for many a multidisciplinary study. Fillmore Earney's discussion of mineral resources in the U.S. exclusive economic zone exhibits a high degree of evenhandedness. And Stephen Langford's treatment of the Channel Islands problem provides superb historical perspective, together with flawless analysis. Broad learning and great good humor are preponderant in this collection of essays, some of which cite not only the expected sources in the standard works, but also such works as Psalms 16:6 and Victor Hugo's *Les Travailleurs de la mer*.

The select bibliography is good, especially for the researcher fairly new to this area. And although the index was, in the words of the editor, "speedily" prepared, this reviewer found it to be complete and very useful. The book's weaknesses, with a few very minor exceptions, were doubtless beyond the control of the editor or the authors. The volume is so poorly bound that the shelf life of a library copy will prove to be ridiculously short and the use of camera-ready typescript makes the text harder to read than is reasonably tolerable. One understands the economic realities of book publishing these days, but here someone has gone too far.

Given that much of the material in this volume might seem relatively arcane to the nonspecialist, it is probably not to be strongly recommended for most individual libraries. But this text should be readily accessible to practitioners. And it is to be especially recommended to students of both international law and related disciplines.

MARTIN T. SIGILLITO
Webster University

International Law and the Use of Force by National Liberation Movements. By Heather A. Wilson. Oxford: Clarendon Press, 1988. Pp. xi, 209. Index. \$49.95.

The subject of wars of national liberation attracted much scholarly attention at the end of the sixties and during the seventies, when decolonization was at its peak. While the United Kingdom and France (the latter after the bitter experience of the Algerian revolution) chose the wise path of liquidating their colonial empires and giving independence to territories for which they were responsible, the fight to gain freedom was particularly intense in the colonies under Portuguese rule (Angola, Mozambique, Guinea) and in white Rhodesia, where the settlers seceded from the country because they were unwilling to be ruled by a black majority. Armed struggle also took

place in Namibia and in South Africa, if less intense in the latter case. The Palestinian conflict added—and it is still adding—more color to this picture.

The main legal problem to be solved was the following: whether members of liberation movements fighting against colonial powers were entitled to combatant status and consequently to treatment as prisoners of war upon capture, or whether their acts of violence could lawfully be subject to the penal law of the established government. This problem is now solved by Article 1, paragraph 4 of Additional Protocol I (1977) to the Geneva Conventions, which has given members of liberation movements combatant and POW status. At the time of its drafting, this provision was the object of an acrimonious debate, and the Diplomatic Conference that adopted the Protocols risked becoming a fiasco. Article 1, paragraph 4 of Protocol I is still an object of contention and its existence is one of the main reasons that the United States refuses to ratify Protocol I.

Wilson's book is welcome, since it is a sort of revisitation. It was written after the decolonization process, when passions had calmed (the Palestinian conflict aside), and Protocol I had been extensively discussed in a number of legal articles and essays.

Wilson's work is divided into four parts. The first deals with such ambitious notions as "concept of law," and gives an overview of the law governing the status of combatants in international conflicts, outside intervention in civil strife, the recognition of belligerency and the content of common Article 3 of the 1949 Geneva Conventions. Her views are usually correct, even though one wonders why in a book devoted to a specific subject the author deems it necessary to cope with the foundations of international law, subjects and sources included (pp. 5–13). These are questions that have to be left to philosophers of law and cannot be dealt with in a dozen pages.

The second part is devoted to the content of the right of self-determination, the denial of which entitles peoples to resort to armed struggle. After a review of UN practice, the author comes to the conclusion that self-determination is a legal right enjoyed by peoples under colonial rule (trust, mandate and non-self-governing territories). She rightly states that self-determination does not mean "a right of secession from a self-governing State unless a part of that State has become effectively non-self-governing with respect to the whole" (p. 87). In the latter case, a right of self-determination is given, even though it is still a moot point in international law. The trend, however, is in that direction, as proven by the UN resolution on friendly relations. However, minority groups do not have a right to self-determination.

The third part is called "Right Authority" and is divided into two sections. The first considers "The Authority to Use Force by National Liberation Movements," while the object of the second is a thorough and well-researched consideration of the status of liberation movements within the international community, their membership in international organizations and their recognition by third states. The first section is particularly worth commenting upon. The author wonders whether national liberation movements have a right to use force in international law against established governments and comes to the conclusion that "the trend over the last four

decades and since 1960 in particular has been toward the extension of the authority to use force to national liberation movements" (p. 136), even though East and West share opposite views on this matter. This is probably the part of the book most open to question. Wilson sees the right to use force by liberation movements as instrumental to the application of *jus in bello* to them. Probably, a parallel of this kind was in existence when the first codifications of the law of war were made. States had the right to wage war (*jus ad bellum*). *Jus in bello*, particularly rules on immunity of combatants for acts of war they committed, was consequential to the lawfulness of the exercise of *jus ad bellum*. At present, immunity of combatants—at least for those categories of persons who did not enjoy such status before—is more rooted in reasons of humanity than in the parallel between *jus ad bellum* and *jus in bello*, since the right to wage war was abolished by the UN Charter and force is prohibited except in self-defense. Therefore, the problem of the lawfulness of resort to force by liberation movements need not be evaluated for its influence on *jus in bello*. Neither is there a real problem of the lawfulness of resorting to force by liberation movements insofar as they limit themselves to fighting against established governments. The real questions are whether third states can help liberation movements in their war against established governments and what, if any, the content and form of such aid should be.

Part 4 is devoted to examining the provisions of Protocol I relevant to liberation movements, i.e., Article 1, paragraph 4, Articles 43 and 44, and Article 96, paragraph 3. These provisions are thoroughly commented on and the author's views are generally correct. Part 4 is the most important section of the book. However, since more than ten years have passed since the adoption of Protocol I, it should have been expanded. Two points, in particular, merit examination. The first is the relevance of Article 1, paragraph 4 in the post-decolonization period. Is this provision to be confined to the history of international law or is it possible to foresee situations in which it will again be invoked? The second is the reconciliation of provisions that have given international status to wars of national liberation, with customary rules of the law of war and conventional humanitarian law in force before the adoption of Protocol I. In this regard, many points are still to be examined. For instance, it has never been completely clarified whether established governments are to abide by the fourth Geneva Convention in case of wars of national liberation or whether the law of neutrality applies, totally or in part, to liberation movements. Is a country that hosts liberation forces infringing any rule of the law of neutrality? What happens if liberation movements engage in hostilities outside the territory they want to free? Have liberation movements any belligerent rights on the high seas? Are they entitled to visit and search foreign ships? These are only a few examples of questions legal scholars have yet to answer.

The phenomenon of wars of national liberation does not mark the end of the era of decolonization. Because of the permanent relevance of the right to self-determination and the trend toward its application beyond classic colonial situations, it is foreseeable that conflicts falling under the definition of Article 1, paragraph 4 of Protocol I will recur in the future. Hence the need

to consider every possible implication of the fact that wars of national liberation have gained the status of international armed conflict.

NATALINO RONZITTI
University of Pisa

The Diplomacy of Biological Disarmament: Vicissitudes of a Treaty in Force, 1975–85. By Nicholas A. Sims. New York: St. Martin's Press, 1988. Pp. xv, 356. Index. \$49.95, cloth.

The 1972 Biological and Toxin Weapons Convention (BTWC) is a watershed among arms control agreements, banning as it does two weapons systems—those based on microorganisms and toxins. The BTWC grew out of the realization that the 1925 Geneva Protocol was too circumscribed to reliably protect society from chemical and bacteriological weapons. In particular, the Protocol forbids only the *use* of these weapons; nations may develop and stock them. Further, the Protocol does not say what to do when a nation illicitly uses such arms. Sims describes the negotiating process, beginning in the late 1960s, for drafting a comprehensive treaty not only to ban the use of these weapons, but also to prohibit their development, manufacture, storage and dissemination to third parties. He analyzes why this process was difficult and, ultimately, unavailing. The British introduced a proposal to separate the issues posed by the two weapons systems and to deal with each system in turn. After initial opposition by the USSR, the proposal was accepted and negotiations for the BTWC were concluded fairly quickly.

The BTWC is innovative. Article 10 enjoins nations to cooperate in the peaceful development of applied microbiology and to share the results of that research. And it is a “living” treaty in that its operations are, in accordance with Article 12, periodically reviewed in light of advances in science and technology. The first review conference was held in 1980, and the second in 1986; the third is scheduled for 1991.

Unfortunately, when the BTWC was eventually tested, its flaws and omissions stood revealed. The “tests,” Sims holds, came from two directions. First, as a result of advances in the biosciences, the military utility of biological weapons had to be reassessed. When the BTWC was drafted, biological weapons were considered useless by the military; they were uncontrollable, undependable and uncertain. However, with the advent of genetic engineering, some scientists and arms security experts concluded that the new biotechnology techniques could be employed to modify or add traits to candidate biological warfare agents, making them useful to armies or terrorists.

Second, certain political events affected the treaty. In 1979 an epidemic of anthrax in Sverdlovsk, USSR, killed anywhere from thirty to a thousand persons. On the basis of covert and overt evidence, the U.S. Government determined that the epidemic's etiology was an accident in a Soviet biological warfare facility that released a large amount of anthrax into the environs of the city. The inept response by Soviet authorities tended to reinforce the view that they were trying to hide something. Another event was the illicit,

but unpunished, use of chemical weapons by Iraq against Iran and the Kurdish people. The world was once again faced with the fact that there are military and political leaders willing to turn to unsavory weapons of mass destruction in times of stress. The legal and political barriers to the use of biological weapons should be no more difficult to breach than those forbidding chemical weapons.

At its inception, the weaknesses of the BTWC were recognized, but they were believed to be inconsequential. The convergence of political events and advancing science proved this supposition incorrect. In general, the use of chemical weapons demonstrated that governments will use forbidden weapons if they see the need for them. The events at Sverdlovsk indicated that without a provision for verifying compliance with the treaty, the BTWC could not prevent the illicit development of biological weapons. Also, because complaints of alleged use of these weapons must go through the UN Security Council, permanent members can easily invoke the veto to protect themselves or their allies. In addition, advances in science have now made it possible to research and develop usable biological warfare agents. However, research is excluded from the purview of the Convention, and it fails to differentiate between defensive (permitted) and offensive (forbidden) development of biological agents and products.

A major part of the book is devoted to the first review conference. This event went largely unnoticed at the time and one may wonder whether its importance is overstated by Sims. Undoubtedly, good ideas were placed on the table at the first review conference; a few came to fruition at the second review conference. Sims discusses, for example, Sweden's suggestion that the investigation of complaints be separated into two phases: a phase of technical investigation performed by an ad hoc consultative committee, and a phase for political decision by the Security Council. The second phase would be considered procedural, precluding the use of the veto.

Sims also assesses the impact of Sverdlovsk on the first review conference. He claims that "it was a remarkably muted impact" (p. 158). Others differ; for example, a Swedish participant found that the event had "a marked impact on the conference The Soviets—who had previously driven hard on the theme of 'effective implementation' of Articles I–IV, and had been against meaningful discussion of complaint procedures—let go of the first and showed a limited willingness to compromise on the second."¹

There is, perhaps, one remarkable achievement of the first review conference: its finding that the new biotechnologies do not create any special difficulties for the BTWC and that genetically engineered organisms and their products fall within the purview of the BTWC. In addition, the conference created a sound basis for the much more important second review conference.

The use of "vicissitudes" in the book's title is apt—high aspirations have given way to distrust, and in turn been replaced by cautious optimism. The

¹ B. Theolin, Promemoria: B-vapenkonventionens granskningskonferens, Genève, 3–21 mars 1980. (A report to the Swedish Ministry of Foreign Affairs; translation by reviewer.)

Convention's inception was auspicious. Nations large and small quickly ratified the treaty, and it entered into force in 1975. With its universal acceptance came the hope that biological and toxin weapons were indeed banished forever. Confidence remained high at the first review conference, although details of the Sverdlovsk epidemic were becoming public. After the conference, the Reagan administration, more so than its predecessor, aggressively publicized the Sverdlovsk epidemic as proof that the USSR was undertaking illicit biological warfare research. This allegation was not well supported when made and it appears less convincing today. Nevertheless, at the time, the U.S. Government, and several of its allies, believed the allegation to be accurate and acted accordingly. Consequently, trust in the BTWC among these nations reached its nadir; there was talk of abandoning it. Restoring confidence in the faltering BTWC therefore became a primary objective of the second review conference.

Sims stops short of the second review conference, but he does cover some of its preparatory work and scrutinizes the pressures on the BTWC shortly after the first review conference. Unfortunately, the "yellow rain" episode is not included, although it began to receive wide publicity in 1982. Specifically, the U.S. Government deduced that toxins, as "yellow rain," were used as weapons from 1982 to 1986 in Indochina and perhaps elsewhere. The large quantities of toxins required in these operations, it was concluded, could only have been supplied by the USSR. Thus, in the view of the U.S. Government, not only does the BTWC fail to prevent nations from developing banned biological warfare agents, but it cannot do anything about their use.

In the first chapter, Sims asks how to restore the health of the BTWC. He ends by developing a commonsense twelve-point agenda for its recovery. One point concerns "resolving the asymmetry of obligations" (p. 273). This asymmetry arose when some signatories made reservations to the Geneva Protocol that could not be maintained when they ratified the BTWC. A second point calls for the establishment of a "serious administration" for the Convention (p. 288). The problem was, and remains, as follows:

Those who took the British initiative of 1968 [which included strong provisions for verification and complaint investigations] and watered it down into the Convention of 1972 gave the world biological disarmament on the cheap; a disarmament régime of minimal machinery which would cost next to nothing to sustain. It is now painfully evident that these short-term savings have been outweighed by the long-term costs of a régime lacking the means to sustain its credibility in the face of suspicious events which cannot be resolved one way or the other. (p. 290)

Sims's contention may be placed in context if one considers the resources it will take to maintain the proposed Chemical Warfare Convention (CWC). The CWC will include strong provisions for verification, including on-site investigations by an international verification agency. It will cost an estimated \$33-500 million per year to operate. Conversely, no provision has been made to fund the operation of the BTWC. This oversight is very im-

portant and deserves rectification by governments that wish to see biological weaponry controlled.

Central to Sims's twelve points is the establishment of "permanent limited institutions" as a treaty regime. An important component of the regime is a committee of oversight, which would promote "opportunities for international co-operation" (p. 299), in accordance with Article 10; have responsibility for the rapid identification of pathogens and toxins whenever unusual outbreaks of disease occur; recruit new state parties as signatories to the BTWC; and in general promote the positive aspects of the treaty over its prohibitions. A treaty regime akin to that suggested by Sims is being set up for the CWC; perhaps Sims influenced this development.

Given the potential importance of Article 10, Sims is remiss in scanning it only superficially. Its implementation would encourage developing countries to become actively involved in the BTWC's operations; and the activities called for in the article could help verify compliance with the treaty. It is worth mentioning that Sims made up for this oversight in a subsequent publication.²

There are a few other problems with Sims's book. At times, his sentences are very long (fifty words and more) and convoluted, making reading difficult. He may move disconcertingly from one event to another, with little or no continuity. He tends to ramble, discoursing about minute events and minor persons. England's contributions to biological arms control efforts are emphasized, to put it mildly. But these are minor criticisms. In the final analysis, Sims provides the best examination of the forces that gave rise to the BTWC, the forces that have since thrashed it, and the attempts by the international community to perform "damage control" on the ailing treaty at the first review conference and afterwards. The BTWC's vicissitudes are certainly not over, as we enter an age when biological and toxin weapons are likely to proliferate. Events will undoubtedly again buffet the BTWC, furnishing grist for Sims to write a sequel.

RAYMOND A. ZILINSKAS
University of Maryland

Open Borders? Closed Societies? The Ethical and Political Issues. Edited by Mark Gibney. New York, Westport, Conn., London: Greenwood Press, 1988. Pp. xvi, 199. Index. \$39.95.

Public debate over levels and categories of immigrant admissions tends to treat these decisions as matters of pure charity or narrow national interest. In this widely held view, the admission and exclusion of aliens are the discretionary prerogative of sovereign nations, who may allocate or refuse admission spaces as they see fit. In many philosophical writings, however, the exclusion of aliens—indeed any selectivity in admissions—is at best an em-

² N. A. SIMS, BIOLOGICAL AND TOXIN WEAPONS: ISSUES IN THE 1986 REVIEW (Faraday Discussion Paper No. 7, 1986).

barrassment, at worst a flat contradiction of a fundamental tenet of the dominant liberal tradition: the equal moral worth of all human beings.

This book, a first-rate collection of essays, wrestles with these discontinuities. It is premised on the sound notion that political and moral philosophy has something to say to the politicians who speak only of the national interest in crafting immigration policy. As the editor, Mark Gibney, phrases it: "The aim is to examine both the political and the moral, with the ultimate aim of providing a moral basis for the alien admission policies that nations will be pursuing" (p. xvi). But it turns out that the contours of the national interest debate may also hold some lessons for the philosophers. Perhaps the premises of much moral discourse on admission questions should be qualified or rethought in recognition of the tenacious hold that national sovereignty thinking exercises.

The excellent opening chapter, by Frederick Whelan of the University of Pittsburgh, pushes hardest and most effectively to challenge liberal theorists to do some of this rethinking. He begins by noting the deeply ingrained liberal habit of considering individuals, "with their rights and their generalized basic interests, [as] abstracted from the identity that actual people have by virtue of being members or citizens of particular communities or participants in actual networks of relations with certain other people" (p. 6). He then marshals an abundance of reasons, drawn from numerous writers in the liberal tradition, that liberalism is deeply hostile to any policy short of open borders. But this conclusion "is paradoxical in the strict sense of the word: it is contrary to common opinion, and startling in its radicalness. Nearly everyone rejects it" in the actual business of shaping immigration policy (p. 14). "This of course is not in itself a reason for rejecting the conclusions, but I believe that it is a reason for scrutinizing them more closely, considering the possible validity of alternative premises and inquiring into the possible grounds of the opposed sentiments of the adherents of traditional opinions" (p. 15).

Whelan then takes the reader through such an exploration, with sensitivity and fidelity. He first considers certain justifications for restrictions on entry that are rather readily linked to liberalism—restrictions meant simply to protect liberal institutions themselves. He then considers other justifications for restrictions that might possibly be considered harmonious with certain versions of liberalism, but that progressively pose greater challenges to the latter's central tenets. These theoretical justifications he labels liberal statism (the existence of alternative states with different political systems "tends to temper despotic government" (p. 25)), liberal democracy (a "working democracy . . . is in concrete actuality built up gradually by the efforts of generations of members of a given society" (p. 31)), and liberal communitarianism (which views individuals as nonabstract members of a particular community or communities; the concept of community "implies a reasonably stable distinction between members and nonmembers" (p. 32)). Whelan finds considerable plausibility in many of these arguments for restrictions.

The debates summarized in this chapter are achieving growing importance in immigration studies. I know of no better brief introduction to the various strands in the controversy than Whelan's essay.

Joseph Carens, the second contributor, may be best known among likely readers of this book for an earlier essay challenging the moral validity of any immigration controls.¹ Here, however, he wants to take a different tack. "To argue for or against open borders on the basis of fundamental principles is perhaps to go too deep too soon" (p. 42). The nation-state is going to remain with us, and most people simply assume that states have the right to choose their own immigration policies. But that hardly silences moral debate. "The important questions to ask are not whether all borders should be open, but whether there are any limits to the right of states to admit or exclude whomever they choose . . ." (p. 43).

Laying aside, at least for now, his earlier "foundationalist" inquiry, Carens now urges "contextualist" moral criticism of particular immigration policies, grounded on a careful understanding of the particular policy, its historical background, and its meaning for the citizens of the excluding state and for outsiders. He admirably illustrates this approach by close scrutiny of the White Australia policy, which characterized that nation's immigration stance until the early 1970s. He presents a careful and thoughtful inquiry, offering several surprising insights, including a rather gentle and sympathetic criticism—but criticism nonetheless—of the policy. Carens also has much of interest to say about moral requirements (less demanding than one might expect) for future levels of immigration to countries that have, relatively speaking, abundant land and resources. He also discusses the difficult question of how much assimilation a receiving country may legitimately demand of its immigrants.

Although it does not use Carens's terminology, the next essay, by John Scanlan and O. T. Kent, likewise eschews "foundationalist" inquiry in favor of a "contextualist" critique of certain elements of American immigration and refugee policy. The authors accept that we live in "a Hobbesian universe," dominated by nation-states oriented toward pursuing the national interest, in their immigration policies and elsewhere. But they move on to argue that the Hobbesian perspective by no means precludes moral arguments. "[P]olitical systems in general—and the American political system in particular—still leave room for moral considerations in shaping and implementing immigration policies" (p. 62). They develop this argument by exploring what really goes into any calculation of the national interest. It must take into account certain moral aspirations of the people who constitute the state, what the authors call the "intersubjective values that citizens attribute to the nation qua nation" (p. 81), or elsewhere, "the moral vocabulary [citizens] use when they express their expectations or complaints about national policy" (p. 82).

This much is relatively convincing in finding footholds for moral critiques in the Hobbesians' own landscape. The essay encounters difficulties, however, when it tries to identify what those intersubjective values are. Because "Americans have traditionally expressed great pride in their nation's openness and hospitality to immigrants and refugees" (p. 83), the authors conclude that authentic American refugee policy must always avoid discrimina-

¹ Carens, *Aliens and Citizens: The Case for Open Borders*, 49 REV. POL. 251 (1987).

tion, and particularly ideological selectivity. One may generally share this choice of values but wonder about the remarkably thin empirical support here for the assertion that nondiscrimination is an inherent component of that traditional American value. Abstract pride was voiced even in an era when immigration was governed by national-origins quotas. And even a policy that has overwhelmingly favored refugees from Communist countries, while overlooking the plight of others, might legitimately prompt pride in openness and hospitality; admitting hundreds of thousands of needy people, however they were selected, represents a real humanitarian achievement.

In any event, the reader may be left wondering just how selections are to be made if Scanlan and Kent's principle is accepted. Which distinctions among refugee claimants would still be appropriate (*some* have to be drawn) and which should be seen as invidious discrimination? Also puzzling is the authors' insistence on attacking Michael Walzer's influential *Spheres of Justice*.² Their approach, emphasizing "intersubjective values," is hardly a universalist argument, and it seems to have more in common with Walzer's "communities of character" approach than they are willing to admit. The authors anticipate this charge and try to refute it, but their defense (pp. 86-87) is not very convincing.

Peter and Renata Singer also take on Walzer, in their chapter on "The Ethics of Refugee Policy." They see Walzer (not entirely justly, in my view) as a defender of conventional Western refugee and immigration policy, founded on a "rights-based argument" that gives primacy to a community's right to determine its own membership. They urge abandonment of this approach in favor of "the principle of equal consideration of interests" (pp. 121-22). To illustrate how this principle operates, they examine the impact on the various interests affected if refugee admissions were doubled. Clearly such a change, within certain limits they discuss, would serve the interests of the resettled refugees far more than it would damage the interests of the population of the receiving state. The Singers also effectively expose the arbitrariness of current refugee policy in most Western nations, which gives *de facto* priority to those who apply for asylum (by reaching a wealthy state on their own and seeking to escape return) over those who, for whatever reason, remain in camps in distant first-asylum countries. It would be far better, they suggest, to decide first the number of people who will be helped through a right of residence in the particular country, and then provide that residence to the neediest, not just to those who get there first (p. 120).

In his chapter, Andrew Shacknove contends that "the challenge that refugees pose is not the expansion of moral categories and the imposition of cosmopolitan duties upon reluctant populations, but the formulation of procedures and institutions [for] the implementation of ancient and widely endorsed norms" (p. 132). In partial service of this end, he sets forth and illustrates specific moral principles that should guide American refugee policy—and, by necessary implication, that of other industrialized countries.

² M. WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* (1983).

He also discusses a dimension of moral obligation often overlooked in writings on refugees: the obligations of the country of origin (pp. 133-34).

The final chapter, by Gibney and Michael Stohl, attempts an empirical exploration of the widely voiced charge that American asylum and refugee policy is politically biased. Applying a "terror scale" to two separate sources of information about human rights abuses in foreign countries (the annual State Department *Country Reports* and the annual Amnesty International reports), they categorize all source countries from 1 to 5, with level 5 being the most abusive. They then compare this ranking, in a variety of ways, to the results of U.S. asylum adjudications and refugee admissions. Asylum adjudication comes in for some criticism in this light, but less than might be expected: "successful applicants are by and large from countries with the worst human rights records" (p. 164). U.S. refugee admissions are more objectionable. They are heavily weighted toward level-3 countries (a category that includes both Vietnam and the Soviet Union), to the detriment of those fleeing worse governments. The authors might have done well to explore more thoroughly other possible explanations for these patterns, but it is hard to quarrel with their conclusion that "both refugee admissions and asylum practice need serious reexamination by policymakers" (p. 172).

DAVID A. MARTIN
University of Virginia

International Criminal Law: A Guide to U.S. Practice and Procedure. Antitrust, Securities, Extradition, Tax, Terrorism. Edited by Ved P. Nanda and M. Cherif Bassiouni. New York: Practising Law Institute, 1987. Pp. xiv, 546. Index.

This book, a compilation of fifteen chapters by diverse authors, is the latest in the collection of works on the frontier subject of international criminal law. It is designed as a source book for practitioners and accomplishes its purpose. The dearth of books for practitioners on this emerging topic ensures its usefulness. The editors, Professors Ved P. Nanda and M. Cherif Bassiouni, are the leading pioneers in international criminal law. Indeed, they were the editors of an early and classic treatise on the subject.¹

After an introduction, the second part of the book, entitled "Jurisdiction," discusses substantive areas of federal antiterrorist legislation; international activities and criminal considerations under U.S. antitrust laws; extraterritorial criminal jurisdiction in securities laws; tax crimes and extraterritorial discovery; criminal enforcement of the Export Administration Act; procedural aspects of antiboycott laws and regulations; and the Foreign Corrupt Practices Act and related statutes. In each of these substantive areas, the reader receives an overview and useful references. The amazing aspect is that only three years after the publication of the book each of these substantive areas has undergone extensive development. For instance, federal antiterrorism legislation has seen both new laws and case develop-

¹ For the early treatise, see M. C. BASSIOUNI & V. NANDA, *A TREATISE ON INTERNATIONAL CRIMINAL LAW* (2 vols. 1973).

ments.² In the Foreign Corrupt Practices Act, legislative revisions have already made the Act less inimical to U.S. businesses. In securities enforcement, the U.S. Congress has enacted laws to expand the power of the Securities and Exchange Commission (SEC) to assist its counterparts in investigations in the United States, and the SEC has concluded memorandums of understanding and, more recently, full-blown treaties on securities enforcement cooperation.³

The next three sections deal with procedural aspects. A compact, but thorough, review is provided of seven U.S. mutual legal assistance treaties (MLATs). One of the major doctrinal issues that was debated during the last two years, the right of defendants to have access to the treaty to obtain information for criminal cases, is discussed. Significantly, since the publication of the book, the number of U.S. MLATs concluded and ratified has doubled, again showing the dynamic developments in this area of the law. Bassiouni discusses perspectives on the transfer of prisoners, and updates a 1978 article. He uses both legislation⁴ and case law⁵ to illustrate developments in this area. A section on extradition contains an article on efforts to revise U.S. legislation to facilitate the struggle against terrorism, and an article on double criminality and complex crimes. The latter will be especially useful to the practitioner, since complex crimes such as those involving narcotics are the subject of most extradition requests.

Professor B. J. George of New York Law School provides a useful review of diplomatic and consular immunity, an area where Congress is considering greater restrictions. The Noriega case alone raised the issues of head-of-government immunity, the inviolability of the Papal Nunciature and the ambassador's home, and the application of the Geneva Conventions.

Professor Jordan J. Paust tackles constitutional limitations on extraterritorial power, particularly concerning persons, property, due process and the seizure of evidence abroad. The decision by the U.S. Supreme Court in the *Verdugo-Urquidez* case has given rise to new discussion of these issues.

Nanda discusses human rights and criminal law and procedure. Although he limits his discussion to judicial remedies in U.S. courts for breaches of internationally protected human rights, the tremendous doctrinal develop-

² One important decision upheld U.S. jurisdiction in the arrest of Fawaz Yunis, captured on a boat near Cyprus, and his subsequent conviction.

³ For a discussion of the securities enforcement cooperation agreements and the legislative changes, see Mann & Lustgarten, *Internationalization of Insider Trading Enforcement—A Guide to Regulation and Cooperation*, in *WHITE COLLAR CRIME* 1990, at 511-62 (ABA National Institute, 1990).

⁴ Congress amended the U.S. prisoner transfer treaty implementing legislation by enacting a new sec. 4106A to title 18 of the U.S. Code. See Pub. L. No. 100-690, §7101, 102 Stat. 4181, 4415 (1988); Abbell, *Congress Amends Prisoner Transfer Treaty Implementing Legislation to Permit Transfer of Americans Convicted in Foreign Country Offenses Committed After October 31, 1987*, *INT'L ENFORCEMENT L. REP.*, December 1988, at 416.

⁵ An important decision that upholds the discretion of the U.S. Attorney General not to issue substantive regulations governing international prisoner transfer decisions is *Scalise v. Thornburgh*, No. 88-2497 (7th Cir. Dec. 19, 1989). For a discussion of the implications of the case, see Zagaris, *7th Circuit Upholds Attorney General's Discretion in Regulating Prisoner Transfers*, *INT'L ENFORCEMENT L. REP.*, March 1990, at 125.

ments have occurred in Europe in the last year. The European Court of Human Rights, in the *Soering* case, held that extradition of a young German citizen who might have faced capital punishment in the United States would violate the European Convention on Human Rights. Similarly, Dutch courts, in the *Short* case, held that a "turn over" under the Status of Forces Agreement would violate the Convention.

In conclusion, the book serves as a useful and practical guide to international criminal law, particularly the chapters on substantive issues. The chapters on procedure are a fine reference tool. Most important, the material on this wide range of subjects is hard to find under one cover.

BRUCE ZAGARIS

Of the District of Columbia Bar

Digest of United States Practice in International Law, 1980. By Marian Nash Leich. (Dept. of State Pub. 9610.) Washington: U.S. Govt. Printing Office, 1986. Pp. xxx, 1134. Index.

The *Digest of United States Practice in International Law, 1980*, like its seven predecessors, constitutes a treasure house of information and furnishes a long-awaited, indispensable research tool for students of international law and relations the world over. Like the two preceding volumes, it was compiled, arranged and annotated with meticulous craftsmanship by Marian Nash Leich of the Office of the Legal Adviser. The volume is dedicated to the memory of Marjorie M. Whiteman, who died during the year when the *Digest* was released and whose great masterpiece is admirably continued by the present editor.

The *Digest* for 1980 covers the last year and three weeks of President Carter's administration and mirrors the myriad of problems, traumatic or trivial, that confronted the Government, especially the Department of State, the Departments of Justice and the Treasury, as well as the courts, during that troubled period. In his introduction, former Legal Adviser Abraham Sofaer highlights some of the thorny issues that occupied the time and talents of the lawyers in the Office of the Legal Adviser and their colleagues in other agencies. The documents collected here demonstrate with clarity the vast range of subjects that are governed by modern international law—from classical problems, such as diplomatic privileges and immunities, to ultra-modern topics, such as space law and control of nuclear energy.

A substantial portion of the 1980 volume is devoted to the steps taken by the United States in response to, and for the resolution of, the crisis precipitated by Iran's taking of hostages in the U.S. Embassy in Tehran on November 4, 1979. The respective chronicles include abstracts from the memorials and pleadings before the International Court of Justice (pp. 302-20 and 989-95), the abortive rescue attempt (pp. 321-25), the termination of diplomatic relations with Iran (pp. 335-40), the assets freeze and its domestic sequels (pp. 531-39 and 794), and the final accords—release of the assets and institution of an international claims tribunal (pp. 726-47, 795-804 and 946-70). The multitude of troublesome legal issues faced by the Executive

in the difficult negotiations stand out with clarity in the hundred-odd pages filled by the accounts.

The year 1980, however, also called for the production of vast numbers of government memorandums relating to other areas of U.S. foreign policy, not least of which was President Carter's concern with the protection of human rights. Particular mention is deserved by the amicus brief of the Departments of State and Justice in *Filartiga v. Pena-Irala*,¹ which advanced the position that "in nations such as the United States where international law is part of the law of the land, an individual's fundamental human rights are in certain situations directly enforceable in domestic courts." The *Digest*'s reproduction of these materials (pp. 10-14 and 252-63) merits particular notice.

The volume contains the usual crop of cases dealing with sovereign immunity and act of state, illustrating the struggle of the domestic courts to reconcile respect for the independence and internal authority of foreign nations with the need to accord relief to injured parties. This concern for the rights of foreign nations is also reflected in the exhaustive memorandum of a Deputy Legal Adviser on the ownership of Japanese war vessels and their cargo, sunk by U.S. forces during World War II (p. 999).

The Department of State, and especially its Office of the Legal Adviser, commands the deep gratitude of practitioners and scholars here and abroad for having allocated gifted personnel and staff time to this formidable enterprise. Mrs. Nash Leich is entitled to high praise for her production of a comprehensive, carefully arranged and masterfully annotated assembly of documents. Without such a massive effort, invaluable keys to comprehension of the enormous tasks of the Government would be lost.

STEFAN A. RIESENFELD
Board of Editors

Die völkerrechtliche Lage der ehemaligen Spanischen Sahara. By Abdelfadil Gnidil. Cologne: Hundt Druck GmbH, 1987. Pp. viii, 331.

The author's goal is to prove that the legal qualification of the status of the Western Sahara (Rio de Oro and Sakiet El Hamra), as construed by the International Court of Justice (ICJ) in 1975,¹ suffers from essential insufficiencies. In his view, the Court did not take into account that the treaty of 1912 establishing the protectorate of France over Morocco could not confer sovereignty over this area on Spain. Gnidil points out that the Court particularly misunderstood the solemn oath of allegiance taken by the tribal leaders in order to recognize the sovereignty of the Sultan of Morocco, since the Court only saw the religious character of this oath and not its legal nature. In the author's opinion, the Court generally overlooked the fact that the continental European rules of international law cannot simply be applied when Islamic nations are involved.

¹ 630 F.2d 876 (2d Cir. 1980).

¹ 1975 ICJ REP. 12 (Advisory Opinion of Oct. 16).

Gnidil offers a detailed history of the region, whose legal relevance, in his mind, was not sufficiently appreciated by the ICJ because of its tendency to consider the right of self-determination as the predominant principle. The author also criticizes the practice of the United Nations, stressing its lack of conclusiveness. If, he argues, the United Nations states that only the right of self-determination can solve this question, it cannot at the same time, as it has done, recommend a solution by negotiation or consultation.

The author next focuses, in detail, on the legal character of the right of self-determination, since the ICJ has strictly confirmed the relevant resolutions of the United Nations. This gives the author reason to describe the historical origin and development of this right. His glance backward includes the well-known resolutions of the United Nations, the Covenants on Human Rights and many other documents and declarations. In spite of this background, the author comes to the conclusion that the right of self-determination cannot be qualified as a rule of international law (p. 230); its normative nature can be based neither on customary law nor on treaties, he says. This argument is related to the statement that resolutions of the United Nations have no binding force upon states. According to the author, notwithstanding some contrary opinion, they have not lost their character as purely recommendatory. Above all, he finds that the definitions of those who are entitled to the right of self-determination and of its contents are extremely vague, so that no applicable norm can be perceived.

Gnidil's remarks about self-determination are superficial and give the impression that his refusal to recognize the legal nature of this right is based primarily on political grounds. If one intends to deny the applicability of this right in the given case, one could better stress the author's point that the tribes already expressed this right of self-determination by taking the oath of allegiance recognizing the sovereignty of the Sultan. At any rate, it can be said that all the arguments of the author relating to self-determination and its legal nature are unacceptable due to their extreme one-sidedness. The currently and overwhelmingly accepted position not only recognizes the legal character of the right of self-determination, but also qualifies this right as a peremptory international norm. This general statement, of course, does not dispense with the duty to test whether that rule can be applied in a concrete case, and one may fully agree that doubts about the characterization of the Western Saharan population as a people or nation in the sense of self-determination cannot lightly be rejected. But the complete denial of the legal relevance of this right as part of international law cannot be accepted as a serious position.

In the last part of his work, Gnidil deals with the *uti possidetis* doctrine. In his mind, this principle is not applicable to the case of the Sahara since colonial frontiers are not appropriate objects of heritage and, moreover, since the distinction between disputes relating to territorial sovereignty and those relating to territorial boundaries must be observed in clarifying the status of the Western Sahara. Surprisingly, here the author argues that, regarding territorial sovereignty only, the right of self-determination is the decisive principle (p. 275). This short remark obviously contradicts his

former long comments on the exclusively political nature of self-determination.

The entire investigation shows that the author, consciously or not, tends to grant political viewpoints predominance over legal reflections. Whether or not the conclusion of this research, namely, that the Moroccan sovereignty established in former times should continue, is correct, remains an open question. The author disregards nearly all opposing points of view. Of course, international law requires an understanding of political relations, but the political issues should never overshadow established principles of international law, even if one concedes that international law cannot always render clear-cut answers.

KARL DOEHRING
Heidelberg

The Status of Tibet: History, Rights, and Prospects in International Law. By Michael C. van Walt van Praag. Boulder, Colo.: Westview Press, 1987. Pp. xxiv, 381. Index. \$35.

Taking a walk down the main street of McLeod Ganj, the major Tibetan refugee town in India adjacent to the compound of the Tibetan Government-in-exile, a visitor has a choice of cuisines in the many small restaurants. Food and conversation are available in equal measure there. If one then asked in Tibetan who the lawyer of the Dalai Lama was, the answer would be "Michael Van" or some Tibetanization of the name Michael van Walt, the author of this book. Such has been his renown among the more knowledgeable of the refugee community as a representative of their leader on the international legal stage, a champion of Tibet and the interpreter of things legal for Tibetans.

His work, *The Status of Tibet*, is a review from the viewpoint of a modern international lawyer of the historical and current arguments for and against the independent position of Tibet in relation to China. The question of Tibet has provoked constant argument since the Chinese takeover of 1950 and van Walt's book is the first to address formally each legal issue seriatim from the Tibetan perspective.

The bewildering array of justifications offered for the Chinese actions over the past forty years have included historical arguments rejecting Tibet's status as a state, arguments for its protectorate status, arguments based on the lack of intrinsic cultural cohesion of the Tibetan people, arguments based on the lack of political control over the territory of Tibet by the Tibetan Government, arguments based on treaties concluded both before and after the takeover, sphere-of-influence arguments, and the argument that Tibet has been an integral part of China for hundreds of years. Chinese commentators such as H. Chiu, Luke Chang, Wang Furen and Li Tieh-Tseng have used events as small as the payment of money to Tibetan emissaries by the Chinese Government and as ancient as the wedding of the first historical king to a Tang princess in the seventh century¹ to substantiate

¹ See WANG FUREN & SUO WENQING, HIGHLIGHTS OF TIBETAN HISTORY (1984).

Chinese claims to the vast plateau area that now constitutes over one-fifth of the entire Chinese landmass.

What was needed from the Tibetan point of view was a counterstatement, grounded in modern international law, theory and acceptable to all modern states, which presented, discussed, pointed out the contradictions in, and then rebutted every current or possible Chinese argument. This would be useful not only as background but in any debate at the United Nations or in other international forums. Michael van Walt has produced such a book. While his conclusions—that Tibet was an independent state throughout its history, that its status with China was never more than that of a limited protectorate, that the current occupation of Tibet by the Chinese is illegal, and that the Tibetan people have a right to self-determination—are not surprising, the copiousness of his research, the thoroughness of his presentation and the depth of his understanding of international law work together to make this a forceful statement.

The first part of the book is a good review of Tibetan history, with an eye toward the international legal questions that van Walt wants to address. Chapters 1 through 6 and chapter 9 move rapidly through the thirteen hundred years of recorded Tibetan history, giving the historical context for the political motivations of the Tibetan rulers and foreign powers. Reading this report, one finds it hard indeed to imagine that China has been able to make a valid claim that Tibet was not a distinct state, no matter what definition of the term was used. Chapter 7 presents van Walt's analysis of the pertinent concepts in international law that apply to the Tibetan situation. Chapters 8 and 10 are an analysis of the historical and recent status of Tibet in light of those legal concepts. He concludes chapter 10 with a section on the present status of Tibet (p. 177) stating that the Tibetan Government now in exile and the Tibetan people on the plateau have never accepted Chinese rule, that opposition to this rule remains widespread, that the Chinese Government has no legal title to sovereignty over Tibet, and that the position of other states toward Tibet remains, at best, noncommittal.

Perhaps the most important aspect of the book for both the international and East Asian scholar is van Walt's discussion of the *Chö-yön* (priest-patron) relationship, which was first established between the Sakya lamas of Tibet and the Mongol khans in the thirteenth and fourteenth centuries. It was a personal and religious tie that "cannot be categorized or defined adequately in current international legal terms and must be regarded as a *sui generis* relationship" (p. 12). Based on an important interrelation in Tibetan Buddhism between the religious person who practices and gives religious teachings and the layman who supports, worships and protects him or her, *Chö-yön*, as van Walt uses the term, is this relationship writ large and carried out on the international stage. The Fifth Dalai Lama of Tibet, for example, was established as the ruler of Tibet by his devotee, the Qoshot Mongol leader Gushri Khan, who invaded Tibet with his armies, set the Dalai Lama on the throne and then withdrew.

The *Chö-yön* tie did not reflect the inequality of the superior and inferior, but the symbiosis of religious lama and secular devotee. It was a personal relationship between two heads of state acted out across history and finally

recanted in the early part of the twentieth century. As such, it hardly fits most of the modern international legal terms that van Walt must attempt to apply to it; instead, he takes the tack of asking what sorts of political exchanges actually occurred under this relationship and then analyzes them in terms of modern theory.

Van Walt does not stress another aspect of the relationship; the Buddhist prohibition against killing was interpreted by some religious Tibetan leaders as a general prohibition against a large military, whose function was then fulfilled at various points in Tibet's history (although certainly not all) by the patron. It was, arguably, this general lack of a strong military that precipitated the continuation of sporadic foreign interference throughout Tibet's history and the ultimate demise of the state in 1950. Also, van Walt does not discuss the development over the last three hundred years of a xenophobic, isolationist style in Tibetan foreign affairs, which would be even harder to explain in modern legal terms. Tibetan rulers constantly balanced foreign pressures against one another, even taking totally contradictory positions with different parties, if it allowed them to remain neutral.² The author takes perhaps the wiser course of looking at the actual events and documents themselves for their cogency in terms of international legal concepts.

Van Walt highlights Tibet as an interesting case study for various aspects of international law: particularly, statehood (pp. 93–110), independence (pp. 133–41), protectorates (pp. 102–4, 127–29), suzerainty (pp. 104–7), acquisition of territory (pp. 177–88), annexation (pp. 183–88) and self-determination (pp. 189–97). He relies heavily for his analysis of the issue of statehood on the work of K. Marek and J. Crawford, and for protectorates and suzerainty on J. H. W. Verzijl, G. B. Davis and L. Oppenheim. Throughout, his range and use of sources is good. He culled all of the standard legal treatises; treatises on Tibetan history and culture; newspapers from England, India, the United States, China, the refugee community and Hong Kong; all of the United Nations reports, cases and resolutions; unpublished records from the wonderful files of the India Office Records in London; published and unpublished Chinese documents that he had had translated; international case law; and a wide selection of books and journals. The work is extensively footnoted (79 pages), appendixes (35 pages) and blessed with an excellent bibliography and index, making it a research tool as well.

In the last chapter, "Beyond the Status Quo; Toward an Equitable Resolution," the author takes a more conciliatory approach and proposes three possible forms for the future status of Tibet: actual autonomy, free association with China or integration with China. Principle 7 of the 1960 UN resolution is the basis for his suggestion of free association, an arrangement that has been employed largely by smaller entities than Tibet. He states that there are "significant similarities" between the modern institution of free association and the traditional *Chō-yōn* relationship between Tibet and China, a point that requires a definite stretch of the imagination. Given the aftermath of the events in Tiananmen Square, one is hard pressed to retain a sanguine attitude toward the Chinese with respect to an innovative idea such

² See C. BELL, *TIBET: PAST AND PRESENT* 56 (1924).

as "free association," but van Walt's work was concluded two years earlier and he took a more optimistic view toward Chinese domestic policy. Nevertheless, this is an excellent and much-needed case study of the status of Tibet as a distinct political entity, which should be consulted by any scholar interested in the complex, and now-tragic, consequences of the Chinese-Tibetan relationship.

REBECCA R. FRENCH
Harvard Law School

Die Wiedergutmachung nationalsozialistischen Unrechts durch die Bundesrepublik Deutschland. Vols. I–VI. Munich: Verlag C. H. Beck, 1974–1987.

Literally, the German word *Wiedergutmachung* means "to make good again." It encompasses *Entschädigung*, which means "to wipe away injury" and *Rückerstattung*, which is "to restore what has been taken away." These form the subject of six volumes that describe legal proceedings in the Federal Republic of Germany to compensate some of those who were persecuted and plundered by the Third Reich of Adolf Hitler. The terms are all misnomers. Some things cannot be made good again. Some injuries can never be wiped away and many things taken can never be restored. As a former Bavarian minister, Governor-General of Poland and President of the Academy of German Law, Dr. Hans Frank, stated at Nuremberg before he was hanged for admitted participation in mass annihilations, "A thousand years will pass and this guilt of Germany will still not have been erased."

The *Wiedergutmachung* program by the West German Government is most impressive. Thirty authors (mostly former officials), who worked on the project for ten years, describe dozens of laws, hundreds of amendments, thousands of decisions, and millions of claims costing billions of dollars. All of this is meticulously detailed in over three thousand pages of careful legal analysis published by the Ministry of Finance in collaboration with Walter Schwarz, a successful restitution practitioner and scholar (now deceased) who initiated the publication. He concluded that, despite many errors and inequities, a great job was done. One hopes that the precedents set in compensating victims of incomprehensible brutality and repression will never have to be used again.

For those who wish to understand the enormous complexity of the program and to measure its accomplishments and shortcomings, these volumes are indispensable. Volume I deals with restitution of identifiable property.¹ Volume II focuses on monetary claims against the Reich for assets that could not be returned. The third volume describes the origins and evolution of the programs to compensate individuals for personal injuries and losses, such as imprisonment, damage to health, disability and economic losses of many kinds. Volumes IV and V spell out how those indemnification laws were implemented. Volume VI describes partial compensation for special groups

¹ Reviewed at 69 AJIL 707 (1975).

of refugees not covered by earlier legislation. A laudatory conclusion by Schwarz was printed as a brochure pending the uncertain publication of a final volume.

Much of this legislation originated during the immediate postwar period, as German states offered help to those who had been liberated from the concentration camps. Military government occupation laws imposed additional obligations, as did the Allies when the Federal Republic was given its sovereignty. The West German program was further stimulated by political pressures that culminated in the Hague "reparations" (another misnomer) agreement of 1952, which included global payments to Israel and Jewish organizations.

Postwar West Germany, citing its limited capacity to pay and noting that it was only a portion of the Greater German Reich, was never prepared to accept full liability for Nazi crimes. In its special and partial legislation, it required each claimant to show a connection to the present territory of the Federal Republic; proof that the persecution was for racial, religious or ideological reasons only; and that the injuries were the direct consequence of such persecution. These requirements excluded masses of persons who had suffered from Nazi brutality and they imposed burdens of proof that were often impossible to meet. These shortcomings are minimized in the Finance Ministry's publication.

Some glaring deficiencies in the program in practice are described in "The Little War against the Victims," published in 1988 by the Hamburg Institute for Social Studies,² Christian Pross, the editor and a medical historian, referring to general German apathy or opposition, cites many cases where disability claims were rejected without cause by Nazi-minded doctors who made victims feel like beggars. German bureaucrats and former oppressors took pride in "being decent"—while giving as little as they could get away with.³

The problem of adequately compensating Nazi victims remains alive today. East Germany has evaded liability completely by arguing that the Potsdam Reparations Agreement—which made no reference to individual claims—freed it of all further obligation. What the new non-Communist Government of the German Democratic Republic, which recently apologized for Nazi crimes, will do to make material amends remains to be seen. The West German model, well described in the volumes cited, erected an enormous, complicated and costly legal structure that sought to squeeze unparalleled moral obligations into a complex, inadequate and ultimately inappropriate legal frame—from which the heart was missing. One hopes that a reunited Germany will find the means, and a more humane way, to close this sorry chapter of human history.

BENJAMIN B. FERENCZ

Pace Peace Center, Pace University School of Law

² WIEDERGUTMACHUNG—DER KLEINKRIEG GEGEN DIE OPFER (C. Pross ed. 1988).

³ A balanced overview is presented in WIEDERGUTMACHUNG IN DER BUNDESREPUBLIK DEUTSCHLAND (L. Herbst & C. Goschler eds. 1989).

COLLECTED ESSAYS

Liber Amicorum: Colección de Estudios Jurídicos en Homenaje al Prof. Dr. D. José Pérez Montero. 3 volumes. (Oviedo: Universidad de Oviedo, 1988. Pp. 1,541.)*

Vol. I: Andrés A. Aramburu Menchaca, *El Derecho de Gentes en la Constitución peruana de 1979*; Julio A. Barberis, *La Regla del uti possidetis en las controversias limítrofes entre Estados hispanoamericanos*; Bernardo Baruch, *Idealismo y realismo de la neutralidad en relación con la neutralidad perpetua, activa y no armada de Costa Rica*; Mohammed Bedjaoui, *Universalisme et régionalisme au sein de la Cour internationale de Justice: La constitution de chambres "ad hoc"*; Juan Antonio Carrillo Salcedo, *El Derecho Internacional en 1945 y en la inmediata postguerra*; Alejo de Cervera, *El porqué de la incondicionalidad del "suum cuique"*; Aldo Armando Cocca, *Antecedentes y desarrollo de la Doctrina Argentina del patrimonio común de la Humanidad en el moderno Derecho Internacional*; Rodolfo Cruz Miramontes, *Presentación del Código de Conducta de las Conferencias Marítimas: su ubicación histórica en el Transporte y el Comercio Internacional*; Emilio Ramón Estrade de Miguel, *Competencia judicial internacional y reconocimiento y ejecución de decisiones judiciales extranjeras en la Comunidad Europea. Incidencia de su régimen en el Derecho español*; Fabio Fournier Jiménez, *¿Es de prever una evolución acelerada del Derecho Internacional?*

Vol. II: Hector Gros Espiell, *El Derecho Internacional de los refugiados y el artículo 22 de la Convención Americana sobre Derechos Humanos*; Alberto Herrarte, *La supranacionalidad*; Julio E. Linares, *La seguridad y defensa del Canal de Panamá a través de la neutralización*; Roman López Tames, *El Estado Libre Asociado de Puerto Rico: dos consideraciones*; Pablo Lucas Verdu, *Kelsen y la morfología política*; Hugo Llanos Mansilla, *El dominio marítimo chileno y su proyección sobre la región Antártica chilena*; Alberto J. Lleonart Amselem, *La Conferencia de San Francisco para la Organización Internacional y España*; Antonio Marín López, *Las competencias de la Comunidades Autónomas y la Comunidad Europea*; Vicente Marotta Rangel, *A controversia Estados Unidos-Nicaragua e o tema da conduta das partes*; Antonio Marquina Barrio, *El contencioso de Gibraltar después de la Declaración de Bruselas*; Juan de Miguel Zaragoza, *El efecto internacional del principio "ne bis in idem", en materia penal*; Alejandro Montiel Argüello, *La Corte de Justicia Centroamericana y los Derechos Humanos*; Isidro Morales Paul, *Juicio crítico sobre el sistema de solución de controversias de la Carta de Naciones Unidas y los conflictos capaces de poner en peligro la paz y la seguridad internacional*; Fernando Murillo Rubiera, *Los Estados y la Conferencia Internacional de la Cruz Roja*; Stanislaw E. Nahlik, *The role of the 1977 Geneva Protocols in the progress of the Law of Armed Conflicts*; Geraldo Eulalio do Nascimento e Silva, *Privilegios e inmunidades consulares*; Manuel Olivencia Ruiz, *La evolución del Derecho de Quiebra y el Consejo de Europa*; Gonzalo Ortíz Martín, *Relación del Derecho Internacional y los Derechos Humanos en Centroamérica*.

Vol. III: José Manuel Pelaez Marón, *La presencia de la Comunidad Europea en el conflicto Norte-Sur*; Manuel Pérez Rodríguez, *La atribución de la nacionalidad en el Derecho Comparado Iberoamericano*; Juan Carlos Puig, *Tendencias doctrinales del Derecho Internacional Público en América Latina*; Antonio Remiro Brotons, *Los efectos del conflicto armado sobre los Tratados (consideraciones sobre la*

* Only entries on international law subjects are listed.

resolución aprobada por el Instituto de Derecho Internacional en la Sesión de Helsinki, 1985); Ernesto J. Rey Caro, *El arbitraje en la tradición Jurídico-Internacional argentina*; Alfredo H. Rizzo Romano, *El Estoppel y la problemática jurídico-política de las Islas Malvinas*; Arias de Saavedra y Muguelar, *La creación y el funcionamiento de las Salas "ad hoc" del Tribunal Internacional de Justicia*; Francisco Sánchez-Apellaniz Valderrama, *Naturaleza y caracteres de la soberanía permanente sobre los recursos naturales*; Efraín Schacht Aristeguieta, *Venezuela y las Naciones Unidas*; Modesto Seara Vázquez, *Hacia el concepto de intersoberanía*; Ignaz Seidl-Hohenveldern, *Jurisdiction over employment disputes in international organizations*; Rafael Somoano Berdasco, *La Declaración Conciliar "Dignitatis Humanae" sobre libertad religiosa*; Enrique P. Syquia, *International Terrorism and International Law*; Luis Tapia Salinas, *Introducción al Derecho Aeronáutico. Su internacionalidad como principal característica*; José Antonio Tomás Ortíz de la Torre, *Anotaciones bibliográficas para la historia del pensamiento iusinternacional de los asturianos*; María Rafaela Urueña, *La Iniciativa de Defensa Estratégica: un tema de controversia*; Diego Uribe Vargas, *Crisis de la cooperación internacional para el desarrollo*; José Antonio Yturriaga Barberan, *Los Estados en situación geográfica desventajosa: una categoría jurídica injustificada*.

BOOKS RECEIVED*

International Law—General

- Recueil des Cours de l'Académie de droit international de La Haye*, 1989. Vol. III. (Vol. 215 of the collection.) Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1990. Pp. 416. Dfl.185; \$112; £62.50.
- Annuaire de l'Institut de Droit International / Institute of International Law Yearbook, Volume 63, Part II. Session of Santiago de Compostela 1989. Deliberations of the Institute during Plenary Meetings.* Paris: Editions A. Pedone, 1989. Pp. 372.
- Carty, Anthony, and Gennady Danilenko (eds.). *Perestroika and International Law. Current Anglo-Soviet Approaches to International Law.* Edinburgh: Edinburgh University Press, 1990. Pp. ix, 231. Index. £30.
- Dembinski, Ludwik, and Richard O'Regan (eds.). *International Geneva Yearbook 1990 (Vol. IV). Organization and Activities of International Institutions in Geneva.* Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1990. Pp. xiii, 330. Index. Dfl.110; \$64; £39.
- Ebke, Werner F., and Joseph J. Norton (eds.). *Festschrift in Honor of Sir Joseph Gold.* Heidelberg: Verlag Recht und Wirtschaft, 1990. Pp. 470.
- Franck, Thomas M. *The Power of Legitimacy Among Nations.* New York, Oxford: Oxford University Press, 1990. Pp. viii, 303. Index. \$29.95.
- Moynihán, Daniel Patrick. *On the Law of Nations.* Cambridge, Mass., London: Harvard University Press, 1990. Pp. 211. Index. \$22.50.
- Polish Yearbook of International Law. Volume XVII, 1988.* Wrocław, Warszawa, Kraków, Gdańsk, Łódź: Polish Academy of Sciences Institute of State and Law, 1990. Pp. 302.
- Slomanson, William R. *Fundamental Perspectives on International Law.* Saint Paul, New York, Los Angeles, San Francisco: West Publishing Company, 1990. Pp. xii, 563. Index.

International Economic Law & Relations

- Cullen, Robert (ed.). *The Post-Containment Handbook. Key Issues in U.S.-Soviet Economic Relations.* Boulder, San Francisco, Oxford: Westview Press, 1990. Pp. xii, 227. \$39.95.

* Mention here neither assures nor precludes later review.

- Dell, Sydney. *The United Nations and International Business*. Durham, N.C.: Duke University Press, 1990. Published for the United Nations Institute for Training and Research (UNITAR). \$29.95.
- de Mestral, A. L. C., and T. Gruchalla-Wesierski. *Extraterritorial Application of Export Control Legislation: Canada and the U.S.A.* Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1990. Pp. vii, 276. Index. Dfl.175; \$99.50; £64.
- Gest, Guy, and Gilbert Tixier. *Droit fiscal international*. Paris: Presses Universitaires de France, 1990. Pp. 611. F 188.
- Julius, DeAnne. *Global Companies & Public Policy. The Growing Challenge of Foreign Direct Investment*. New York: Council on Foreign Relations Press, 1990. Pp. xiii, 126. \$14.95.
- Merkt, Hanno. *Investitionsschutz durch Stabilisierungsklauseln. Zur intertemporalen Rechtswahl in State Contracts*. Heidelberg: Verlag Recht und Wirtschaft GmbH, 1990. Pp. 418. Index. DM 150.
- Nau, Henry R. *The Myth of America's Decline: Leading the World Economy into the 1990s*. New York, Oxford: Oxford University Press, 1990. Pp. xiii, 424. Index.
- Šarčević, Petar, and Hans van Houtte (eds.). *Legal Issues in International Trade*. London, Dordrecht, Boston: Graham & Trotman/Martinus Nijhoff, 1990. Pp. xi, 225. Index.
- Sinke, Marjorie J. *Legal Language. US-Dutch Legal Concepts on Business and Tax Law. A Glossary*. Deventer, Boston: Kluwer Law and Taxation Publishers, 1990. Pp. x, 212. Indexes. Dfl.110; \$59.
- Wallace, Cynthia Day (ed.). *Foreign Direct Investment in the 1990s. A New Climate in the Third World*. Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1990. Pp. xiii, 213. Index. Dfl.125; \$49.50; £42.75.
- Whalen, Richard J., and R. Christopher Whalen (eds.). *Trade Warriors: The Guide to the Politics of Trade and Foreign Investment*. Washington, D.C.: The Whalen Company, Inc., 1990. Pp. v, 467. Index. \$34.95.
- Zamora, Stephen, and Ronald A. Brand (eds.). *Basic Documents of International Economic Law*. 2 vols. Chicago: Commerce Clearing House, Inc., 1990. Vol. I: pp. xxi, 1057; vol. II: pp. viii, 1080. \$80.

Law of the Sea & Maritime Law

- International Organizations and the Law of the Sea. Documentary Yearbook 1987. Volume 3.* The Netherlands Institute for the Law of the Sea (NILOS). London, Dordrecht, Boston: Graham & Trotman/Martinus Nijhoff, 1989. Pp. x, 807. Index. Dfl.300; \$175; £97.
- Jayewardene, Hiran W. *The Regime of Islands in International Law*. Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1990. Pp. xxv, 572. Index. Dfl.315; \$159; £105.
- Platzöder, Renate, and Horst Grunenberg. *Internationales Seerecht*. Munich: C.H. Beck, 1990. Pp. xv, 729. DM 75.
- Schmidt, Markus G. *Common Heritage or Common Burden? The United States Position on the Development of a Regime for Deep Sea-Bed Mining in the Law of the Sea Convention*. Oxford: Clarendon Press, 1989. Pp. xiv, 366. Indexes.
- Tanja, Gerard J. *The Legal Determination of International Maritime Boundaries. The Progressive Development of Continental Shelf, EFZ and EEZ Law*. The Hague: T.M.C. Asser Instituut; Deventer, Boston: Kluwer Law and Taxation Publishers, 1990. Pp. xxi, 360. Index. Dfl.120; \$64.

Use of Force & Law of War

- Cousin, René (ed.). *La Guerre et l'enfant*. Actes du colloque organisé par l'Association internationale des journées universitaires de la paix, à l'Institut de Sociologie de l'Université Libre de Bruxelles. Brussels; Commission Communautaire Française, 1990. Pp. 101.
- Joyner, Christopher C. (ed.). *The Persian Gulf War: Lessons for Strategy, Law, and Diplomacy*. New York, Westport, Conn., London: Greenwood Press, 1990. Pp. x, 256. Index. \$45.
- Révolutions et droit international*. Société Française pour le Droit International. Paris: Editions A. Pedone, 1990. Pp. 445.

Terrorism

Rubin, Barry (ed.). *The Politics of Terrorism: Terror as a State and Revolutionary Strategy*. Washington, D.C.: Foreign Policy Institute, School of Advanced International Studies, The John Hopkins University, 1989. Pp. xi, 236. Distributed by University Press of America.

Human Rights

Boivin, Michelle, John Manwaring, and Daniel Proulx (eds.). *Canadian Human Rights Yearbook / Annuaire canadien des droits de la personne 1989-1990*. Ottawa: Human Rights Research and Education Centre, University of Ottawa, 1990. Pp. xvi, 366. \$50, cloth; \$25, paper.

Scalabrino-Spadea, Michelangela. *Le droit à la santé. Inventaire de normes et principes de droit international*. Padua: Cedam, 1990. Pp. 95-293.

Dispute Settlement

Bernhardt, Rudolf, Juliane Kokott, Werner Meng, and Karin Oellers-Frahm (eds.). *Fontes Iuris Gentium. Digest of the Decisions of the International Court of Justice / Répertoire des Décisions de la Cour internationale de Justice / Handbuch der Entscheidungen des Internationalen Gerichtshofs 1976-1985*. Berlin, Heidelberg, New York, London, Paris, Tokyo, Hong Kong: Springer-Verlag, 1990. Pp. xxxvii, 386. Index. DM 390.

Rabow, Gerald. *Peace Through Agreement. Replacing War With Non-Violent Dispute-Resolution Methods*. New York, Westport, Conn., London: Praeger, 1990. Pp. xi, 189. Index. \$37.95.

Soons, A. H. A. (ed.). *International Arbitration: Past and Prospects. A Symposium to Commemorate the Centenary of the Birth of Professor J.H.W. Verzijl (1888-1987)*. Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1990. Pp. xix, 221. Index. Dfl.145; \$85; £54.

Arms Control & Disarmament

Dunn, Lewis A., and Amy E. Gordon (eds.). *Arms Control Verification and the New Role of On-Site Inspection*. Lexington, Mass., Toronto: Lexington Books, 1990. Pp. viii, 260. Index. \$39.95, cloth; \$14.95, paper.

Meyrowitz, Elliott L. *Prohibition of Nuclear Weapons: The Relevance of International Law*. Dobbs Ferry, N.Y.: Transnational Publishers, Inc., 1990. Pp. xvii, 333. Index. \$58.

SIPRI Yearbook 1990. *World Armaments and Disarmament*. New York: Oxford University Press, 1990. Pp. xx, 714. Index.

Aliens & Refugees

Barwig, Klaus, Klaus Lörcher, and Christoph Schumacher (eds.). *Asylrecht im Binnenmarkt. Die europäische Dimension des Rechts auf Asyl*. Baden-Baden: Nomos Verlagsgesellschaft, 1989. Pp. 363. DM 48.

La reconnaissance de la qualité de réfugié et l'octroi de l'asile. Actes de la journée d'études du 21 avril 1989. Brussels: Editions Bruylant; Editions de l'Université de Bruxelles, 1990. Pp. 256. F 1.400.

Environment & Natural Resources

Baram, Michael S., and Daniel G. Partan (eds.). *Corporate Disclosure of Environmental Risks: U.S. and European Law*. Salem, N.H.: Butterworth Legal Publishers, 1990. Pp. x, 359. Index. \$95.

Chossudovsky, Evgeny. "East-West" Diplomacy for Environment in the United Nations: "The High-level Meeting within the Framework of the ECE on the Protection of the Environment". A Case Study. New York: United Nations Institute for Training and Research, 1990. Pp. xix, 256. Index.

Koester, Veit. *The Ramsar Convention On the Conservation of Wetlands. A Legal Analysis of the Adoption and Implementation of the Convention in Denmark*. Gland, Switzerland: Ramsar Convention Bureau, International Union for Conservation of Nature and Natural Resources, 1989. Pp. xii, 104. Index.

Sand, Peter H. *Lessons Learned in Global Environmental Governance*. Washington, D.C.: World Resources Institute, 1990. Pp. vi, 60.

Air & Space

- Böckstiegel, Karl-Heinz, and Marietta Benkő (eds.). *Space Law. Basic Legal Documents*. Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1990. Loose-leaf. Dfl.275; \$152; £100.
- Du Pontavice, Emmanuel, Jacqueline Dutheil de la Rochère, and Georgette M. Millèr. *Traité de droit aérien* (2d ed.). Paris: Librairie Générale de Droit et de Jurisprudence, 1989. Pp. 1340. Index.
- Papacostas, Alkis-Basil N. *International Law of the Air and Outer Space (Satellite Communications)*. Athens, 1990. Pp. 502. (In Greek.)

International Organizations

- Amerasinghe, C. F. *Local Remedies in International Law*. Cambridge: Grotius Publications Limited, 1990. Pp. xxvi, 410. Index. \$110; £58.
- Nation Building: The U.N. and Namibia*. Washington: National Democratic Institute for International Affairs, 1990. Pp. xviii, 130. \$6.95.
- Wellens, Karel C. (ed.). *Resolutions and Statements of the United Nations Security Council (1946-1989). A Thematic Guide*. Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1990. Pp. xxxiv, 691. Dfl.350; \$210; £130.
- White, N. D. *The United Nations and the maintenance of international peace and security*. Manchester and New York: Manchester University Press, 1990. Pp. xiv, 240. Index. \$59.95.

European Community Law

- Ballarino, Tito. *Lineamenti di diritto comunitario* (3d ed.). Padua: Cedam, 1990. Pp. xxvi, 442. Index. L 40.000.
- Panebianco, Massimo. *Codice del mercato comune. Raccolta di provvedimenti italiani di esecuzione del trattato istitutivo e degli atti della cee con note infra testo desunte dalla gazzetta ufficiale. 1984-1988*. Milan: Dott. A. Giuffrè Editore, 1990. Pp. xxxix, 1691. Index.

Treaty Law

- La Celebración de tratados internacionales por España: Problemas actuales*. Actas del Seminario organizado por el Ministerio de Asuntos Exteriores, el Ministerio de Relaciones con las Cortes y de la Secretaría del Gobierno y el Instituto Nacional de Administración Pública. Madrid, 1990. Pp. 382. Index.

Jurisdiction & Immunities

- Papacostas, Alkis-Basile N. *Le Droit des relations diplomatiques et consulaires*. Athènes-Komotini: Editions Ant. N. Sakkoulas, 1989. Pp. 368. (In Greek.)

Telecommunications

- Fisher, David I. *Prior Consent to International Direct Satellite Broadcasting*. Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1990. Pp. xvi, 236. Index. Dfl.135; \$79; £47.90.
- Lyall, Francis. *Law and Space Telecommunications*. Hants, England: Dartmouth Publishing Company Limited, 1989. Pp. xii, 428. Index. \$99.95.
- Smith, Milton L. *International Regulation of Satellite Communication*. Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1990. Pp. xiv, 245. Dfl.150; \$89; £56.

Private International Law

- Bernardini, Piero, and Andrea Giardina (eds.). *Codice dell'arbitrato*. Milan: Dott. A. Giuffrè Editore, 1990. Pp. xiii, 952.
- Fumagalli, Luigi. *Conflitti tra giurisdizioni nell'assunzione di prove civili all'estero*. Padua: Cedam, 1990. Pp. ix, 285. Author Index.
- Šarčević, Petar (ed.). *International Contracts and Conflicts of Law. A Collection of Essays*. London, Dordrecht, Boston: Graham & Trotman/Martinus Nijhoff, 1990. Pp. viii, 155. Index. Dfl.162; \$82; £43.

Development

Powelson, John P., and Richard Stock. *The Peasant Betrayed. Agriculture and Land Reform in the Third World*. Washington, D.C.: CATO Institute, 1990. Pp. xvi, 401. Index. \$20.

U.S. Law & Foreign Relations

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Fix, Michael, and Paul T. Hill. *Enforcing Employer Sanctions. Challenges and Strategies*. Santa Monica, Calif.: The Rand Corporation; Washington, D.C.: The Urban Institute, 1990. Pp. xiv, 148. \$11.75.

Gillers, Stephen (ed.). *Looking at Law School. A Student Guide From the Society of Law School Teachers*. New York: Penguin Books, 1990. Pp. xix, 330. \$9.95.

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Pallone, Nathaniel J. *Rehabilitating Criminal Sexual Psychopaths. Legislative Mandates, Clinical Quandaries*. New Brunswick, N.J., London: Transaction Publishers, 1990. Pp. vii, 162. Index. \$24.95.

Vitas, Robert A. *The United States and Lithuania. The Stimson Doctrine of Nonrecognition*. New York, Westport, Conn., London: Praeger, 1990. Pp. vii, 175. Index. \$39.95.

Regional, Foreign & Comparative Law & Politics

Barav, A., D. A. Wyatt, and Joan Wyatt (eds.). *Yearbook of European Law 1988*. Volume 8. Oxford: Clarendon Press, 1990. Pp. xiv, 380. Index.

Bernhardt, Rudolf, and Ulrich Beyerlin (eds.). *Reports on German Public Law*. XIIIth International Congress of Comparative Law, Montréal 1990. Heidelberg: C.F. Müller, 1990. Pp. x, 257. DM 128.

Hirsch, Hans Joachim, and Thomas Weigend (eds.). *Strafrecht und Kriminalpolitik in Japan und Deutschland*. Berlin: Duncker & Humblot, 1990. Pp. 212. DM 82.

Quigley, John. *Palestine and Israel: A Challenge to Justice*. Durham, N.C.: Duke University Press, 1990. \$42.50, cloth; \$18.95, paper.

Schmidt, Albert J. (ed.). *The Impact of Perestroika on Soviet Law*. Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1990. Pp. xxvi, 558. Index. Dfl.315; \$185; £117.

Protection of Cultural Property

Prott, Lyndel V., and P. J. O'Keefe. *Law and the Cultural Heritage. Volume 3. Movement*. London and Edinburgh: Butterworths, 1989. Pp. xlix, 1049. Index. £48.

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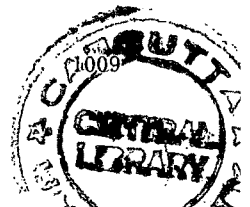
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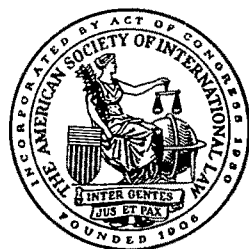
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